

BARBADOS

[Unreported]

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL**

No. 12 of 1999

NEAL ANTHONY BOYCE

(Appellant)

AND

THE QUEEN

(Respondent)

Before: The Honourable Sir Denys Williams, Chief Justice, The Honourable Mr. Justice George Moe, and the Honourable Mr. Justice Colin Williams, Justice of Appeal.

2000: January, 18th.

2000: March, 3rd.

Mr. N.K. Simmons in association with Mr. M. Lashley, Mr. B. Taitt Jr, and Mr. A. Sealy for the Appellant.

Mr. C. Leacock in association with Mr. E. Edwards for Respondent.

DECISION

On April 22, 1999 the appellant Neal Boyce was arraigned before a judge and jury charged with the murder on October 13, 1998 of Collis Branch. A week later he was convicted of manslaughter by a majority verdict and on May 5 he was sentenced to imprisonment for 20 years.

The evidence disclosed that about 8.15 p.m. on October 13, 1998 Branch, also called Bulk, was seen stumbling on a track off Durants Village, St. James and that he was then seen to fall to the ground. A doctor visited the scene and certified him dead at 11.22 p.m. Another doctor who performed a post mortem on the body three days later testified that there were nine injuries on the body, that all of them had been caused before death and that the cause of death was blood and air in the chest cavity as a result of three of the injuries. In the doctor's opinion those three injuries were caused by a sharp cutting instrument such as a knife.

The case for the prosecution was that the appellant had inflicted the injuries on Branch and it was based on an oral and a written statement which the police testified were made by the appellant.

The oral statement was –

“He had a gun pointing straight at me to kill me and I drew my knife and stab he”.

The written statement which was admitted in evidence after a voir dire described what the appellant said took place on the material date sometime after 6 p.m. He had been sitting on the bridge at Durants Village and then went up the road:-

“When I get up the road I see Andre and he tell me that Bulk be tripping and that he went up by them trying to interfere with Keisha and brek in the house. I walk and went out by Andrea and she tell me that Bulk got Keisha frightened to go home, that it like he want to rape she or something. I went back down the road and as I get by the track I see Bulk walk out from down between the cherry tree pointing a gun straight at me and tell me he gine kill me. I had a knife in my pocket and I draw it and stab hi in he hand and the gun fly out he hand. He hold me and pull me further across the track and we lash on pun the paling. We continue scuffling and I stab he again in he belly and the knife slide out my hand and drop on the ground. I left he standing up in the track and I run and went down Haynesville.....”

The defence was self-defence and the appellant made a statement from the dock telling the jury what he said had happened:-

“I went down Durants Village to shout a girl named Janelle...I Walk and went up the road and I saw Andre, Andre Benjamin, and I just shout him and I ask him what he was saying in me and he gap and thing and he told me that Bulk was tripping, he want to break in he house and trouble

Keisha. So that's what he told me and I left Andre and went by Andrea which is next door.....When I got there now Andrea Prescod told me that Bulk like he want to rape Keisha and trouble her. So I tell she that I gine back down there and shout Janelle.....so I went back down the road and shout Janelle. But while I was going down the road Collis Branch walk out from under a cherry tree right there by the road there and the cherry tree right long side the road. But that area real dark and when I got there he walk out with a gun pointing at me kike he going to kill me and I stab he in his hand and the knife drop out he hand...the gun drop out he hand and pull me inside the track and when I was in the track I manage to get way my hand cause he had my hand holding and I manage to stab he again in he belly and while that was going on like blood was on my hand and knife dropped and I ran. I left the man in the track standing and I run. That's all I can give account for".

The learned Judge left self defence and provocation to the jury.

The grounds of appeal are stated as follows:-

- (1) the learned trial Judge failed to put the defence adequately;
- (2) the learned trial Judge failed to direct the jury "as to how to reach a verdict in relation to murder and manslaughter was incorrect in law":
- (3) the verdict is unsafe and unsatisfactory; and
- (4) the sentence is manifestly excessive.

An order is sought that the conviction be quashed and the sentence set aside.

