



The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 16 of 2008

Between:

ANDRE KIRK EVERETT HYPOLITE

Appellant

-v-

THE QUEEN

Respondent

**Before: Zacca, President
Evans, J.A.
Auld, J.A.**

Appearances: Ms. Elizabeth Christopher for the Appellant
Ms Cindy E. Clarke and Ms Maria Sofianos for the Respondent

Judgment

Date of Hearing:

17 November 2010

Date of Judgment:

23 November 2010

AULD JA:

Introduction

1. On 26th September 2008 the appellant, Andre Hypolite, was convicted before The Hon Justice Charles-Etta Simmons of murder of Nicholas Dill and of unlawful wounding of Ms Stacey Pike in the early hours of the morning of 26th December 2004. On 29th November

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2008, he was sentenced to life imprisonment for the murder of Mr Dill and 3 years imprisonment for the unlawful wounding of Ms Pike.

2. Mr Hypolite has two grounds of appeal, each of alleged failure by the Judge properly to direct the jury.

3. There were three main players in the story. Two of them were Nicholas Dill, the victim of the alleged murder, and Ms Pike, his girl friend, who had lived with him, in the main contentedly, for some years in part of a shack that he shared with relatives in Warwick. They were long-term and regular drug-users and addicts, and often entertained others of the same habit in their shack in the night-time hours. The third was the appellant, Mr Hypolite a visitor to the shack on the night in question.

4. There were three minor players, Lisa Caines and Andre Dill, the brother of the deceased, both of whom gave evidence, and a man named Shakai.

The Crown case and evidence

5. The Crown case started with the evidence of Lisa Caines, a long-standing drug addict, in particular of cocaine and heroin. She and Mr Hypolite had previously lived together, but she had brought the relationship to an end some time before the night of the killing. He had nevertheless continued to visit her home from time to time, as had Ms Pike, seeking cocaine from her. Ms Caines' evidence was that Mr Hypolite was not a seller of drugs for money, but for sex. She also spoke of his call at her home on 25th December, the eve of the killing, armed with two long – “butcher-like” – knives in the waist of his pants.

6. The Crown's principal witness was Ms Pike. Her account, so far as material to the appeal, was that in the early hours of the 26th she set out from the shack with some money to buy drugs for herself and Nicholas Dill. She met Mr Hypolite, whom she knew and with whom she had previously had drug-dealings. On her evidence, they agreed that he would supply her with cocaine in exchange, not for money, but for performing oral sex on him. He returned with her to the shack and made the same proposal to Nicholas Dill, offering him cocaine if he would allow Ms Pike to go with him to Lisa Caines' house for the purpose. Nicholas Dill refused. During or just after this exchange Mr Hypolite bought some ecstasy tablets from Shakai, who was also in the shack at the time, Mr Hypolite shared them between Nicholas Dill, Ms Pike and himself. Shortly afterwards Shakai left.

7. Nicholas Dill had been reluctant to let Ms Pike leave the shack with Mr Hypolite for sex elsewhere. However, he was seemingly willing or resigned for her to pay for the cocaine that Mr Hypolite had for sale by performing oral sex on him in the shack and in his, Nicholas Dill's, presence. Mr Hypolite undressed and, before laying on the bed, removed from a paper bag he had brought with him a large yellow-handled kitchen knife, which he put on a dresser. It was clear from Ms Caines' evidence and from the scientific evidence that he had another knife with him that night, which, unlike the yellow-handled knife, had a long serrated blade. He also

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removed from the bag a crack-pipe and some other drug paraphernalia, which he took over to the bed, and gave Nicholas Dill and Ms Pike some cocaine to smoke.

