Hilary Term
[2015] UKPC 7
Privy Council Appeal No 0021 of 2014

JUDGMENT

Director of Public Prosecutions (Appellant) *v* Nelson (Respondent)

From the Court of Appeal of the Eastern Caribbean Supreme Court (Antigua and Barbuda)

before

Lady Hale
Lord Hughes
Lord Toulson

JUDGMENT DELIVERED BY LORD HUGHES ON

16 February 2015

Heard on 27 January 2015

Appellant	*Respondent*
James Guthrie QC Anthony Armstrong (Director of Public Prosecutions) (Instructed by Charles Russell Speechlys)	Dr David Dorsett Owen Roach (Instructed by M A Law)

LORD HUGHES:

1. The defendant Kevil Nelson was convicted at trial of murder. The Court of Appeal held that there was a critical omission from the judge's direction to the jury on provocation and accordingly allowed his appeal to the extent of substituting a conviction for manslaughter. The Director of Public Prosecutions contends on this appeal that the direction did not suffer from any omission. The defendant cross appeals on separate grounds which were some of those rejected by the Court of Appeal.

2. In the evening of 23/24 October 2006 there was a dispute at the home of the deceased between himself and his girlfriend, Nasha Edwards. He put her out of the house. She called the police. Two officers responded, the defendant Nelson and a colleague, PC Francis. They assisted Nasha to collect her son from the home of the mother of the deceased, and then they took her at her request to the deceased's home to collect a bag of the child's necessities. By the time they arrived there it was something like 0130 in the morning. The deceased emerged from the house, carrying the bag of the baby's things. A confrontation ensued between the two officers and the deceased. How it arose and of what it consisted was in hot dispute at the trial. But in the course of it, the defendant drew his gun and shot the deceased dead when he was no more than an arm's length away.

3. According to Nasha, the officers had summoned the deceased out of the house and had told him that he must come to the police station, although, she said, she told them to leave him alone. According to her, the defendant then seized hold of the deceased, the deceased struck the defendant powerfully in the eye, and PC Francis tackled the deceased to the ground. Then, she said, the defendant told Francis to "watch yourself" and shot the deceased as the latter tried to get up from the ground. She said that when she asked why he had shot the deceased, the defendant replied "You don't see; he almost burst my eye? What do you want me to do?", thus indicating that he was shot as a reprisal. There was medical evidence that the defendant had received a heavy blow to the eye which had caused a 'blow out' fracture of the floor of the orbit.

4. The defendant's account, by contrast, was that they were leaving when the deceased approached him aggressively telling him to get out his yard. The defendant said that he saw the deceased put something shiny into his trouser pocket. When PC Francis tried to search him, the deceased knocked him to the ground and turned on the defendant, striking him in the eye. Francis grappled with the deceased and they both went to the ground, but the deceased then charged at the two officers as they retreated towards the fence of the yard. The defendant said that he believed the deceased to have a weapon in his hand. He

said that he shot the deceased as he closed on the two of them, and did so in reasonable self defence.

5. There was undisputed evidence from police officers that when the scene was afterwards examined, a pair of scissors was found by or in the hand of the deceased. The defendant's case was that these were the weapon which the deceased had first concealed in his pocket and then had in his hand when he attacked. Nasha said that the deceased never had any kind of weapon in his possession and, moreover, that the scissors did not belong to the house.

6. The evidence of PC Francis at trial broadly supported that of the defendant. All witnesses had made earlier statements and were duly cross examined upon suggested inconsistencies between those statements and their evidence at trial. The pathologist's evidence suggested that the trajectory of the fatal bullet had been somewhat downwards having entered the front of the body at chest level. There was thus a direct conflict of evidence, which only the jury could resolve, as to what had happened, as to whether the defendant was under attack from the deceased, and as to whether the latter was armed with the scissors.

