Privy Council Appeal No. 77 of 1996

Pasqual Bull *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF BELIZE

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, OF THE 23rd March 1998, Delivered the 27th April 1998

Present at the hearing:-

Lord Nolan
Lord Jauncey of Tullichettle
Lord Steyn
Lord Clyde
Lord Hutton

*[Delivered by **Lord Steyn**]*

On 26th October 1994 in the Supreme Court of Belize a jury convicted Pasqual Bull of two murders. Singh J. sentenced him to death. He appealed against his conviction to the Court of Appeal of Belize. On 7th February 1995 his appeal was dismissed. By Order in Council dated 13th March 1996 he was granted special leave to appeal to Her Majesty in Council.

At the conclusion of the hearing of the appeal their Lordships indicated that they would humbly advise Her Majesty that (a) the conviction of murder and sentence of death should be quashed; (b) a conviction of manslaughter should be substituted; and (c) the matter should be remitted to the Court of Appeal to pass sentence. Their Lordships' reasons for their advice now follow.

The law of provocation in Belize.

The principal ground of appeal is that the trial judge incorrectly directed the jury about the defence of provocation. Their Lordships observe at once that counsel for the appellant rightly acknowledged that the summing up was carefully crafted and balanced. But, he argued, in the result the judge did not correctly explain the law of provocation to the jury. The background to this issue is that in Belize, as in other Caribbean countries, the modern legislation reformed the law of provocation by leaving intact provisions based on common law principles dating from Victorian times and introducing a reforming measure based on section 3 of the English Homicide Act 1957. In Belize, and elsewhere in the Caribbean, the inconsistency between the old and new law greatly complicated the task of trial judges. For Belize that problem was solved by the judgment of the Privy Council in *Logan v. The Queen* [1996] A.C. 871 which was to the effect that as a matter of construction the reforming provision, which became part of the law of Belize in 1981, must be given full force and effect: compare *Culmer v. The Queen* [1997] 1 W.L.R. 1296 where in effect, although by different reasoning, the Privy Council arrived at a similar conclusion in respect of The Bahamas.

The present case pre-dates the judgment of the Privy Council in *Logan*. In accordance with the practice which prevailed in Belize before *Logan* the judge quite understandably felt compelled to sum up in accordance with the old law of provocation as well as the new reforming provision i.e. section 118. The correctness of the directions on provocation must, however, be judged in the light of the provisions of section 118 of the Criminal Code as explained in *Logan*.

Given that there was no issue of principle as to the law of provocation in Belize it is unnecessary to discuss the legal position generally. But it appears that there may be confusion in Belize about two matters. The first point relates to the old rule that provocation offered by a third party could never reduce murder to manslaughter. It is rightly conceded by the Crown that the effect of section 118, as explained in *Logan*, is that provoking conduct does not have to be that of the victim. Secondly, their Lordships were told that since *Logan* trial judges in Belize still sometimes consider it necessary to cover the old law in directions to the jury. That is unnecessary and calculated to confuse the jury. As in

The Bahamas (as to which see *Culmer*, at page 1308C) judges ought now to sum up in the terms of section 118, ignoring the historic ballast of the old law.

The evidence before the jury.

On 15th April 1993, and in the presence of his 16 year old common law wife, the appellant killed two men with a machete. The deceased were Turcios, a Salvadorean man, and Cowo, a Belizean man. There were four versions of the critical events before the jury.

First, there was before the jury the evidence of Rosita Carillo, the appellant's common law wife. She said that at 6.30 p.m. on 14th April 1993 she and the appellant returned from a shopping trip in Belize City. The appellant had gone to the hospital to collect his pay. Turcios and Cowo were waiting for them at the appellant's home. They wanted the appellant to pay them for some work they had done. Rosita cooked dinner and the men ate and then got drunk on rum and brandy. Turcios went to sleep and the other man, Cowo, began arguing with the appellant about the money he was owed. Cowo wanted to get paid that night, but the appellant refused. The quarrel lasted until 12.00 p.m. Cowo then told the appellant that Rosita had had sex with Turcios. Rosita denied having sex with Turcios. Nevertheless the appellant began beating her up. He put a knife to her throat and pushed her onto the fire, burning her breast and her back. Rosita said that while she was being beaten up Cowo fell asleep. The appellant then cleaned two machetes and instructed Rosita to kill one of the men while he killed the other. He gave her one of the machetes and went outside. Rosita went outside and unsuccessfully tried to wake up Turcios. Rosita then heard a noise and saw the appellant chopping at the throat of Cowo. He then attacked Turcios, who got up and ran away. The appellant chased him into the bush and killed him. Cowo asked Rosita for help but the appellant came back and chopped him twice more. The appellant then threw the two machetes into the bush.