8. On the evidence of Ms Pike, she began to perform oral sex on Mr Hypolite on the bed while he and Nicholas Dill smoked the cocaine and talked, and she occasionally stopped to smoke some herself. Mr Hypolite acknowledged in evidence that he had smoked cocaine while all this was going on, but said that he had only had four puffs of the cocaine – there was no evidence to suggest that he had taken more or that what he had taken would have had any significant effect on his ability to form an intent to kill or cause grievous bodily harm. Continuing with Ms Pike’s evidence, he then sought to involve Nicholas Dill in their sexual activity by proposing anal sex with him. Nicholas Dell initially consented, but at the last moment said he could not go through with it. That appears to have triggered a change of attitude on the part of Mr Hypolite. He got off the bed, went to the dresser, returned with what must have been the second knife with the long serrated blade to which we have referred, and, with some deliberation, stabbed Nicholas Dell in the back. Nicholas Dill then pleaded with Mr Hypolite, saying that he would do whatever he wanted, but a prolonged and violent struggle ensued with Mr Hypolite brandishing and thrusting with the knife and Nicholas Dill trying to ward off the blade, during which he was stabbed and cut several more times. Ms Pike grabbed a nearby machete to go to Nicholas Dill’s defence, but as she did so, Mr Hypolite struck her on the forehead with the knife, causing one of a number of wounds that she suffered in the struggle, the subject of Count 2.

9. At some point during the struggle between the three Ms Pike saw Nicholas Dill’s brother, Andre Dill, who also lived in the shack, looking through the window. Andre Dill’s evidence of his view from that vantage point was that it was fleeting - just a few seconds – but it was vivid and, if true and accurate, of some significance when put alongside Ms Pike’s evidence. He saw Mr Hypolite holding in his raised arm a knife aimed at his brother. At about that moment Ms Pike shouted to him to call the police, which he immediately ran off to do. His brief presence outside the window brought the struggle inside to an end. Mr Hypolite grabbed his pants, put them on, and, still armed with the knife, escaped by breaking out of the window. He then ran away to where he had left his bicycle nearby, leaving on the way a trail of blood drops and stains matching his DNA profile, and also the blood-stained knife, with stains matching his and Nicholas Dill’s respective DNA profiles.

10. Ms Pike, for her part, rushed to the aid of Nicholas Dill, trying, with towels, to staunch the flow of his bleeding while awaiting an ambulance and the police.

11. Nicholas Dill died shortly afterwards from blood loss caused by the many deeply penetrating stab wounds and cuts. Ms Pike was found to have suffered a wound to the forehead, caused, on her evidence, by the blow of the knife wielded by Mr Hypolite when she tried to go Nicholas Dill’s aid. She also had classic defensive wounds, in the form of lacerations, requiring stitches, to the palm of each hand, and some other lacerations and abrasions. Mr Hypolite too was found to have some injuries, but in sharp contrast, certainly to those of Nicholas Dill, they were all superficial and comparatively trivial, just a number of abrasions and small scratches.

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12. Ms Pike's evidence going to extent of her, Nicholas Dill's and Mr Hypolite's intoxication that night was that she and Nicholas Dill had each received half a tablet of ecstasy from Mr Hypolite out of his purchase from Shakai, leaving him with two. She said that she had felt no effect from the ecstasy and little lasting effect from the cocaine she had been given by Mr Hypolite for performing oral sex on him. Mr Hypolite's evidence as to the ecstasy was different, as the Judge underlined for the Jury. He said in interview and evidence that Ms Pike and Nicholas Dill each had and took two tablets. He denied having taken any ecstasy, and there was no evidence of any effect on him if he had done.

13. In an interview under caution after arrest and in evidence, Mr Hypolite denied Ms Pike's account that he had been naked whilst in the shack or had proposed homosexual activity with Nicholas Dill or of having attacked and wounded him with a knife. He said that Nicholas Dill and Ms Pike, each with a weapon, had first attacked him and that he had defended himself as best he could without a weapon. He suggested that it was Ms Pike who had fatally assaulted Nicholas Dill. He acknowledged having run off with the knife alleged to be the murder weapon, but gave no explanation.