Ground (1)

The learned judge told the jury that on the evidence the issue of self defence had arisen (p.155 of the record) and went on to give them very full directions on that issue (pp.155 to 158). He later reviewed the evidence and reminded the jury of what the appellant said in his unsworn statement from the dock. He went on to put the case for the Crown and then the case for the defence in these words:-

"The case for the accused is that he is not guilty. The accused told you in his statement from the dock that he inflicted only injuries on the deceased, a stab to the hand and a stab to the belly, and that those injuries were inflicted in self defence. The accused says that the deceased attacked him with a gun and that he drew his knife and defended himself".

In the view of this Court the learned judge dealt adequately with the defence. The jury no doubt found it impossible to reconcile the appellant's story of having stabbed the deceased only twice with the unchallenged medical evidence that there were nine injuries on the deceased. They must obviously have ruled out the possibility that some other person had come upon the scene and inflicted the other seven injuries on the deceased.

There is no merit in this ground.

Ground (2)

The learned judge gave the following directions as he concluded the summing up (p.184 of the record):-

"Madam foreman and members of the jury, a verdict in this case must be unanimous. A verdict of murder must be unanimous. A verdict of not guilty of murder must likewise be unanimous. So I must ask you when you retire to seek to reach unanimity, that is a verdict upon which each one of you is agreed. Seek to reach a verdict, a unanimous verdict. The law permits me in certain circumstances to accept a verdict of manslaughter which is not the verdict of you all but that time has not as yet come. Should that time come, I will give you a further direction. Now bear this in mind, madam foreman and members of the jury, verdict of guilty of murder must be unanimous verdict, similarly a verdict of not guilty of murder. A verdict of manslaughter does not necessarily have to be unanimous but you cannot reach such a verdict until you have considered all the circumstances that arise. So my advice to you now is when you retire you should seek to reach a unanimous verdict. Should it come to pass that you cannot reach a unanimous verdict I shall give you a further direction".

This was a perfectly clear and satisfactory direction but the record discloses that the jury found difficulty in understanding it. They retired at 11.14 a.m. and returned to court at 12.25 p.m. when exchanges between the Court clerk and the foreman revealed that they had not reached unanimity. The judge asked them to retire again and seek to reach a unanimous verdict but told them that if they could not, he would accept a verdict on which no less than nine of them were agreed in the case of manslaughter".

The jury again retired at 12.29 p.m. and returned to the court at 1.11 p.m. when further exchanges between the Court Clerk and the foreman revealed that they had reached a verdict on which at least nine were agreed the foreman saying that they had not reached a unanimous verdict, that they had reached a verdict on which at least nine were agreed and then stating "eleven guilty". The judge then asked if they had reached a verdict on which at least nine of them were agreed and the foreman stated the verdict to be guilty of murder. The following is a record of what followed:

"The Court: Madam foreman, a verdict of guilty of manslaughter all of you must be agreed... of murder all of you must be agreed. A verdict of not guilty of murder all of you must be agreed. When you retired on the second occasion I told you I could accept a verdict of guilty of manslaughter if at least nine of you agreed. Have you reached a verdict?"

Madam Foreman: Eleven of manslaughter....

The Court: How many of you are agreed upon that verdict?

Madam Foreman: Eleven.

The Court: of guilty of manslaughter?

Madam Foreman: Yes, sir.

The Court: Pardon, Mr. Simmons (defence counsel).

Mr. Simmons: I think just ask again. The sentence you just asked. I am hearing things so I think you should just ask again. I have no objection.

The Court: Madam foreman, do you wish to consult with the jurors?

Madam Foreman: Yes, please.

The Court: Three hours have not yet gone?

Mr. Simmons: No, my Lord.

Mr. Leacock: Only two hours.

Mr. Simmons: Two hours have gone. About two hours.

The Court: Madam foreman, do you wish to retire again.

Madam Foreman: Yes, sir.

The Court: I must again ask you, Madam foreman and members of the jury, to seek to reach a unanimous verdict, that is a verdict upon which each and everyone of you is agreed. If you find that you cannot reach a verdict upon which each and everyone of you is agreed, I can accept a verdict upon which at least nine of you are agreed, whether that verdict be guilty or not guilty of manslaughter. But a verdict of murder or not guilty of...guilty of murder or not guilty of murder must be twelve of you. Manslaughter, nine of you be it guilty or not guilty.