Provocation

7. The defence advanced at trial was reasonable self defence, alternatively reasonable action taken to prevent a crime. Provocation was not advanced; indeed the defence case was positively inconsistent with it, because the defendant asserted that, far from being provoked to loss of control leading him to shoot the deceased, he had been in control throughout and had used his gun only as a matter of last resort when under attack. Nevertheless, on the evidence, it was plainly possible that if the jury were to reject the defendant's account and find that he had shot the deceased by way of reprisal for the severe blow to his eye, provocation might be open to it. This was therefore a trial in which the judge had to leave manslaughter by way of provocation to the jury, notwithstanding that this was not the defendant's case, and had, in doing so, to avoid saying anything which might be taken by the jury to undermine the defence which the defendant was advancing.

8. The Court of Appeal was faced with the necessity to deal with a large number of grounds advanced by the defendant. Of those, the last to be raised was that the judge had wrongly omitted to tell the jury that provocation could arise despite the fact that the defendant had shot the deceased with the necessary intent for murder, namely the intent either to kill or to do grievous bodily harm.

9. It is of course trite law that murderous intent (of either kind) is in no sense inconsistent with the partial defence of provocation. Indeed, provocation assumes murderous intent. It only arises when the essential elements of murder are all proved, including murderous intent. If the judge had indeed left manslaughter to the jury in a manner which might have led it to think that murderous intent negated provocation, that would have been a material misdirection.

10. The Court of Appeal was persuaded that this error had been made. In its judgment it quoted a single passage from the summing up which, as it correctly observed, did not sufficiently avoid this potential error. In this passage the judge told the jury:

> "Before you can convict the accused of murder, the Prosecution must make you sure that he was not provoked to do as he did. Provocation has a special meaning in this context, which I'll explain to you in a moment. If the Prosecution does make you sure that he was not provoked to do as he did, he will be guilty of murder. If on the other hand you conclude either that he was or that he may have been provoked, then the defendant would not be guilty of murder but guilty of the less serious offence of manslaughter."

The Board agrees that if that were all that had been said about provocation, the summing up would have been defective. But it was not. The passage cited came in the context of a careful summing up which made the correct position amply clear to the jury.

11. The judge had first correctly identified the legal ingredients of murder, including murderous intent of either kind, and he had explained intent in entirely appropriate detail. He had gone on, correctly, to set out the law on self defence (alternatively prevention of crime) which was the defence relied on by the defendant. His treatment of it is, rightly, the subject of no kind of complaint; it was full, accurate and correctly tailored to the facts of the case. In the course of it, he had correctly told the jury that murderous intent did not negate self defence. It was only after this that the judge turned to provocation, correctly pointing out that it was not the defence relied upon but that it was his duty to explain any defence which might arise on the evidence, whether relied upon by the defendant or not.

12. The judge then provided a textbook definition of provocation, using the words of the statute, as counselled by Lord Diplock in *DPP v Camplin* [1978] AC 705

at 718E. As a result, on four different occasions, the judge correctly used the formula: 'was the defendant (or may he have been) provoked *to do as he did*'? He coupled his direction upon provocation with references back to the ingredients of murder as he had previously defined them, thus including murderous intent. In particular he said this just two pages after the passage cited by the Court of Appeal:

> "If you are sure that what was done and/or said would not have caused an ordinary sober person of the defendant's age and sex to do as he did, the prosecution will have disproved provocation. And providing the Prosecution has made you sure of the ingredients of the offence of murder, <u>because all the ingredients are the same as the offence of murder</u>, your verdict will be guilty of murder.
>
> If on the other hand you answer is that what was done and/or said would or might have caused an ordinary sober person of the defendant's age and sex and occupation to do as he did, your verdict will be not guilty of murder but guilty of manslaughter by reason of provocation. Provocation is not an actual defence to murder. It doesn't bring about an acquittal. What it does, it reduces the offence from murder to manslaughter.
>
> If you find under these directions that he was provoked to do as he did, the circumstances I have pointed out, then - <u>and all the elements of murder as given to you, the ingredients are proved</u> and [sic] it is open to you to find him not guilty of murder but guilty of manslaughter." (emphasis supplied).