14. The appeal concerns only the conviction of murder and directions of law and of fact going to that charge.

Ground 1 – No warning of need for caution in relation to evidence of Pike, Dill and Caines

15. Ms Elizabeth Christopher, counsel for Mr Hypolite on the appeal but not at trial, submitted that the Judge had wrongly failed to caution the jury of the need for particular care in the absence of supporting evidence when considering the testimony of Ms Pike, Andre Dill and Ms Caines, all of whom, she maintained, had a potential interest of their own to serve in the matter. There was no discussion between counsel and the Judge on this issue before her Summation, and no mention of it in the exchanges between counsel and the Judge at the end of it and before retirement of the jury. Ms Christopher maintained that the Judge should have given such a warning, notwithstanding the absence of any such discussion.

16. Ms Christopher acknowledged the abrogation of corroboration as a legal requirement in Bermuda by amendment in 1994 of section 32 of the *Evidence Act 1905*, at about the same time as the similar abrogation in the UK by section 32 of the *Criminal Justice and Public Order Act 1994*. But she pointed to its express preservation in section 32(3) of the 1905 Act of a judge's entitlement to advise a jury in their discretion to look for corroborative evidence and recognition of a judge's duty to "assist ... a jury in their consideration of any evidence where the interests of justice warrant". In this context a common instance for consideration by a judge of the exercise of his discretion to give assistance is to caution a jury of the need for care where there is an evidential and/or circumstantial basis for suggesting that the evidence of witness *may be* unreliable because he has a potential interest of his own to serve. Ms Christopher drew the Court's attention to a number of authorities giving voice to that familiar evidential and/or circumstantial safeguard, most recently that of the Privy Council in *Pringle v R(Jamaica)* [2003] UKPC 9, and of the English Court of Appeal in *R v Makanjola & Easton* [1995] 1 WLR 1348, CA.

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17. The Judge, at pages 11 - 13 of her Summation, drew the Jury's attention to the need in the case of each witness, to have regard to their credibility and also their reliability, which may or not, depending on the circumstances, turn on credibility.

18. Ms Christopher's main application of this principle was to the evidence of Ms Pike, who, she maintained, had a powerful interest of her own falsely to incriminate Mr Hypolite: 1) she had a conviction following a plea of not guilty of manslaughter for killing a man with a knife and, therefore both potential lack of credibility and arguable propensity to knife-violence on that account; 2) she was addicted to cocaine and had a level of cocaine intoxication at the material time; and 3) she had a potential interest of her own to serve in implicating Mr Hypolite, for, if he did not kill the deceased, she was the only other person who could have caused his death. Ms Christopher acknowledged a number of references in the Judge's treatment of the evidence of Ms Pike in which he indicated that the Jury should look for, or might find, independent evidence on particular aspects of her evidence. But, she maintained that, given the powerful potential motives she had for lying, the Judge did not give a sufficiently general warning to the jury to approach her evidence with caution, coupled with properly focused assistance as to presence or absence of evidence that might support her account where it differed from that of others. She referred the Court to dicta to that effect of Lord Abinger in *R v Farler* (1837) 8 Car & P, 106, at 108 and of the Northern Ireland Court of Appeal in *R v Donnelly & Ors*, 17 July 1986, Tr, p 21.

19. Andre Dill, the only other eye-witness of what happened - albeit fleetingly through the window - of Mr Hypolite holding a knife aimed at the deceased, was the subject of a warning from the Judge to the jury to look at his evidence with caution. But that was simply in respect of a contradiction between his witness statement and his evidence as to the hand in which he had held the knife. Ms Christopher submitted that the Judge should have gone further and referred to other detailed and, in our view, largely inconsequential differences between his witness statement and his evidence and that of Ms Pike as to the confusing and startling scene before him when he peered briefly through the window before running off to call the police. The Judge, rightly in the Court's view, did not consider it necessary to detail those differences as to scene and sequence that Mr Hypolite's trial counsel, Mr John Perry QC, had explored in his cross-examination of Andre Dill. However, she did remind the Jury of his strong filial relationship with Nicholas Dill.

