BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 28 of 2002

BETWEEN:

HENDERSON RICARDO HEWITT

(Appellant)

AND

THEQUEEN

(Respondent)

BEFORE: The Honourable Colin A.Williams, Chief Justice (Acting), The Honourable Frederick L.A. Waterman and The Hon. Peter D.H. Williams, Justices of Appeal.

2003: September 22

2004: July 6

Mr. N. Keith Simmons and Mr. Branford McG. Taitt, for the Appellant

Mr. Charles Leacock, Q.C. and Mrs. Wanda Blair,for the Respondent

DECISION

[1] WATERMANJA: The appellant was chargedwith murdering his girlfriend Audrey Hintizen ("Audrey") on 29 July, 2000. At the July Assizes of 2002 he was convictedof manslaughter and sentenced to 16 years' imprisonment on 18 July, 2002. His appeal is against conviction and sentenceand 6 grounds of appeal were filed on his behalf.

THE FACTS

[2] Thefacts are that on Friday night 28 July, 2000 the appellant and Audrey were atCopacabana night club in the Bay Street area of the City of Bridgetown. He was drinking in one corner of the Clubwith his friends and she was in another corner with her friends. About 2 a.m. on 29 July, the deceased madearrangements with one Wayne Clarke, alias "Salt Bread", to get transportationto take her home. He arranged for ataxi; the taxi came and pulled up in Combermere Street just off Bay Street andClarke sat in the taxi waiting for Audrey. About 2.45 a.m. Clarke saw Audrey coming towards the taxi with theappellant quickly pursuing her. AsAudrey got quite near to the taxi the appellant started remonstrating with her,as if he wanted to beat her. There was aquarrel between the two of them. Clarkethen got out of the taxi to stop the appellant from beating Audrey. He gave evidence that he was backing theappellant and was facing Audrey when he heard an explosion. He then heard Audrey scream and he saw her fallto the ground. Clarke immediately ranback to the taxi and was driven straight to Central Police Station where hereported the matter.

[3] Atabout 3.45 a.m. Sergeant Leacock and other police officers responded to thereport. Sergeant Leacock conductedpolice investigations at the scene, where he saw the appellant and invited himto accompany them to Central Police Station. Police Constable Clarke took command at the scene where the body was,and the scene was restricted. PoliceConstable Boyce, the police photographer, arrived about 6.45 a.m. and he tookphotographs.

[4] Dr.Andrew Murray also visited the scene that morning where he examined Audrey'sbody and pronounced her dead. Hisevidence is that he saw an injury to her chest. The body was then removed and on the same day the appellant was taken tothe police station where he was interviewed by police officers Leacock andLynch.

[5] Theappellant made an oral statement to Sergeant Lynch which he recorded in hisofficial police notebook. This is whathe said:

"Sergeant I shot that woman by accident."

[6] At3.30 p.m. the same day, the appellant gave a written statement, to theadmissibility of which no objection was taken. The written statement is as follows (page 88):

“Lastnight when I leave Copa I went through Beckwith Street and I saw my girl Audreywalking towards Saltbread and I shout she. I then walk towards Audrey. Saltbread who did sitting in a taxi, then get out of it. I had a gun in my hand because I see a manwho did shoot me in my finger and I did not taking any chances. Saltbread then hold on to Audrey and I holdshe hand. Saltbread and I had a strugglefor the gun I had. The gun then went offand shoot Audrey accidental. She thendropped to the ground and I pick she up and she dead in my arms. I drop the gun and I don’t know where itis. I sorry that it happen.”

[7] Theappellant subsequently directed police officers Lynch and Gill to an area atthe junction of Beckwith Street and Bay Street and said, “this is where I shootAudrey and drop the gun”. He wascautioned. Then about 4 feet away from thestreet pole he pointed to another area and said, “this is where I pick upAudrey and she dead in my arms”.