The second version of the events was contained in a caution statement made by the appellant at 9.00 a.m. on 15th April. He said that he had left home at 7.00 a.m. on 14th April to go to work at the hospital and had returned at 2.00 p.m. Rosita was crying. She told him that she had been raped by the two men. The appellant and Rosita then

went to Belize City. He bought the rum and brandy and returned home. Turcios and Cowo were still there. All his clothes had been scattered over the house. They all ate and drank. Turcios then went to sleep. The appellant told Cowo that he was not going to pay him as much as Cowo wanted because he had not worked hard. Cowo replied that then the appellant would pay with his life. They carried on drinking. Cowo then fell asleep. The appellant went inside and Rosita told him again how the men had "chanced" her. She suggested that they kill the men. The appellant was drunk. He got his machete and killed Cowo. He then went to Turcios and hit him. He got up and ran off so the appellant followed him and killed him.

The third version was a statement made by the appellant at the Preliminary Inquiry on 30th June 1994. The prosecution adduced it in evidence. He said that on 15th April he went to work. When he came home he saw his wife crying. Her face was bruised. She told the appellant that she had been raped by the two men who had been working at the house. Whilst she was explaining this to him Turcios burst into the house with his machete and attempted to hit the appellant with it. The appellant then got his machete and hit Turcios on the head. Cowo then opened the door and started to attack the appellant for killing his partner. He swung at the appellant a number of times but the appellant managed to hit him in the hand. Cowo then ran towards the appellant but the appellant chopped him again and he dropped dead.

The fourth version was contained in the appellant's statement from the dock. As to the events of the day, he said that on 15th April 1993 he woke up at 4.45 a.m., when his wife told him that he had killed the men. He went outside and saw that the men were dead. He could not remember anything that had happened because he had been very drunk. His wife told him to throw the machetes away and to bury the bodies. He refused to do so and said that he would call the police later. They started walking to the road going to Belmopan and she explained to him what had happened. While they were sleeping Turcios and Cowo had come in and taken her out of the room. The two men had started to "use she" and beat her up. She started screaming and the appellant had got up with his machete and started to chop up the men. She told the appellant that he couldn't remember because he had been drunk.

The summing up.

In dealing with provocation the judge started his directions of law by reading from section 116 which confines the defence to "extreme provocation given by the other person". Under section 118 the provocation need not be extreme and need not come from "the other person". The judge then read from section 117 containing a list of categories of extreme provocation, such as unlawful assault or battery, an act of adultery committed in the view of the accused person with his wife, and so forth. These extreme examples were not helpful in concentrating the jury's minds on the generality of the tests contained in section 118. The judge then read out section 118. Quoting from section 117 he continued as follows:-

> "But, Members of the jury, there are instances when even if a person is provoked, provocation must not be taken into account, and one of these is where another of our section of the law says, 'not withstanding the existence of such evidence, as is referred to in the last section, the crime of the accused shall not be deemed to be thereby reduced to manslaughter if it appear, either from the evidence given on his behalf, or from evidence given on the part of the prosecution, that after the provocation was given and before he did the act which caused the harm such a time elapsed; or such circumstances occured that a person of ordinary character might have recovered his self-control'. This is what in law we refer to as 'the cooling off period'. If you are provoked and a reasonable time elapse between the provocation and the time you do the act that a reasonable person might have cooled off, then you cannot call in aid that provocation, as to say that is why you did the act, because provocation is like a temporary loss of self-control, in the heat of the moment you are provoked you go-- you do an act. You have no control over your emotions at the time, but if there is an interval which is reasonable that anybody can say that you should have cooled off in that time, then you cannot go and do an act after you have cooled off. Here we are told in this case that it was around 12 o'clock that the accused told, either that the Belizean man told the accused that his wife have had sexual intercourse with the Salvadoran or at that time the accused told her that the Belizan man said it. And we are told by her that it was about three hours

later that the accused went and chopped up these two men. [This is a reference to version 1.]