(Jury withdrawn under sworn marshals at 1.16 p.m.).....

Jury returns at 1.35 p.m.

The Clerk: Madam foreman, please answer yes or no. Have you reached a verdict upon which you all are agreed?

Madam Foreman: No, Sir.

The Clerk: Have you reached a verdict with which at least nine of you have agreed?

Madam Foreman: Yes, Sir.

The Clerk: What is your verdict?

Madam Foreman: Guilty of manslaughter.

The Court: How many of you are agreed upon that verdict?

Madam Foreman: Ten.

The Court: You may sit".

Two comments need to be made. First, with respect to the trial judge's direction that a verdict of not guilty of manslaughter could have been returned on this indictment of the appellant for the murder of the deceased: that in our view is not a correct direction. The verdicts that could have been returned are guilty of murder, guilty of manslaughter or not guilty. Section 39 (a) of the Juries Act Cap.115B does not authorise a majority verdict of not guilty of manslaughter in a trial for murder. However in the light of the jury's verdict this point is of no more than academic interest. Second, the Judge accepted a majority verdict of manslaughter even though section 40(1) of the Juries, Act Cap.115B enacts that a judge shall not accept a majority verdict of manslaughter unless the foreman of the jury had stated in open court the number of jurors who respectively agreed to and dissented from the verdict.

The corresponding legislative provision in England (section 13(2) of the Criminal Justice Act, now contained in section 17(3) of the Juries Act) fell to be construed in *R v Barry* [1975] 2 All E.R. 760 where the learned deputy Judge had accepted a majority verdict on the basis that at least ten members of the jury had agreed on it. On appeal to the Court of Appeal, Criminal Division, counsel for the appellant contended that a majority verdict taken in the form in which that verdict was taken, without the numbers agreeing and dissenting being stated in open court, was not a proper or a lawful majority verdict authorised by the statute. The argument for the Crown was that the provisions of subsection (2) were no more than directory and not mandatory and that a failure to comply with that subsection did not violate the majority verdict. Roskill L.J. who delivered the judgment of the Court dealt with the argument that so long as it was made plain that at least ten jurors were agreed on a majority verdict, the rest was merely procedural relied on passage from the judgment of the Court of Appeal, Criminal Division delivered by Salmon L.J. in *R v*

Bateman [1969] 3 All E.R. 1372 at 1374 and said (at p.763):-

"With respect to that argument there is a difficulty in its way. First of all it involves, as I have already said, giving a different effect to the opening words of each of the two subsections (subsection (1) and (2) of section 40 of the Barbados Act), and secondly it means ignoring the subsequent provisions of subsection (2) which require the foreman to state in open court not merely the numbers of the jury who agree with the majority verdict, but also the numbers who dissent from it. It was that later provision which was not complied with in the present case. Quite apart from the regrettable failure to comply with the provisions of the practice direction (which if it stood alone would not compel this court to interfere with this majority verdict (for the practice direction has no statutory force)) if we were looking at this matter purely as a matter of construction and unaided by authority, we would also have no doubt that the requirements of subsection (2), like those of subsection (3), were mandatory and that what happened here was that a majority verdict was obtained which did not comply with the requirements of the statute and was not a proper or lawful majority verdict".

This view was endorsed by the Court of Appeal, Criminal Division in *R v Reynolds* [1981] 3 All E.R. 849 where the foreman of the jury stated in open court that ten had agreed on the verdict but nothing more was said either by the clerk to the foreman or by the foreman to the clerk. The Court held that the irregularity was fatal as no verdict was properly taken and it was irrelevant to consider the application of the proviso. Shaw

L.J., who delivered the judgment of the Court said (p.851) that the statutory requirements are plainly stated and they must be meticulously followed if a majority verdict is to be legitimately accepted. The point of law was raised before the House of Lords in *R v Pigg* [1983] 1 All E.R. 56 on an appeal by the Crown against the decision of the Court of Appeal quashing the conviction of the respondent on a charge of attempted rape. The Court of Appeal reluctantly followed *R v Reynolds*, Lord Lane C.J. who delivered the judgment of the Court saying ([1982] 2 All E.R. 591 at p.595)-

"However it is plain that we are bound by that authority which states it as a mandatory requirement. It may be that the matter should be considered elsewhere but it does seem to us that it is highly unlikely that Parliament should intend that the validity of a verdict should depend on the following of a precise formula of words. No doubt it is highly desirable and necessary that the foreman should himself state in open court that ten of the jury, in a case where there is a full complement of twelve, are agreed on the prisoner's guilt. That should be mandatory. But to say that it is other than discretionary that he should go on to say how many dissented seems to us to be bordering on the absurd. In the event we have no alternative save to quash this conviction".