Those passages are not referred to by the Court of Appeal. They, and explicitly the last, amply made clear to the jury that provocation arose if and only if the ingredients of murder, including murderous intent, were proved. Moreover the judge made clear in the first passage that the basic ingredients of murder were the same as the ingredients of manslaughter by provocation.

13. If there were any room for doubt, which there is not, the position was made even more explicit when the judge returned briefly to a summary of issues after he had rehearsed the evidence in the case. At p 77 of the summing up the judge reminded the jury of provocation in the following terms:

> "If you were to find that he was provoked and that that provocation was such that has [sic] caused a reasonable and sober person of his age and sex and occupation to do what he did, <u>and all the other</u>

> elements you are satisfied that murder existed, then your verdict would be not guilty of murder but guilty of manslaughter by reason of provocation." (emphasis supplied)

Once again, there is no reference to this in the judgment of the Court of Appeal.

14. Finally, at the conclusion of the summing up, the judge added a rider on provocation at the suggestion of the Director of Public Prosecutions. He correctly directed the jury that provocative acts might include not only anything said or done by the deceased to the defendant himself, but also things said or done to his colleague PC Francis.

15. The Board is satisfied that when the whole of the summing up is examined and the passage cited by the Court of Appeal is taken in context, the judge plainly did not fall into the error supposed by that court. There was no danger that the jury might think that murderous intent negated provocation.

16. Before the Board the defendant renews a distinct ground of appeal relating to the provocation direction, which the Court of Appeal rejected. He contends that the direction did not sufficiently explain to the jury that provocation means, in law, things said or done which cause the defendant to have murderous intent. The causal link was not, it is said, explained. This complaint is ill-founded, as the Court of Appeal correctly held. It is certainly true that the legal concept of provocation is of provocative behaviour which leads the defendant to do as he did, that is to say to kill the deceased. In the present case, the judge's repeated directions that the question for the jury was whether provocative behaviour led the defendant "to do as he did" amply made this clear. So did the rider at the end telling the jury that it should consider whether the defendant might have been reacting to whatever was found to have occurred to PC Francis. Moreover, if indeed the judge had left open for the jury the possibility of a verdict of manslaughter rather than murder even if any provocative behaviour had not caused the killing, that would have been too favourable to the defendant, rather than occasioning him any unfairness or ground for complaint.

17. Before the Board the defendant also sought, somewhat faintly, to argue that the judge had not sufficiently identified the evidence which might have been taken to be of provocative behaviour by the deceased. This was not part of the defendant's grounds of appeal before the Board, and no leave had been, or would have been, given to argue it. There was ample reminder of the potentially provocative behaviour, in particular of the evidence, which was common ground, of the severe blow struck by the deceased to the defendant's eye. Further, the rider relating to the possibility that provocation might be found in the behaviour

of the deceased towards PC Francis was an additional identification of evidence which could be relevant.

18. In those circumstances it is unnecessary to address the precautionary submission made by the Director of Public Prosecutions to the effect that even if there had been error in the treatment of provocation, the conviction ought to be upheld by the application of the proviso to section 40 of the Eastern Caribbean Supreme Court Act, viz because no miscarriage of justice actually occurred. The Board expresses no view about that hypothetical question (save to say that one cannot necessarily deduce from the jury's verdict that it accepted wholesale the evidence of Nasha; it may of course have done so but the verdict could also have been founded on a view of excessive response).