Now, if you accept that, Members of the Jury, then I will say that you might easily find that that was a more than reasonable period of cooling off. Even if it can be said that such - such a statement to him might have amounted to extreme provocation, even so. We are told that during that time he was beating her and he threw her in fire, hold a knife to her throat, was cleaning machetes and what not. When he did all these things, was he still acting under this temporary loss of self-control due to provocation? That's question for you to determine as a question of fact because if you find that what he did was caused by provocation, then of course, you will have to bring him in guilty of manslaughter. Another thing, if the statement of being attacked in his house is correct, even if you do not find that there was self-defence, you could easily find that there was provocation if you accept that. [This is a reference to version 3.] Thirdly, if what he tells you his wife told him, but this is after the act of course, that while they were both sleeping these two men came in and took her outside and started abusing her, sexually and physically; she screamed, he went outside, saw them in the act, use the machete and killed them. [This is a reference to version 4.] Then you will have to ask yourself two questions if that is so then of course that could amount to provocation if he killed them at the time that they were abusing somebody under his charge, but as to whether his retaliation was reasonable under the circumstances, it is up to you to determine ...

Just to summarize, Members of the jury, this provocation would apply if you believe that the deceased persons attacked the accused [version 3], or that the accused saw them sexually and physically abusing his common-law wife [version 4]." [References to different versions supplied]

These directions must be considered in the light of section 118 which succinctly states the law of provocation. It reads as follows:-

"Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both

> together) to lose his self-control, the question whether the provocation was extreme enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining the question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

Confusing as the four different versions of events were, the appellant was entitled to have the defence of provocation left to the jury in accordance with section 118 and not any stricter criteria.

The issue: Did the judge misdirect the jury?

At first glance it seemed that the judge's directions plainly did not meet the requirements of section 118. But counsel for the prosecution presented a formidable argument. He acknowledged that the judge nowhere left version 2 (the caution statement) for the jury to consider as arguably raising a defence provocation. But, he argued, the caution statement did not raise provocation as an issue. He further acknowledged that the judge on two occasions misstated the burden of proof by posing a cooling off as a possibility ("might"). But, he argued, in other places he correctly directed the jury.

This has proved a difficult case. On balance though their Lordships conclude that the caution statement arguably raised the defence of provocation. The background of an allegation of rape of his wife, the scattering of his clothes, and the threat "you will pay with your life" is important. True it is that there was an interval of hours before the killing but if there was evidence that the appellant lost his self-control the defence still had to be left to the jury. And the frenzied nature of the attack was material upon which a jury could infer a loss of self-control. In any event, according to the caution statement the appellant's wife reminded him immediately before the killings that the "two men had chanced her". It is true that the appellant said he was drunk but that was a matter for the jury: it does not as a matter of law negative the defence of provocation. In these circumstances it follows that there was a material non-direction in that the judge failed to leave to the jury a defence of provocation based on the caution statement. The impact of this non-direction is heightened by another misdirection. The judge directed the jury, in the context of

the issue of intent, that "you can ignore whatever he says [in the caution statement], that is, regarded in law as a self-serving statement, which is not evidence". The prosecution acknowledges that this was a misdirection. It may have reinforced a view that the caution statement could be ignored by the jury when they came to consider the defence of provocation.

Then there are at least two misdirections on the burden of proof in the context of directions on a "cooling off period". The lapse of time was a real issue both on Rosita's evidence and on the account in the caution statement. It is true that the judge also correctly directed the jury that the prosecution must disprove provocation. On the other hand, a correct direction on the burden of proof does not necessarily "correct" an earlier misdirection. While everything will depend on the context, *prima facie* a misdirection upon the burden of proof must be corrected in the plainest possible terms: *Reg. v. Moon* [1969] 1 W.L.R. 1705, C.A.; Archbold, Criminal Pleading, Evidence and Practice, 1997 edition page 457, para. 4-374.

The effect of the misdirections.

While acknowledging again the legal and factual difficulties in this perplexing case, the outcome is that the defence of provocation was not fairly left to the jury. They had deliberated for more than three hours. Their Lordships cannot exclude the possibility that the jury might have reached a different conclusion if they had been properly directed. It follows that the conviction ought to be quashed.

The prosecution does not submit that the matter should be remitted to the Court of Appeal to consider whether the appellant should be retried. Given that the appellant was already pinioned for execution, and came within 20 minutes of execution, stopped only by an injunction granted by the Privy Council, it would be wrong to order a retrial.