[2009] UKPC 42
Privy Council Appeal No 0043 of 2009

JUDGMENT

Burnett *v* The State of Trinidad and Tobago

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Phillips
Lord Saville
Lord Rodger
Lord Walker
Lord Mance

REASONS DELIVERED BY
Lord Saville
ON

4 November 2009

Heard on 15 July 2009

Appellant
Lord Thomas of Gresford QC
Gilbert Blades
(Instructed by Wilkin Chapman Epton Blades)

Respondent
Howard Stevens
(Instructed by Charles Russell LLP)

LORD SAVILLE :

1. On the night of Saturday 24th January 2004, a group of young people, including Kevin Cato and Ryan Solomon, joined a crowd of approximately 20,000 at the *"Outrageous in Red"* Carnival Fete in Chaguaramas, Trinidad.

2. The Appellant, Dave Burnett, was one of a number of armed police officers providing security at the fete. He was in plain clothes. He was 30 years old and had been a regular police officer for 7 years.

3. At about 4 am, some of the group of young people were locked in a circle and were jumping up and down. They were bumping into and throwing water over other people at the event. One of them had identified the Appellant as a policeman and said that he had warned his friends not to bounce into him or throw water at him for that reason. However, members of the group did bump into the Appellant on two or three occasions. Slaps were exchanged between the Appellant and Ryan Solomon.

4. According to the Appellant he was attacked by at least six people, two of them armed with knives, and he feared for his life. He drew his revolver and shot Ryan Solomon and then Kevin Cato, both in the chest at short range. Kevin Cato was mortally wounded. The Appellant immediately made a report to his superior officer at the fete, Inspector Lezama, showing him a knife and telling him that he had been attacked by some *"knife wielding patrons inside the fete"* and that he believed that he had shot one of them, who had lunged at him with the knife.

5. Inspector Lezama observed that the left side of the Appellant's face appeared to be swollen, that there appeared to be a small blood stained injury to the back of his neck and that there was a small hole on the left side of his jersey. The Appellant told Inspector Lezama that the hole had been made by the knife, which had become entangled in his clothing.

6. The Appellant was medically examined at the Port of Spain General Hospital and found to have a swollen left cheek, a 3cm abrasion to the back of his neck and a soft tissue injury to the left side of his chest.

7. Other witnesses, including Ryan Solomon, gave a different account of what happened before and as the Appellant fired his revolver, and disputed his account of two people coming at him with knives. Their evidence was that neither Ryan Solomon nor Kevin Cato was armed.

8. The Appellant was committed by the Magistrates' Court to stand trial for manslaughter at the Port of Spain 3rd Assize. His trial commenced on an indictment laid

for murder before Brook J and a jury on 14th February 2006 and concluded on 21st March 2006, when the jury returned a verdict of murder and the Appellant was sentenced to death. His appeal to the Court of Appeal was dismissed in a judgment delivered on 19th July 2007. He appealed with leave to this Committee, which on 15th July 2009 announced that the Board would allow the appeal and remit the case to the Court of Appeal. The reasons for the Board taking this course are as follows.

9. At the trial the Appellant gave evidence. His case throughout was that he had acted in self-defence, fearing for his life. The prosecution case was that that there had been no more than a minor altercation after people had accidently bumped into the Appellant, who for no good reason had drawn his revolver and shot two of them. However, some of the prosecution witnesses gave accounts that indicated that there had been more than a minor altercation; and that there had been a struggle or fight, during which Ryan Solomon had got hold of the Appellant.

10. Right at the end of the trial and immediately before the judge began his summing up, prosecuting counsel submitted that the issue of provocation should be left to the jury; a submission that was strongly opposed by counsel for the defence.

11. Section 4B of the Offences against the Persons Act (similar to Section 3 of the United Kingdom Homicide Act 1957) provides 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 enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything done and said according to the effect which, in their opinion, it would have on a reasonable man."

12. The judge, in his ruling on this point, considered that on the authority of *R v Acott* [1997] 1 All ER 706, there could only be an issue of provocation to be considered by the jury,

> "if the judge considers that there is some evidence of a specific act or words of provocation resulting in a loss of self-control. It does not matter from what source that evidence emerges or whether it is relied on at trial by the defendant or not. If there is such evidence, the judge must leave the issue to the jury. If there is no such evidence, but merely the speculative possibility that there has been an act of provocation, it is wrong for the judge to direct the jury to

> consider provocation. In such a case there is simply no triable issue of provocation."

13. The judge ruled that the issue of provocation should not be left to the jury. He held that on a totality of the evidence,

> "the evidence of loss of self-control, by the Defendant, is nonexistent; on the contrary, there is, on the defence case, evidence of a measured response to an attack by two knife wielding patrons at the fete. At its highest, on the prosecution case, in my judgment, such evidence as may exist as to loss of self-control is minimal or fanciful... "

14. The Court of Appeal upheld the judge. Having reviewed the evidence, the acting Chief Justice R. Hamel-Smith observed, in para 33, that there could be little doubt that what occurred that night between the Appellant and the group of young men was nothing short of provoking conduct.

> "At best, it was a deliberate attack on the appellant and when he retaliated by shoving off Ryan, they attacked him. The Appellant claimed that in the course of the struggle that ensued Ryan came at him with a knife. He drew his firearm and shot him. He then saw the deceased coming at him in a similar fashion and he too was shot."