Fresh Evidence

19. Before the Court of Appeal, the defendant sought leave to adduce a new witness statement from an ambulance emergency officer, Mr Greenidge, who had been called out in the early hours of the morning to the scene of the shooting. His evidence disclosed that he had, on inspecting the scene and turning over the body, seen 'a shiny chrome object' (ie the scissors) in the hands of the deceased, lying dead on the ground. The court granted leave to adduce the evidence, but on examining it concluded that it could not affect the safety of the conviction. The defendant's contention is that in so concluding the Court of Appeal illegitimately arrogated to itself the fact-finding function which is exclusively committed to the jury, and moreover deprived the defendant of his constitutional right to the verdict of the jury. He contends that once the fresh evidence was received by the Court of Appeal, the only possible consequence, unless the evidence were such as to demonstrate unequivocally the innocence of the defendant, is that a re-trial be ordered to enable the jury to perform its task in assessing the whole of the evidence, including the new. In support of that contention, the Board was referred by Dr Dorsett for the defendant to the Canadian case of *R v Stolar* [1988] 1 SCR 480.

20. In that case the Canadian Supreme Court addressed the test in Canada for the reception at appeal level of fresh evidence. The statute (section 610(d) of the Criminal Code) merely permits the Court of Appeal to receive any fresh evidence if it is in the interests of justice to do so. But the caselaw of Canada, as *Stolar* shows, establishes that a two-stage process is, or is normally, adopted. The first question is whether the evidence should be admitted. At this stage the test includes asking whether the evidence is such that, if believed, it could reasonably be expected to have affected the result of the trial. In *Stolar* the Court of Appeal had, at the first (admission) stage, resolved by a majority that the fresh evidence was such as might reasonably have been expected, if accepted, to affect the

outcome of the trial. But when dealing with the appeal the same court had, by a different majority, determined that the case against Mr Stolar had been so strong that the new evidence could not have altered the jury's conclusion. The Supreme Court held that it was impossible so to reason when the opposite conclusion had been reached and announced at stage one. At 486 it held:

> "Given that the test for the admission of fresh evidence is so well settled, the source of the confusion in this case is at once apparent. The Court of Appeal by a majority decision admitted the evidence of a preliminary application but, by a differently constituted majority, dismissed the appeal on the basis that the fresh evidence was not such that it could reasonably have affected the jury's verdict. This was done, despite the fact that the very act of admitting the evidence, according to the required test, is based upon a finding that the evidence could reasonably have affected the result. This inconsistency was recognised in the dissent by O'Sullivan JA."

21. The decision of the Court of Appeal in the present case to receive the evidence of Mr Greenidge did not involve any finding that it could reasonably have been expected to affect the outcome of the trial. The test is set out in section 45 of the Eastern Caribbean Supreme Court Act. This requires the court to receive the evidence "unless it is satisfied that the evidence if received would not afford any ground for allowing the appeal". That clearly leaves open the question, for determination at the appeal, whether the evidence affects the validity of the conviction, including whether it would, if accepted, be such as might reasonably have affected the outcome of the trial. The procedure conventionally adopted by the English Court of Appeal, Criminal Division, under the differently expressed section 23 of the Criminal Appeal Act 1968 is comparable, namely in most cases to receive the fresh evidence (if the other conditions for doing so are met) *de bene esse* and then to examine in the context of the appeal as a whole whether it is such as to impact adversely on the safety of the conviction. The Supreme Court of Canada, in *Stolar* at 488, expressly distinguished the basis of the order for reception of the evidence which was there in question from an order which allows consideration of the evidence for the purpose of determining whether it should be admitted. Nothing in *Stolar* imposes on the Eastern Caribbean Court of Appeal the obligation to determine at the stage of receiving the evidence that it would be expected, if accepted, to have affected the outcome of the trial, and generally it is both permissible and sensible to receive the evidence on the basis that its possible impact on the trial will be examined during the hearing of the appeal.