20. Perhaps more central to Ms Christopher's submission about Andre Dill was his exasperated outburst at one point to Mr Perry in response to his detailed cross-examination, "If you're trying to make Stacey look guilty for killin' my brother, you're wrong. He did it." Ms Christopher suggested that that assertion, when there was nothing to justify it, suggested possible motives such as jealousy, spite, levelling an old score, or hope of an advantage - in short that he fell to be considered a suspect witness in part because of that assertion.

21. Last for mention under this ground of appeal is the evidence of Lisa Caines of Mr Hypolite's proclivity for selling drugs, not for money, but for sex, a proclivity which, on Ms Pike's evidence, he was engaged with her in the shack just before the killing.

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22. Ms Christopher's complaint was that, not only was Ms Caines' evidence to be treated with caution as to its accuracy on account of her drug habit, but that in the immediate aftermath of the killing, she showed hostility to Mr Hypolite. She was, maintained Ms Christopher, a "suspect witness" about whose evidence the Judge should have cautioned the jury, not least if the Jury were left with the possible understanding that Andre Dill's evidence was capable of supporting that of Ms Pike.

23. In summary, Ms Christopher submitted that the evidence of each of these three witnesses was so suspect and/or otherwise questionable that the Judge unreasonably failed in each case to exercise her discretion to caution the jury appropriately about their credibility and/or reliability and on that account to look for supporting evidence, if any.

24. Ms Cindy Clark, for the Crown, who also appeared as part of the Crown team of counsel at the trial, emphasised the ambit of discretion indicated by the authorities as available to a trial judge on the need for and content of a direction to exercise caution in their approach to the evidence of any prosecution witness. She drew attention to a number of instances in the transcript of the Summation where the Judge, in dealing with individual pieces of Ms Pike's and Mr Dill's evidence on important issues, had tailored her directions so as to include reminders of conflicts between their evidence and the case of Mr Hypolite, and as to the existence or non-existence of potential supporting evidence, some of it independent and highly authoritative on the central issue in the case,

25. In our view, it was not unreasonable for the Judge to take the course she did in relation to each of these three prosecution witnesses, and we do not consider that the Jury would have been confused, as suggested by Ms Christopher, in her reminder to them early in her Summation that, when assessing the evidence of witnesses, they should have in mind both reliability and credibility. It must have been blindingly obvious to them that Ms Pike, in the highly unlikely event of herself being the murderer, would, by her long-standing and intimate relationship with Nicholas Dill, have had an interest in his cause, whether truthfully or otherwise.

26. In any event, as Ms Clark submitted, the Judge – and the Jury – must have had this aspect in mind on the several occasions when she identified issues of fact and directed them to potential supporting evidence or its absence. In addition to the points made by Ms Clark about the detailed directions of the Judge as to points of conflict, we should draw attention to some fundamental questions prompted by the overall issue, namely who was the initial and continuing aggressor who caused the fatal wounds to Nicholas Dill? There was the second knife, with long serrated blade, which Mr Hypolite must have had with him in the shack and carried away with him, by then with his and Nicholas Dell's blood-stains on it - to be contrasted with Ms Pike remaining in a vain attempt to save Nicholas Dill's life by staunching his bleeding. And there was the gross disparity between the many and fatal wounds suffered by Mr Nicholas Dill and the much fewer, superficial injuries found on Mr Hypolite.

27. There was also the big question posed by the fact that the only possible murder candidates before the Jury were Ms Pike or Mr Hypolite. What possible motive could she have

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had, regardless of the bizarre circumstances immediately preceding the violence, for murdering the man with whom she lived, and for doing it with a knife brought by a man who had just brought drugs to both of them? The only suggestion that Mr Hypolite came up with in interview was that she had killed Nicholas Dill in a fight over the cocaine and money. The Judge rightly observed to the Jury that Mr Hypolite, neither in interview nor evidence, provided any coherent explanation or justification of his case that Nicholas Dill was the first to attack, and that Ms Pike, after joining in and eventually arming herself with Mr Hypolite's second knife, deliberately attacked and fatally wounded Nicholas Dill.