[8] Atthe trial the appellant made an unsworn statement from the dock in which hegave this version of the events (pages 68-69):

“On thenight in question, sir, me and Audrey sleep at the same house, we get up aboutminutes to 8, sir. We went to thebathroom together. We bathe one another,sir. When we done bathe one another,sir, we dress. Audrey call a taxi. We get in the taxi and leave the house. We went to Combermere Street. I get out de taxi in Combermere Street, sir,and walk Audrey to Bay Street to Copacabana. We get upstairs Copacabana, sir, Audrey went behind the bar put down shebag and some keys she had fuh de house.

I leaveAudrey and went back in Combermere Street. Fifteen minutes later I went back in Copacabana to check Audrey when Iget back upstairs, sir, the bartender tell me Audrey now left and gone down thestep. I leave Copacabana and went backdown the step. I went back in CombermereStreet. When I got back to CombermereStreet I spoke to one of my friends by the name of Hendy. He tell me Audrey now gone ‘round the cornerto go back on Bay Street. I walk andwent ‘round the corner.

Before Iget to the four-cross I did see a fellow that a time back, years back, inChapman Lane he did shoot me. I saw himwith an object in his pocket and he did reaching for his pocket. The same time when I look to the bottom of degap I see Audrey and “Salt Bread” and Audrey got “Salt Bread” holding. I went and I tell “Salt Bread” let go Audreyhand and let me get Audrey offa de road and “Salt Bread” resist to let goAudrey hand. I had a gun in my hand,“Salt Bread” snatch at de gun, me and he had a struggle then I see Audrey,Audrey did gine to fall to the ground, sir and I catch Audrey. I let go everything I had in my hand, sir,and catch Audrey and try to revive Audrey, sir. Couple minutes after, sir, Audrey count-out in my hands, sir. I try stopping a car to carry Audrey to thehospital and de man drive along and left me on de sidewalk with Audrey. I stay with Audrey until the policecome. That was it, sir.”

[9] Theevidence of the forensic pathologist, Dr. Stephen Jones, revealed that therewas an entry wound to the front of the chest of the deceased lateral to theleft nipple and that the entry wound appeared to be a gunshot wound and that ittraversed through the body. It penetrated the right ventricle of the arteryinto the lower lobe and exited at the back. Death was attributed to shock andhaemorrhage as a result of the gunshot injury to the chest.

[10] Theappellant’s defence was that the deceased was shot accidentally. Accident was an issue at the trial and wasdealt with at length by the trial Judge in his summation.

The Grounds of Appeal

[11] TheGrounds of Appeal as stated in the record are:

1. That the learned trial Judgefailed to assist the jury in identifying, applying and assessing the evidencein relation to his direction of law on inconsistencies and discrepanciesparticularly in relation to the evidence of Wayne Clarke.

2. That the learned trial Judge failed toadequately put the case for the defence to the jury.

3. That the learned trial Judgeerred in law by failing to direct the jury to bring a formal verdict of notguilty.

4. The verdict was against the weight of theevidence.

5. The verdict was unsafe and unsatisfactory.

6. The sentence was excessive.

Ground1

[12] Counselcomplains that the trial Judge failed to assist the jury in identifying,applying and assessing the evidence in relation to his directions of law oninconsistencies and discrepancies particularly in relation to the evidence ofWayne Clarke. In support of hissubmissions Counsel cited Fuller v. The State (1995) 52 W.I.R. 424,Abdulla and Others v. The State (1971) 17 W.I.R. 266 and The State v.Mootoosammy and Budhoo (1974) 22 W.I.R. 83.

[13] Counselhas drawn to the Court’s attention in particular the discrepancies andinconsistencies in the evidence of Wayne Clarke at pages 57, 58, 62, 63, 80 and98 of the record, which dealt with his account of what transpired between theappellant and Audrey just prior to her death.

[14] Thelearned Judge told the jury (at pages 80-81) how they should deal withdiscrepancies and inconsistencies:

“I mustalso give you a direction on dealing with discrepancies andinconsistencies. If you find that awitness has lied before you on oath, you should reject his evidenceentirely. The reason is, that a witnesswho lies to you on oath on any particular matter, is capable of lying to you onthe rest of his evidence and would therefore be unreliable. If on the other hand, you find that a witnesshas not deliberately lied to you but was

mistaken or confused, on anyparticular matter, you should nevertheless look at the whole of the evidence todetermine where the truth of the matter lies and what weight or value you placeon the witness' evidence.