22. If there had been a live dispute as to whether the scissors were found under the body, then the evidence of Mr Greenidge would, no doubt, have been likely, if

accepted, to impact on the trial outcome. Such was, so it would appear, the position in *Stolar* where the fresh evidence was potentially alibi evidence and the Court of Appeal, having determined that it was such as might well have affected the outcome, went on to weigh it against other (different) evidence of guilt. But in the present case, it was common ground that the scissors were found under the body. Some five witnesses, called by the Crown, gave evidence of seeing them there when the scene was examined, and one, Assistant Superintendent Lewis, had photographed them in situ for the jury to see. The issue about the scissors was not whether they were found under the body sometime after the shooting, but whether the deceased had been in possession of them at the time he had been shot. If it had been the case that Mr Greenidge had arrived at the scene sufficiently promptly for his sighting of the scissors to be good evidence that they had not been introduced after the shooting, then again his evidence might well have been such as might have affected the outcome of the trial, if given there. But his statement made it clear that he was not by any means the first on the scene. His ambulance had had the misfortune to skid off the road on the way and it had taken 20-30 minutes, at least, to recover it and carry on to the scene. By the time he arrived various others, including some police officers, were present. In those circumstances the Court of Appeal's conclusion that his evidence added nothing to the agreed facts, and could not help on whether the scissors had been in the hands of the deceased when he was shot, was plainly correct.

The scissors; plant?

23. The defendant's remaining ground of cross appeal complains that the defendant was unfairly treated at the trial by the handling of the evidence relating to the scissors. Says Dr Dorsett, the Crown case must have involved at least the hinted suggestion that the scissors had been planted in place sometime after the shooting. If that was the suggestion, he submits, it ought to have been made explicitly to the defendant in cross examination. It was not. Counsel for the Crown put to the defendant that there were no scissors at the time of the shooting, but he went no further than that. This contravened, it is said, the general principle that if a party proposes to invite the jury to disbelieve the evidence of a witness on a particular point, that ought except in unusual circumstances to be made clear to the witness so that he has the opportunity to offer any explanation which he may have for what he says, and to show if he can that his evidence is reliable: see for example *Browne v Dunn* (1893) 6 R 67 and *R v Hart* (1932) 23 Cr App R 202.

24. The Board endorses this general principle. The gravamen of it is fairness. The witness, and in particular a defendant witness, must not be deprived of the opportunity to deal with a particular suggestion by its being unspoken when it ought to be put directly. But in the present case there was no question of the

defendant being unaware of the possible inference that the scissors had been put in position after the shooting, not necessarily by him, but by somebody acting in his supposed interests. Once Nasha said, as she repeatedly did, that the scissors were not in the hands of the deceased at the time of the confrontation between him and the officers, and once she said that they were not from the house, the question was necessarily raised of how and when they had come to be in position under the body. There was no question of the defendant not being aware of this. Indeed his counsel at trial made much of it, inviting the judge to direct the jury to disregard the possibility that the scissors had been introduced after the shooting. There is nothing which it is suggested that the defendant could have done or said, or any additional evidence which it can be suggested that he might have called, if counsel for the Crown had, instead of simply putting to him that there were no scissors at the time of the shooting, added a suggestion that they had been put under the body afterwards. That they had been put there afterwards necessarily followed if it was true that they had not been there at the time of the shooting. The challenge to the defendant's evidence that he saw a shiny object first in the pocket and then in the hand of the deceased was an explicit challenge to his truthfulness. In the end the Crown seems to have judged that it could not put the distinct suggestion that the defendant himself, or any other identified person, had put the scissors where they were found, and nor was there sufficient basis for suggesting that the defendant must have known about it at the time. That was a permissible albeit not an inevitable stance. The result was far from unfairness to the defendant. On the contrary it enabled his counsel to make a powerful speech to the jury underlining that no suggestion was made that the defendant had been responsible for planting the scissors, and criticising the Crown for being willing to wound but afraid to strike. The conclusion of the Court of Appeal that this point afforded no grounds for quashing the conviction was correct.

Disposal

25. For the reasons given above the Board will humbly advise Her Majesty that the appeal of the Director of Public Prosecutions should be allowed and the conviction for murder and sentence restored, whilst the cross appeal of the defendant should be dismissed.