The House of Lords in *R v Pigg* thought that the criticisms made by Lord Lane C.J. of the reasoning of Shaw L.J. in *R v Reynolds* were fully justified and allowed the Crown's appeal. Lord Brandon with whose speech their Lordships agreed said (at p.62):-

"If one or two members of a jury do not agree to a majority verdict of guilty, then, ex hypothesi, they dissent from it: whether they have made up their minds that the defendant is not guilty, or whether, for one reason or another, they have failed or been unable to reach a final conclusion on the matter at all, is immaterial. Their position is perfectly expressed by the well-known saying in the New Testament: "He that is not with me is against me".

Once the reasoning of Shaw L.J. in *R v Reynolds* is shown to be unsound, the major basis of the decision goes. One is left with what seems to me to be the overwhelming argument, in a case where there are twelve jurors, that, if the foreman of the jury states no more than that the number agreeing to the verdict is ten, it is nevertheless a necessary and inevitable inference, obvious to any ordinary person, that the number dissenting from the verdict is two. True it is that the foreman of the jury has not said so in terms as s.17(3) of the 1974 Act, interpreted literally, requires. In my opinion, however, it is the substance of the requirement prescribed by s17(3) which has to be complied with, and the precise form of words by which such compliance is achieved so long as the effect is clear, is not material. In a case where there are twelve jurors, once the foreman has stated in open court that ten of them agreed to the verdict, it becomes immediately obvious to any ordinary person that the remaining two jurors did not agree to the verdict i.e. that they dissented from it.....

In short, compliance with the requirement of s17(3) of the 1974 Act is mandatory before a judge can accept a majority verdict of guilty; but the precise form of words used by the clerk of the court when asking questions of the foreman of the jury, and the precise form of words used by the latter in answer to such questions, as long as they make it clear to an ordinary person how the jury was divided, do not constitute any essential part of that requirement".

The record in the present case discloses that the foreman of the jury, comprised of twelve jurors, stated in open court that ten jurors agreed to the majority verdict of guilty of manslaughter and following the reasoning of the House of Lords in *R v Pigg*, with which this Court agrees, the verdict of guilty of manslaughter is a proper and lawful majority verdict.

This ground of appeal fails.

Ground (3)

Counsel for the appellant criticized the learned judge for leaving provocation to the jury. The defence, the argument goes, was self-defence and there was no basis in the evidence for the defence of provocation. Reliance was placed on the House of Lords decision in *Regina v Acott* [1997] 1 WLR 306.

In that case Lord Steyn with whose speech their Lordships agreed said (at p.312):-

"I am willing to infer from the injuries of the deceased that there was reasonable possibility that the appellant lost his self control and attacked his mother in anger. But by itself that is not enough. The question is whether there is any evidence of specific provoking conduct. As the issues became refined during the helpful oral submissions of both counsel, it became clear that counsel for the appellant was sometimes treated by his mother as a little boy it is a rational inference that the appellant's loss of self-control might have followed upon a specific provoking element albeit perhaps of a trivial and "last straw" variety. Subject to his earlier argument already discussed, counsel for the appellant accepted that if

such an inference is not justified, the appeal must fail. In my judgment that concession was rightly made. It is a short point not of law but of logic and common sense. The Recorder plainly took the view that the evidence did not justify an inference of a specific provoking event. In my view the evidence was insufficient to support the suggested inference. It was not a reasonable possibility arising on the evidence: it was mere speculation. In these circumstances the appeal must fail on the facts.