28. In the circumstances, we are firmly of the view that nothing more was required of the Judge by way of caution and direction as to the presence or absence of supporting evidence in the case of Ms Pike. The same applies *a fortiori* to the evidence of Ms Caines and Mr Dill; in particular, Ms Christopher's criticisms of the latter having a filial interest to lie, which, she suggested, should have been the subject of a direction coupled with reminders of his lack of memory in response to Mr Perry's cross-examination as to detail. Such criticisms, with respect, lack reality and give little credit to the common-sense for which juries are widely credited in our common-law system of criminal trial.

29. We, therefore, reject this ground of appeal.

Ground 2 – Failure to direct jury on a possible alternative verdict of involuntary manslaughter

30. The Judge, over some 14 pages in her summation, correctly directed the jury of what they had to be sure to convict of murder, including unlawfulness.

31. She dealt first with the requisite intent to kill or to cause grievous bodily harm;

“... In order for you to find the Defendant guilty of murder, the prosecution must prove to your satisfaction, so that you are sure, that the Defendant inflicted the injuries that we have heard Mr Dill sustained, and in doing so, the Defendant either intended to cause the death of Mr Dill or intended to cause him some grievous bodily harm in the sense of serious bodily injury, and that he did so unlawfully, that is, without justification or excuse.” [Summation, p 20]

“Intention is an element of this offence that the prosecution must prove. In deciding whether the Defendant intended to kill or intended to cause serious bodily injury, you must take into account the evidence in this case that the Defendant was smoking crack cocaine. If you think that because he was so affected by drugs, that he did not intend, or may not have intended to kill, or cause serious bodily injury to Mr Dill, then you must acquit him, because the prosecution will not have proven the element of intention.” [Summation, p 21]

32. This would have been an appropriate place in the Summation for the Judge to have told the Jury that, subject to what she was about to tell them about the defence of self-defence and partial defence of provocation, they could, as an alternative, convict Mr Hypolite of

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manslaughter if sure he had unlawfully caused the deceased's death but not sure that in doing so he had had an intention to kill or cause grievous bodily harm. However, she left that until later, and returned briefly to the concept of "unlawfully" before turning to those defences:

"I told you that I would return to the concept of 'unlawfully' and what it means. The law provides certain defences to what otherwise might be considered to be unlawful acts. Let me make one thing clear ... you will only be considering the defences that I'm about to explain to you if you are first sure that the Defendant caused and intended to cause serious bodily harm to Mr Dill or intended to cause his death." (Summation, p 22 –This superfluous passage may have been deleted or reduced in the written directions later given to the jury; (see Summation p 106 and paragraphs 35 and 36 below)

33. The Judge moved to the defence of self-defence (Summation, pp 23 – 27) and the partial defence of provocation, indicating a possible alternative of manslaughter on that account (Summation, pp 27 – 32). She then recapitulated in summary form her direction as to provocation, again (Summation, p 32).

34. In the very next paragraph, on page 33 of the Summation, the Judge gave what she called her "final direction ... on Count 1", articulating for the first time a direction as to a possible alternative verdict of involuntary manslaughter for want of proof of intent to kill or cause grievous bodily harm – a direction, which as we have said, would have been better given earlier in her Summation immediately following her direction on the *mens rea* necessary for proof of murder:

"Now, my final direction to you on this Count is that if you are sure that the Defendant wielded a weapon unlawfully and caused the deadly injuries, but you are not sure that he intended to kill him Mr Dill, or seriously injure him, then this conduct will not amount to murder but rather to manslaughter, and your verdict will be 'Guilty of manslaughter'".