When I cometo read the evidence, you may wish no doubt to bear in mind and to lookcarefully, certainly at all the evidence, but particularly no doubt at theevidence of Salt Bread and indeed also that of the accused.

I mustalso direct you in dealing with inconsistencies. This occurs where one witness says one thingand another witness says something different in respect of the samematter. Where you find a contradictionon the same subject matter, you should apply the same test I mentioned earlierto determine if a witness is lying or if he is merely mistaken or confused."

[15] Thelearned Judge after carefully reviewing the evidence of Wayne Clarke (at pages98-106) then analysed (at pages 106-107) Clarke's evidence for the benefit ofthe jury as follows:

"So thereyou have the evidence of "Salt Bread" and Mr. Foreman and you members, you haveto make what you can of that. You haveto ask yourselves whether this is a witness you can believe or not. You may still, I'm sure wish to satisfyyourselves about the position of these three people on Beckwith Street thatnight, whether the evidence led before you satisfies you as to exactly wherethese people were at the moment that that shot was fired. The medical evidence suggests that the bulletwound here in the chest was the entry wound. The medical evidence is not able to speak as to the position of theparties when the shot was fired. But youmay think as men and women of the world and using your common sense that thedeceased was facing the accused when the shot was fired. And you heard "Salt Bread" say that he wasbacking.

You mayask yourselves, Mr. Foreman and members of the jury, on this evidence that hasbeen led before you, if he went to try to stop the accused beating Audrey, ifyou believe his story in the first instance that, the accused raised his handas though attempting to beat the deceased which he never mentioned in the LowerCourt, how did he go to stop him? Wasthere a struggle? Did the accused manhave the gun in his hand as he said? Wasthere a struggle for the gun? How did hego to stop the accused beating Audrey, if you believe his story? And then you must ask yourselves, well, howis it that if he had just gone to prevent an alleged beating how is it that heends up backing both Audrey and the accused? That is a matter for you. You aremen and women of the world. You are thejurors and you have to find the facts. You have to do the best you can with the evidence which has been putbefore you. You will have to resolvethat one. He says he was backing Audreyand backing the accused. The suggestionis from that, the inference is from that and you can draw such inferences fromsuch facts as you find, provided those inferences follow logically from thefacts that Audrey was between him and the accused. How is it you may ask yourselves that – didit come about that he was backing these two at the time the shot was fired."

[16] Thelearned Judge returned towards the end of his summation (at pages 109-111) toassess Clarke's evidence for the benefit of the jury and directed them asfollows:

"SaltBread tells you that they appeared to be quarrelling. Salt Bread's story isthat he was in the car when Audrey came to the car and spoke to the taxi driverand was going back up the road and the accused was just a little beyondher. It appears that the accused hadfollowed or had been following her down to where she came to the car.

Salt Breadsays he is in the car sitting down, front passenger seat. The accused man said that when he came downBeckwith Street, Audrey had Salt Bread holding. Salt Bread was holding her and, and he tells you that he tell Salt Breadto let go her hand and Salt Bread hesitated.

Salt Bread'saccount of the matter is that when Audrey came and spoke to the taxi driver shewent back up the street towards where – a few feet away, 7 feet or so where theaccused was, and he says that they appeared to be quarrelling but he couldn'thear what they were saying. He openedthe door – he says that he appeared like he wanted to beat her. When he opened the door he overheard theaccused saying: Salt Bread in the caryou think I is a idiot or words to that effect. So Salt Bread tells you that he goes as though to stop the accusedbeating Audrey, yet he says that there was no struggle. And you have to ask yourselves, well how didhe go to stop the accused beating Audrey? If you accept his story that the accused was trying to beat Audrey. Did he try to stop this beating by saying,man you see de woman like she ain't want you why you don't go 'long, or wordsto that effect or did he really intervene physically and struggled with theaccused who admits he had a gun in his hand.

