IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

CRIMINAL JURISDICTION

THE STATE

Vs

DHAMESH RAYMOND

2nd June 2009

Mr. Ganesh Heera, State Counsel, for the State.
Ms. K. Kyte-John for the defence.

RULING

INSANALLY, J:

The accused Dhamesh Raymond a/k Fat Boy was indicted for the capital offence of murder resulting from an incident at No.36 Village, Corentyne, Berbice. The cause of death was given as shock and haemorrhage due to stab wound. The P.M report showed that the deceased received two injuries – a sutured wound 11.0cm long on the left arm commencing directly in the left axilla and moving downwards and slightly to the outside. Removal of the sutures showed a large haematoma in the musculature and a cut to the left upper brachial artery. The second wound was found just above the hip joint (4.0cm) and this wound did not pass beneath the skin.

The Doctor (Dr. Brijmohan) was not called to give evidence so there was no explanation forthcoming as to where exactly the first wound was located. However, bearing in mind that the second wound did not pass beneath the skin, it is to be assumed that it was the first wound that was the fatal one which caused the death of the deceased.

The witness Minette Chinamootoo gave evidence that the deceased was found lying on the No.35 Public Road in a pool of blood. She said she took the deceased to the Port Mourant Hospital where he was treated by the doctor there and sent home. The next morning she said, after he continued to cry out for pain, she took him back to the Port Mourant Hospital. There the Doctor examined the deceased again and referred him to the New Amsterdam

hospital. On arrival there the deceased was taken to the theatre. After he was brought out from the theatre he died. She said that from the time she picked him up from the No. 35 Public Road to the time she took him to the Port Mourant Hospital and then home and then back to the Port Mourant Hospital and then to the New Amsterdam Hospital he received no further injury.

It can therefore be concluded that the wound on the left upper arm was most likely the wound that caused the death of the deceased.

Now we come to the evidence of the witnesses called by the prosecution. None of these witnesses saw what happened. The mother of the deceased, Minette Chinamootoo only saw her son lying on the No. 35 Public Road and all she did was to take him to the Hospital. However, she said in her evidence that the deceased told her that it was the accused who juk him.

The father of the deceased, Joseph Chinamootoo told the court that he identified the body of the deceased to Dr. Brijmohan who carried out the Post Mortem examination on the body of the deceased and the body was handed over to him for burial, and he buried the deceased on the 8th June, 2005.

The witness Kowsilla Balgobin said in her evidence that the accused's mother called out to her on 4th June 2005 at about 5.30 pm and told her something. She said she saw the accused sitting in front of his gate and he took off his watch and shirt and threw them on the ground and she picked them up and gave them to the accused's mother. She said later that night the accused's mother again called out to her and again told her something.

The other witnesses was Philbert Kendall Police Constable, who said that on the 19th April 2006 he arrested the accused in a minibus, put the allegation to him and cautioned him after which the accused said "Officer me and Cliff had an argument over a CD disc and we had a fight and he own knife juck he."

Detective Sergeant Winston Gravesande said in his evidence that he saw the accused at Springlands Police Station on the morning of the 20th April, 2006. He said he put the allegation to the accused and cautioned him and the accused told him a story and he asked the accused if he wanted to put what he said into writing and the accused said yes.

A Voir Dire was held after which the caution statement was admitted into evidence. In the cautioned statement the accused said that the deceased came to his house about 6.00 o' clock. He appeared to be drunk and asked the accused for his CD, i.e. the deceased CD, which the accused told him he had left by the deceased's sister. The accused said the deceased began to curse him and boxed him and he fell on the ground. The deceased then pulled out a knife and the accused scrambled the hand the deceased was holding the knife with. They rolled over a couple of times, then fell into a drain. The accused said the deceased loose him and then he loosed the deceased's hand and the deceased said "Fat Boy I get juck". The accused said he went into his house and the deceased went away.

The prosecution witnesses were not cross examined by the defence, for obvious reasons. They had nothing to say about what transpired and none of them knew the circumstances that occurred during the incident.

The only evidence of what transpired on the 4the June 2005 was what the accused said in his caution statement. There is no evidence from the prosecution contradicting his version of the incident.