35. At the conclusion of the Judge's Summation and just before despatching the Jury to consider their verdicts, the Foreman of the Jury asked her to provide them with written copies of her directions on the law. In the Judge's discussion with counsel about that request in the absence of the Jury, Ms Paula Tyndale for the Crown, turned immediately to the matter of alternative verdicts, expressing some uncertainty whether the Judge had, or had sufficiently clearly, directed them on the alternative to murder of involuntary manslaughter, in addition to and distinct from provocation manslaughter. Ms Tyndale's observation to the Judge, with which Mr Perry agreed, deserve reproduction. She said:

"Just define what it was and, at the end, just to remind them what options on murder, they can either return a verdict of murder – guilty of murder, or have, if they've considered that [sic] not guilty of murder, they consider manslaughter on either the provocation or the lack of intent grounds." (Summation Transcript, p 98)

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36. Following a short adjournment, during which the Judge undertook what she called a “cut and paste” exercise so as to reproduce the relevant passages from her notes for summation, she showed them to counsel, securing their agreement before having copies prepared for the Jury to take to the jury room. From the Transcript’s record of this short exchange with counsel [pp 106 – 108], the Judge appears to have added to her written reproduction of her direction on involuntary manslaughter at page 33 of the Summation, a passage defining it as follows: “Manslaughter: A person who unlawfully kills another person under such circumstances as not to constitute murder”.

37. Despite the efforts of the Court of Appeal Registry and of counsel, it has seemingly not been possible to find a copy of those written directions to show the Court. But it looks as if they did indeed reflect the earlier direction of the Judge at paragraph 33 of her Summation, with the above addition designed to emphasise the distinction between it and her earlier direction as to provocation manslaughter.

38. Ms Christopher submitted, nevertheless, that, taking the directions as a whole, the Judge wrongly failed to leave with the Jury the possible alternative open to them of conviction of involuntary manslaughter for want of intent to kill or cause grievous bodily harm, including the relevance of intoxication which may have affected Mr Hypolite’s capacity to form either intent. She based her concern on the well established jurisprudence in a number of common law jurisdictions that there may, in certain circumstances, be a risk of a jury convicting of murder when not satisfied of the *mens rea* for it, for want of direction that they have an alternative of manslaughter on which they might otherwise have returned a verdict of guilty; see e.g. *R v Jackson* [1993] 4 SCR 573; *Von Starck v The Queen (Jamaica)* [2000] UKPC 5; and *Gilbert v The Queen* [2000] HCA 15;.

39. As to the relevance of intoxication to such a direction, Ms Christopher pointed out that the Judge had clearly considered it relevant in her direction on Count 2 – charging Mr Hypolite with causing grievous bodily harm to Ms Pike with intent. However, the Judge also dealt with intoxication when directing the Jury on the requisite *mens rea* for murder (Summation, p 21) and again, twice, in the context of her directions on provocation (Summation, pp 31 and 32).

40. Ms Clark, for the Crown relied on the direction given by the Judge on page 33 of her Summation on the possibility of an alternative verdict of involuntary manslaughter if the Jury were not sure of an intention to kill or to cause grievous bodily harm, and, as we have noted, in her written reproduction and supplementation of it for the Jury on their retirement.

41. If the Jury had been uncertain as to the two separate forms of manslaughter available to them as possible alternatives to murder, given the many technical directions of law that she had had to give them, they were sufficiently on the ball to resolve it before their retirement. The Judge’s written directions could have left them in no doubt that the direction first given on page 33 of her Summation was a free-standing reference to involuntary manslaughter, not a continuation or further repetition of what the Judge had just told them of provocation manslaughter. And there was no need for her to return to the possible relevance of

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intoxication in that context, given the lack of evidence of any significant intoxication on the part of Mr Hypolite. She had said all that needed to be said about it in the passage in page 21 of the Summation that we have reproduced in paragraph 31 above.

42. We, therefore, reject this Ground of Appeal.

43. Accordingly, we dismiss the Appeal. In doing so, we pay tribute to the able assistance given to the Court by Ms Christopher and Ms Clark in their respective written and oral submissions, all prepared at very short notice.

Signed

Auld, JA

Signed

Zacca, P

Signed

Evans, JA