Strictly, the certified question need not be answered in order to dispose of the appeal. But it seems possible to summarise the legal position in terms that might be helpful. Section 3 is only applicable "if there is evidence...that the person charged was provoked (whether by things done or things said or by both together) to lose his self-control. A loss of self-control caused by fear, panic, sheer bad temper or circumstances (e.g. a slow down of traffic due to snow) would not be enough. There must be some evidence tending to show that the killing might have been an uncontrolled reaction to provoking conduct rather than an act of revenge. Moreover, although there is no longer a rule of proportionality as between provocation and retaliation, the concept of proportionality is nevertheless still an, important factual element in the objective inquiry. It necessarily requires of the jury an assessment of the seriousness of the provocation. It follows that there can only be an issue of provocation to be considered by the jury if the judge considers that there is some evidence of a specific act or words of provocation resulting in a loss of self-control. It does not matter from what source that evidence emerges or whether it is relied on at trial by the defendant or not. If there is such evidence, the judge must leave the issue to the jury. If there is no such evidence, but merely the speculative possibility that there had been an act of provocation, it is wrong for the judge to direct the jury to consider provocation. In such a case there is simply no triable issue of provocation. I would hold that in such circumstances our law of provocation knows no principle that "the jury must not be deprived of their opportunity to return a perverse verdict"...

Counsel for the appellant invited Your Lordships to go further and state what would be sufficient evidence of provocation to justify a trial judge in leaving the issue of provocation for the jury to consider. The invitation was attractively put. But it must be rejected. What is sufficient evidence in this particular context is not a question of law. Where the line is to be drawn depends on a judgment involving logic and common sense, the assessment of matters of degree and an intense focus on the circumstances of a particular case. It is unwise to generalise on such matters; it is a subject best left to the good sense of the trial judges. For the same reason it is not useful to compare the facts of decided cases on provocation with one another".

In *Regina v Acott* the defendant lived with his mother and on the evening of her death he telephoned for an ambulance, saying that his mother had been injured in a fall. She was found dead on the floor of the hallway to her bungalow, having suffered multiple injuries. The preponderance of the medical evidence given at the trial of the defendant charged with her murder was that the deceased had been the 'victim of a sustained attack. The defendant was convicted and on his appeal it was said that the Crown in cross-examination had repeatedly put to the defendant that he had lost his self-control and attacked his mother because of her behaviour towards him, thereby making provocation an issue which should have been left to the jury in accordance with section 3 of the Homicide Act 1957. The Court of Appeal dismissed the appeal but certified that a point of law of general public importance was involved in their decision, namely, whether in a prosecution for murder, before the judge was obliged to leave the issue of provocation to the jury, there had to be some evidence, either direct or inferential, as to what was either done or said to provoke the alleged loss of self-control and granted leave to appeal.

The tenor of Lord Steyn's speech indicates the way in which the House of Lords answered the certified question and the Court of Appeal's decision was affirmed.

In that case there was no evidence as to anything being done or said to provoke loss of self-control by the son. In the present case there is evidence in the oral and the written statements which the police testified were made by the appellant of specific provoking conduct. In the oral statement the appellant was alleged to have said that the deceased had pointed a gun straight at him to kill him, and in the written statement that the deceased pointed a gun straight at him and told him that he was going to kill him. The evidence disclosed that the appellant and the deceased had known one another and the learned judge having formed the view that in the circumstances the evidence of what the appellant said the deceased had done and said to him constituted provoking conduct, this Court declines to say that provocation should not have been left to the jury.

Another matter raised by counsel in his argument was the discovery by the police on the scene of a couple of items which the investigations did not reveal to have any connection with the case. The suggestion was that they pointed to the possibility of some other person being implicated in the killing. In our view that response of the Director effectively disposed of this: the incident occurred on a clearly defined path and the items found could have been deposited there in any of different ways entirely unconnected with the circumstances in which the deceased met his death.

There is no substance in this ground.

The last ground argued was that the sentence was excessive.

The appellant's record reveals that he had previously been convicted of causing serious harm to the deceased. The injuries on the deceased revealed that he had been attacked in a vicious manner and the appellant should consider himself fortunate in that a verdict of guilty of murder had not been returned.

Knives, cutlasses and swords are now all too frequently used for the infliction of severe injuries and this Court considers that stern punishment must follow convictions in cases such as this one.

The appeal is dismissed and the conviction and sentence affirmed, the sentence to run from June 17, 1999.