Ms. Kyte-John for the accused made a no-case submission at the close of the prosecution's case. She submitted that the accused's statement raised the defences of accident and/or self defence and that the prosecution failed to negative or rebut these defences, and that therefore there was no case for the accused to answer. She further said that any directions given to a jury in these

circumstances would have to be to direct the jury to acquit. Ms. Kyte-John relied on the Court of Appeal decision on self-defence from the Solomon Islands, R V Somae (2006) 2LRC p.431 and submitted that the case for the prosecution taken at its highest is such that a jury properly directed could not properly convict. She supported her submissions with two local cases, the case of State v Ramchan Seuralall (Guyana, 2005) High Court, 27the July 2005, a decision of Justice of Appeal Chang sitting as a Judge of the High Court in its Criminal Jurisdiction, and the case of the State v Creame + Creame, a decision by Justice George given May 8, 2008.

In State v Ramchan Seuralall Chang JA upheld a no-case submission on the ground that the prosecution could not seek to establish an intention to kill or cause grievous bodily harm on an indictment for manslaughter where the accused had already been acquitted of murder at a previous trial and where there was a strong inference that the accused was acting in self-defence on the uncontradicted evidence for the prosecution.

In State v Creame + Creame, Justice George upheld a no-case submission on the ground that the primary facts as disclosed by the witnesses for the prosecution all point to the issue of self-defence looming large and the totality of the evidence was plainly rationally consistent with a defensive action by the No. 2 accused and therefore innocence, and that the prosecution had not established by any of the evidence led that the ingredient of unlawfulness of the action of the accused had been proven, that is, that the accused was not acting in self-defence in the circumstances.

In this case where the offence is Murder, the prosecution was unable to prove an essential ingredient of the offence, which it that the accused had the intent to kill or cause grievous bodily harm. They produced no evidence from which the jury could find such an intention. The only evidence which the cautioned statement of the accused clearly reveals is that at the most the defence of the

accident arises and possibly self-defence since the accused said that after the deceased boxed him he fell to the ground, the deceased pulled a knife and he held onto the deceased's hand with the knife and they rolled into a drain. The accused is saying clearly that he held onto the deceased's hand with the knife, obviously to prevent the deceased from using the knife on him, that is, he was defending himself, and then they rolled over and fell into a drain whereupon they loosed each other and the deceased said " Fat Boy ah get juck". The accused was clearly and without a doubt in a defenceless position whereupon he was forced to do whatever was necessary to prevent the deceased from boring him with the knife. Clearly self-defence and accident arise on the accused's cautioned statement.

The evidence is uncontradicted by the prosecution. In fact the prosecution admitted that the state did not negative or rebut the defences of self-defence or accident. At the material time when the fatal injury was inflicted there was no evidence of the circumstances that led to the deceased receiving the injuries as none of the witnesses called were eye witnesses.

In Crèame + Crèame Justice George Stated at p. 11,

"The primary facts as disclosed by the witnesses for the prosecution all point to the issue of self-defence loaming large and the totality of the evidence is plainly rationally consistent with a defensive action on the part of the No. 2 accused and therefore innocence. Thus while the prosecution had proven that an intentional, deliberate and voluntary act of the No. 2 accused caused the deceased's death, the issue would be a matter of law whether the prosecution has established by any of the evidence led that the ingredient of unlawfulness of the action of the accused has been proven, that is, that the accused was not acting in self-defence in the circumstances of this case".

Justice George quoted from R v Dziduch (1990) 47A Crim R 378 at p. 381, in which Hunt. J stated:-

"The direction on self-defence must nevertheless assume that each of the ingredients of the offence charged has been made out."

In Creame's case the No. 2 accused after being attacked by the deceased who fired an arrow at him, which missed the No.2 accused as he jumped aside, the deceased put down the bow, and then the No. 2 accused picked up a piece of wood and lashed the deceased about his body, including his head.

The learned Judge held that the prosecution had not negatived or rebutted that the accused was acting in self-defence at the material time and that the prosecution had not proven that the accused acted unlawfully.

Thus, in the instant case, the situation as given by the caution statement of the accused is even more clearly defined in that the accused was in a defenceless position on the ground and did the only thing possible, which was to hold onto the hand of the deceased that held the knife. There is no evidence that he took control of the knife and then turned the knife onto the deceased and inflicted the injuries.