15. The Acting Chief Justice continued, para 34:

> "There would have been no difficulty therefore in the trial judge coming to the conclusion that there was evidence of provoking conduct on the part of the group. What seems to have created the difficulty is the absence of any evidence of loss of self control. The judge considered that the response of the appellant was a measured one. He appeared to be in control at all times. The appellant himself was conscious of the fact that the group might get hold of his firearm so he was braking the blows with one hand and shielding the firearm with the other. And he was in control to the extent that while under attack he could pinpoint Ryan coming at him with a knife and, in defence of his person, deliberately shot him (albeit in his view with no intention to harm him)."

16. The Acting Chief Justice, in para 36, then categorized the Appellant's evidence as *"quite revealing in that it does not betray any loss of self control"* and having examined that evidence in some detail, expressed the following conclusion, in para 39:

> "Looked at as a whole it is not possible to find fault with the trial judge's decision not to put the issue of provocation for the jury's consideration. One is compelled to agree with him that the appellant's response to the attack was indeed a measured one and not the response of someone who has lost his self-control. The others were attacking and beating him but amidst it all he was able to single out the deceased and Ryan (the ones with the knives) and shoot them in defence of his person, at the same time exercising restraint in respect of the others who were attacking him (without knives). It had all the appearances of a decisive response by someone in total control notwithstanding the attack."

17. As Lord Steyn pointed out in *R v Acott* (*op. cit.* at p.310), there are three parts to the defence of provocation, namely provoking conduct; causatively relevant loss of self-control; and the objective criterion whether the provocation was enough to make a reasonable man do as the defendant did. In that case (where the Appellant had killed his mother) there was no evidence from any source of any form of provoking conduct. As Lord Steyn put it (at p. 312), *"it was not a reasonable possibility arising on the evidence: it was mere speculation."* In those circumstances the House of Lords held that the trial judge was right not to leave the issue of provocation to the jury.

18. Lord Steyn also made clear (at p. 310) that so far as the second part of the defence of provocation was concerned, in the absence of any evidence, emerging from whatever source, suggestive of the reasonable possibility that the defendant might have lost his self-control due to the provoking conduct of the deceased, the question of provocation again does not arise. In *R v Acott*, (*op.cit.*) there was a reasonable possibility that the Appellant had lost his self-control and attacked his mother; but only a speculative possibility that this loss of self-control was due to provoking conduct.

19. In the present case (as the Court of Appeal acknowledged) there was evidence of provoking conduct. The question therefore was whether there was on the evidence a reasonable possibility that such provoking conduct caused the Appellant to lose his self-control and fire his revolver; or whether such a possibility was merely speculative.

20. It is at this point that the Board departs from the reasoning of the trial judge and the Court of Appeal. Both took the view that there was on the evidence nothing to suggest that provoking conduct caused the Appellant to lose his self-control. However, that view was based on accepting as true at least part of the Appellant's evidence, which, if true,

showed that he had acted in a measured and considered way and that he did not lose his self-control.

21. In the judgment of the Board, in forming the view that he did the trial judge usurped the function of the jury. It was for the jury to decide whether and to what extent to accept the evidence given by the Appellant, in the light of all the other evidence put before them. On the evidence as a whole it was open to them to conclude that the prosecution had failed to establish that the Appellant had not fired his revolver in reasonable self-defence. This in the event they obviously did not do. It was also open to them to decide that while the Appellant had acted in self-defence, as he said he had done, in a measured and considered way, he had used disproportionate force. It was equally open to the jury to decide not to believe the Appellant's evidence that he had acted in a measured and considered way at all. We do not of course know by what route the jury became satisfied that the Appellant had not acted in reasonable self-defence and so returned a verdict of murder.

22. In the circumstances of the present case the Board considers that, given the evidence of provoking conduct, there was a reasonable, as opposed to a merely speculative, possibility that the Appellant was provoked by that conduct to lose his self-control. Indeed, in their Lordship's view, this was no less a possibility than that he acted, as he asserted that he had, in a measured and considered way. After all, the Appellant was a trained police officer who, if he was actually acting in a controlled fashion, could have been expected to react to the provocation in a proportionate fashion. If, therefore, the jury concluded that his response to the provocation had not indeed been proportionate, then it would have been open to them to infer that, contrary to what he himself might have believed and said in evidence, the provocation had actually caused him to lose his self-control. Preferring one approach rather than the other necessarily involved the assessment of the credibility of part of the evidence given by the Appellant. That assessment was for the jury, not for the trial judge. Similarly, it was for the jury to draw the appropriate inferences from the evidence. In other words, the Board considers that trial judge erred in failing to leave the issue of provocation to the jury; instead he wrongly took over from them the task not only of assessing the credibility and reliability of a crucial part of the Appellant's evidence, but also of drawing the appropriate inferences from the evidence as a whole. In the view of the Board, the Court of Appeal erred in the same respects when it upheld the ruling of the trial judge.

23. In the Court of Appeal the Appellant raised a number of other points by way of challenge to the verdict. The Court of Appeal rejected these grounds of appeal. They were renewed before the Board, but having reached the views expressed above, it was not necessary for the Board to consider them.