If hetried to stop the accused beating Audrey as he says, and after he had told theaccused, man you see de woman like she ain't want you, why you don't do'long? Does it seem to you to be fair,reasonable a common sense thing that he could suddenly end up backing Audreyand also his back both to Audrey and to the accused and he ain't see anygun. But he hears an explosion and hetakes off and tell the taxi man carry me to the police station.

This, Mr.Foreman and members, is a question for you. You have to deliberate on that andtry to sort out whose story you believe? Who is telling the truth? Who istelling lies? I've already directed youon how you should treat these matters but most importantly, you may think, iffrom the outset the accused man was saying it was an accident, in his writtenstatement he said it was an accident. Heis taken back to the scene and he is not asked to explain, well where were youwhen these different things happened? Heonly pointed out where the body was and the approximate area where he droppedthe gun. But in terms of finding out howthe accident happened, he was asked no questions. In terms of the positions ofthe parties when the shot was fired, no questions. You may think a thoroughly unsatisfactoryinvestigation. But the burden is on theprosecution to satisfy you, so that you are sure that the accused man committedthe offence of murder, and that all the ingredients of the offence of murder asI have read to you are present.

You willhave to determine whether on this sort of evidence you are satisfied that theyhave – that the prosecution has made out a case to you beyond reasonable doubtor satisfied you so that you are sure."

[17] Againstthe background of the summation taken as a whole, in our view, the trial Judgein reviewing the evidence in the instant case and, in particular the evidenceof Wayne Clarke, did identify and analyse the discrepancies and inconsistenciestherein for the benefit of the jury. Further, he dealt accurately and fully with the manner in which the juryshould approach the evaluation of discrepancies and inconsistencies appearingin the evidence and as we see it, the appellant would not have beendisadvantaged or prejudiced in any way.

Ground 2

[18] Underthis ground it is contended that the trial Judge erred when he failed toadequately put to the jury the case for the defence.

[19] Thegravamen of Counsel's argument on this ground was that accident is a completedefence and the trial Judge erred in telling the jury it was a complete defenceto murderand as such he did not make it clear that it was a complete defence to bothmurder and manslaughter.

[20] Itwas also submitted that the appellant at the trial did not raise the defence ofprovocation yet the Judge put that defence to the jury. In support of his submission Counsel citedthe case of Reg. v. Acott [1997] 1 W.L.R. 306.

[21] Thisis what the trial Judge told the jury as regards the defences open to theappellant on the evidence (pages 74-75):

"Mr.Foreman and members of the jury, it is my duty as the judge in this case todraw to your attention the alternative defences that could arise from theevidence led in this case, whether or not raised by counsel. The same issues do not always arise in everymurder trial and in this trial there is no issue of self-defence or ofdiminished responsibility. You do nottherefore have to concern yourselves with those two defences.

However,the case put forward raises two issues on the evidence for yourdetermination. One is the defence ofprovocation. The other is the defence ofaccident. The defence has put its casebefore you in respect of the defence of accident, and the defence of accidentis a complete defence. The defence hasnot put its case before you based on provocation as you will hear later, provocationreduces murder - an offence of murder toone of manslaughter. The defence aresaying that they have a complete answer to this charge of murder, namely thedefence of accident.

So theseare the issues the defence suggests you should concern yourselves with, namelyaccident. In other words the defence issaying that it is either or in their view namely, murder, he either beconvicted of murder or he will be acquitted on the ground that he has a completedefence, that defence being accident. Sothe defence is saying that it is either or and in their view the preponderanceof the evidence is in favour of accident and since moreover, the prosecutionhas not negatived accident by the police admittedly not inquiring at all, intothe accused claim that the death occurred accidentally, they are saying thattheir client must be acquitted because accident is a complete defence."

[22] The trial Judge's further directions onaccident appear at pages 90-91:

"He wasasked if the accused was co-operative and he said, yes. And he said that the accused said to him,'Sergeant I shoot that woman by accident'.