It is therefore, even clearer in this case that the prosecution has failed to prove that the accused acted unlawfully. Therefore, even the defence of provocation could not be left to the jury, because any direction to the jury on this defence, would be to tell the jury that since the prosecution cannot negative the defences of self-defence or accident then the issue of manslaughter does not arise, since the prosecution would have failed to prove an essential element of the crime, namely that the violence used by the accused was unlawful.

This was also the reasoning of the court in Beckford v R (1987) 36 WIR 300 at 307 where the Privy Council held that:

"It is because it is an essential element of all crimes of violence that the violence or the threat of violence should be unlawful that self-defence, if

raised as an issue in a criminal trial, must be disproved by the prosecution. If the prosecution fails to do so, the accused is entitled to be acquitted because the prosecution will have failed to prove an essential element of the crime, namely that the violence used by the accused was unlawful."

In R v Galbraith (1981) 2 AER 1060 the principle laid down by Lord Lane CJ is that:-

"Where the Judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not convict on it, it is his duty, on a submission being made, to stop the case."

This means that the Judge has to assess the facts that were proven by the prosecution and come to the conclusion that a jury properly directed cannot convict on such evidence, where that evidence is plainly consistent with innocence as with guilt.

Although in Re Levine it was stated by the Court that those defences were issues for the jury to decide and that it was for the jury to determine whether the case put forward by the state had disproved the special defences, Justice Bishop went on to say that the state had satisfied the criteria of relevancy and sufficiency, thereby rendering interaction by the trial Judge and the imposition of a directed verdict both inopportune and inappropriate.

Applying those criteria to the instant case, I find that the prosecution has not satisfied the court that there is sufficiency and relevancy in the evidence given by the witnesses. None of the witnesses can say what happened, nor give an account as to the circumstances that lead to the incident.

The fact that the deceased said that "Fat Boy juk me" only identifies the accused as the person with whom the deceased had a fight, which is admitted by the accused. And even if the jury were to believe the deceased and say that

the accused juked the deceased, this still does not explain in what circumstances the accused juked the deceased. The prosecution has not explained what those circumstances are and the jury would have to speculate. Did the accused juk the deceased intentionally? Was the injury inflicted while they were scrambling or rolling into the drain, or was it inflicted when the accused held onto the deceased's hand that held the knife?

As explained before, those words do not prove that the injury was inflicted intentionally. Nor do they negative the fact that the injury might have been inflicted in self-defence or by accident. So, yet again the jury would be unsure as to what happened and they would have to give the benefit of the doubt in the accused's favour.

Accordingly, any directions that the Judge might give the jury would be to direct the jury that the words of the deceased do not prove an intentional act by the accused nor do they provide evidence to negative self-defence or accident, and therefore they would have to acquit the accused.

Thus, on the whole of the prosecution's case there are no primary facts upon which the jury can come to the conclusion that the accused is guilty of the offence. The evidence of the prosecution at its highest is inconsistent with guilt, rather than consistent with guilt. In it totality, the evidence of the prosecution is plainly rationally consistent with innocence (or defensive action, or accident).

In the State v Clement Singh (1995) 51 WIR 128 at page 140 Chancellor Bishop stated that " the function of the trial Judge to elucidate the favourable facts and circumstances of or concerning the defence is an obligation devolving on him, and therefore he is not to disregard it or be seen to have omitted to discharge it."

The other principle enunciated in Galbraith is that:

"Where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the Judge should allow the matter to be tried by the jury."

This principle pre-supposes that there are facts on the prosecution's case from which an inference can be drawn by the jury that the accused is guilty of the offence charged. The prosecution of course has to prove its case beyond reasonable doubt.

In R v Somae the Court held that:-

"Prosecution evidence that was to be considered for the purposes of a no case submission had to be capable of amounting to proof beyond reasonable doubt of the accused's guilt. It is not enough if it was merely capable of proving the possibility of guilt. There had to be some evidence capable of establishing, whether directly or inferentially, every element of the offence charged beyond reasonable doubt. In each case it was incumbent on the prosecution to prove both that the act causing death was intentional and that it was not committed in self defence".

In Somae the Court of Appeal found that self-defence arose in the prosecution's case which was dependant solely on the account given by the accused in his statement to the police, and upheld the trial judge's decision to uphold a no-case submission.