Q. Did you ask him to elaborate or explain what he meantby accident.

A. No, sir.

Well hereis a defence set up at the very early stage of the investigation and no attemptis made to investigate it to see if it was really true or not. You may think, Mr. Foreman and your members,a golden opportunity lost. It is -- accident is a complete defence and the policefailed to inquire whether the circumstances really were accidental or not, andyou may think that it is unassailable. It is unassailable. It's acomplete defence. When pressed furtheras to why he didn't ask him to explain what he meant by accident, he repeated,"I didn't ask him, it was not a matter of importance. I did not ask him." Not a matter of importance? A man saying that I shot her but it was anaccident and the police saying it is not a matter of importance. I leave that for you to see what you make ofit. But I can tell you that in law,accident is a complete defence. If you have to consider, look at thecircumstances and if you determine that it is a matter of fact it was anaccident, that is the end of the matter."

[23] Thetrial Judge's directions on provocation appear at paragraphs 76-78 and 111 ofthe record. It is relevant to quote fromparagraph 3 on page 111:

"I alsodrew to your attention the matter of provocation, whether by thesecircumstances the accused seeing Salt Bread holding on or Audrey holding on toSalt Bread, whether he could have been provoked to lose his self-control. And even if he didn't have any intention tokill whether this provocation would have caused him to lose his self-control. Provocation in a situation like that onlyreduces the offence of murder to that of manslaughter, but it is eminentlywithin your domain, that question has to be left to the jury whether thesecircumstances amount to provocation as I have explained it to you in law. I said the defence rest its case on thedefence of accident and you have to determine whether you accept that ornot."

[24] Wedo not see any merit in this ground. Thetrial Judge directed the jury properly on the defence of accident in accordancewith the guidelines given by this Court in Andre Orlando Best v. The Queen (CriminalAppeal No. 18 of 2001, unreported decision of 27 March 2002). Further, the trial Judge quite properly putto the jury the defence of provocation, although it was not raised by theappellant at the trial. This isconsistent with the statement of Lord Tucker in Bullard v. The Queen [1957] A.C.635 at 642 where he said:

"It haslong been settled law that if on the evidence, whether of the prosecution or ofthe defence, there is any evidence of provocation fit to be left to a jury, andwhether or not this issue has been specifically raised at the trial by counselfor the defence and whether or not the accused has said in terms that he wasprovoked, it is the duty of the judge, after a proper direction, to leave opento the jury to return a verdict of manslaughter if they are not satisfiedbeyond reasonable doubt that the killing was unprovoked."

Ground 3

[25] Thisground alleges that the trial Judge erred in law by failing to direct the juryto return a formal verdict of not guilty. In support of his submission on this ground, counsel on behalf of theappellant referred the Court to page 90 of the record already quoted atparagraph [22].

[26] Counselcontended that if the Judge felt that the defence of accident could not beattacked or questioned because it was impregnable, then he failed in his dutyto direct the jury to return a formal verdict of not guilty.

[27] Wewere referred to D.P.P. v. Stonehouse [1978] A.C. 55 where LordSalmon at page 79 said:

"… thereis no doubt that if a judge is satisfied that there is no evidence before thejury which could justify them in convicting the accused and that it would beperverse for them to do so, it is the judge's duty to direct them to acquit."

[28] Thereis no merit in this ground. Where thedefence of accident is raised it is not for the Judge to find accident. It is the duty of the Judge to identify forthe jury the evidence giving rise to the defence of accident and relate theissues of fact in the evidence to the legal principles of the defence. It is for the jury to find accident. The jury alone have the right to accept orreject the defence of accident.

Grounds 4 and 5

[29] Thesegrounds are (a) that the verdict was against the weight of the evidence and (b)that the verdict was unsafe and unsatisfactory.