The Court of Appeal concluded that "there was no evidence at all, either directly or inferentially, capable of negativing the reasonable possibility that the respondent acted in self-defence."

Unlike the facts in Somae, in this case the accused admits that he and the deceased had a scramble over the knife and during the scramble the deceased

got jucked. But like Somae there would be need for speculation on the part of the jury as to what had occurred.

In R v Somae the Court of Appeal said that:

"The state of the evidence was such that the respondent might have acted in self-defence or he might not so have acted. In order to be satisfied as to that element, the tribunal of fact would inevitably have needed to speculate about what happened."

In this case there is no evidence contradicting the accused's account of events. The state of the evidence, here, is that the accused might have acted in self-defence, or he might not so have acted, with no evidence of the fact, one way or another, capable of resolving the issue. The jury would inevitably have needed to speculate about what had happened.

Likewise, if the injuries were inflicted accidentally through the scramble and rolling into the drain the same considerations would apply. The jury would inevitably have to speculate.

The onus is always on the prosecution on a charge of murder to negative self-defense and/or accident, where these defences clearly arise. It is incumbent on the prosecution to prove both that the act causing death was intentional and that it was not committed in self defense or by accident. There was no evidence at all either directly or inferentially capable of negativing the reasonable possibility that the accused acted in self defense or that it was an accident.

As Justice Chang said in The State v Seurlall (supra):

"Where the inference of innocence is plainly rational on the assumed primary facts, to send the case to the jury, even with proper directions, is to leave it open to the jury to render a verdict of guilty inconsistent with the legal burden

and standard of proof by inviting speculation between rational inferences of guilt and innocence where the rational inference of innocence alone suffices for an acquittal."

The only direct evidence the prosecution has established comes from the caution statement of the accused which places the accused at the scene of the incident. Beyond that everything else becomes speculation and the jury would have to engage in "speculative guesswork" to use the phrase coined by Justice Chang in R v Seurlall when he said " even though an inference of offensive action (or guilt) also arises, to invite the jury to decide between two inferences would be to invite them to engage in speculative guesswork."

It must be noted that in State v Seurlall the evidence was that it was the deceased who attacked and cut the accused on his hand with a knife following a quarrel. The accused responded by firing lashes at him with a bicycle bar before they became engaged in a physical struggle in which he eventually took away the knife from the deceased. On the case for the prosecution, when the accused had possession of the knife, he kicked the deceased and did not seek to use the knife on the deceased even though he had the opportunity of doing so.

Justice Chang said "paradoxically, the defence of self-defence arises from the very evidence on which the prosecution relies to support a conviction for manslaughter. The prosecution's case therefore suffers circumstantially from its own inherent weaknesses. While an inference that the accused acted offensively out of provocation is not an unreasonable inference, the matter does not end there. On the assumption that the evidence adduced by the prosecution is true, where such evidence gives rise rationally to two (or more) conflicting inferences, the inference which is most favourable to the accused must be drawn by the jury. This stems from the onus and standard of proof in criminal proceedings. In cases where it is plain or obvious that guilt and

innocence are both rationally consistent with the circumstantial evidence, it would be superfluous and an exercise in folly for a judge to put the case to the jury only to direct them that they must draw the inference of innocence. But a judge should be cautious not to withdraw from the jury a prosecution case based on circumstantial evidence unless it is plain to him that, on the assumption of the truth of all the material evidence adduced by the prosecution, a rational inference of innocence can be drawn".

In this case, the evidence of the prosecution based solely on the caution statement of the accused points clearly to the issues of self-defence and accident arising therein and is plainly rationally consistent with a defensive action on the part of the accused, and/or accident, and therefore consistent with the rational inference of innocence which alone suffices for an acquittal.

In Neal v Queen Crim App No. 6 of 2001 (Court Judgments, Belizelaw.org) the Court said "that it did not appear to us that at the end of the Crown's case there was any fit case to be left to the jury because self-defence which arose on the Crown's case had not been negatived."

I therefore must apply the principle in Galbraith that "where the prosecution evidence, taken at its highest is such that a jury properly directed. Could not properly convict upon it, then the judge should stop the case."

I therefore uphold the no-case submission made on behalf of the accused, by his counsel.

……..

D. Insanally

Puisne Judge

Dated this 2nd day of June 2009.