[30] Inour view the trial Judge dealt fully and adequately with the evidence of WayneClarke, the principal witness for the Crown (pages 98-106 and 111) and the jurywere entitled to act on his evidence which they undoubtedly did; with thedefence of accident and the jury plainly rejected accident; and withprovocation and the jury would have returned the manslaughter verdict on thebasis of the Judge's directions on provocation.

[31] Onthe evidence as a whole we do not think that the verdict of guilty ofmanslaughter can be said to be against the weight of evidence or unsafe andunsatisfactory.

Ground 6

[32] Mr.Simmons submits that the sentence of 16 years' imprisonment is excessive.

[33] Thetrial Judge before sentencing the appellant addressed him thus (pages 121-122):

"THECOURT: Mr. Hewitt, the juryconvicted you on the offence of manslaughter. Manslaughter according to the Offences Against the Person Act ispunishable by life imprisonment. Thejury obviously felt that you did not have the intention to kill but that thecircumstances in which you killed Audrey Hintizen might have caused you to loseyour self-control, in other words provocation.

However,it seems to me that when you armed yourself with a gun ostensibly to protectyourself against this shadowy figure who is supposed to have shot you in thefinger, then you know you should not have been carrying the gun in the firstinstance because you were not a licensed holder. You are not licensed to carry a firearm. But then according to the evidence youapproached the car where salt bags had been sitting. "Salt Bread" sorry, had been sitting. Only you and "Salt Bread" and Audrey knowwhat really happened there that evening. But your own statement showed that you approached them with a gun inyour hand. And I think the jury wereright to convict you because you intended to do something there thatevening. You shot down AudreyHintizen. She was standing in front ofyou and "Salt Bread" was nearby. Oneshot and that ended her life and you don't have the authority to take anybody'slife, whether she was your girlfriend or not. Whether you all had slept during the evening, took a taxi and went tothe Copacabana. You know what yourbusiness there was. She knows what herbusiness there was and you did not have it in your power to take her life.

I am goingto sentence you to a term of imprisonment and the term of imprisonment will bea long one. I know you are 33 years oldbut then as I said you shot a woman down. For that you must pay your debt to society. The term of imprisonment is 16 years."

[34] Thecriminal record of appellant shows that the appellant had 3 convictions at thetime of his trial. His first two convictionswere for possession of cannabis for which he was fined. His third conviction in December 1996 was forcommitting an act of serious indecency upon a female for which he was sentencedto 2 years' imprisonment.

[35] Mr.Simmons referred the Court to the guideline judgment on "murder manslaughter"delivered in Romain Bend and Rodney Murray v. R. (Criminal Appeals Nos.19 and 20 of 2001, unreported decision of 27 March 2002) and to thesentences for manslaughter imposed by this Court in recent years – see NicholasScantlebury v. R. (Criminal Appeal No. 14 of 1996 unreported decision of 27September 1999) (life imprisonment); Rodney Hinds v. R. (1999) 58W.I.R. 38 (25 years); and Mark Savoury v. R. (Criminal Appeal No. 62 of 1995unreported decision of 30 October 1998) (20 years).

[36] InBendand Murray v. R. (supra) Sir David Simmons, Chief Justice said atparagraph 28:

"Thus,using Scantlebury and Hinds as indicative of the very topof the range and, having regard also to the fact that guns were used in thosecases, whereas in Mark Savoury the instrument was a knife, the range ofimprisonment, as we conceive it, for a grave case of manslaughter, (without theuse of a firearm), such as this appeal would normally be 16 to 20 years. Use of a firearm will invariably be anaggravating factor which would take a sentence towards the top of thescale. Similarly, any mitigating factorswould put the sentence nearer to the lower end of the scale."

[37] Inthis appeal the trial Judge quite properly took into account the fact that afirearm was used in the commission of the offence and determined that theoffence was so serious that it justified a custodial sentence of 16 years. We cannot say in all the circumstances thatthe sentence of 16 years is excessive.

[38] Inthe result, the appeal is dismissed and the sentence is affirmed. The sentence will commence 6 weeks after thedate of conviction.

Chief Justice (Acting)

Justice of Appeal Justice of Appeal.