

REPUBLIC OF TRINIDAD & TOBAGO

HIGH COURT OF JUSTICE

HCA # 93/05

BETWEEN

THE STATE

-v-

DAVE BURNETT

RULING ON ADMISSIBILITY

BEFORE THE HONOURABLE MR. JUSTICE IAN STUART BROOK (Ag.)

PORT OF SPAIN 4th ASSIZE

MRS PAMELA ELDER S.C. for the DEFENDANT
MR GEORGE BUSBY for the STATE

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1. The Defendant, Dave Burnett ("Burnett") is before the Court on an indictment charging him with the murder of Kevin Cato ("Cato"), on the 24 January 2004. Cato had gone to the "Outrageous and Red Fete", at Pier 1, Chaguaramas, on the evening in question, with approximately 13 friends. It seems that one of them, Ryan Solomon ("Solomon"), whilst "jumping up" to the music, had bumped into Burnett, spilling his drink, who was none too pleased about that. Burnett was there as a plainclothes police officer, part of a contingent of uniformed and plain clothed officers who were patrolling the event. On deposition, Burnett slapped Solomon twice, whereupon Solomon slapped him back, in retaliation. According to Solomon, this caused him to fall towards Burnett who went back with the slap. According to the evidence of one of the friends, Marc Fermin, a struggle ensued and Cato went to the assistance of his friend Solomon. Solomon described how he was then shot by Burnett, heard a loud explosion and felt a compression in his chest, which was followed by a second explosion, within seconds, which was the shot that fatally wounded Cato.
2. Burnett approached another officer, Sgt Lezama, said that he had been attacked and beaten by a bunch of "knife wheeling (*sic*) patrons", and was, in fact, holding a knife in his hand, and said that he *believed* that he had shot one of them.
3. Once the jury had been empanelled in this matter, on the 14 February 2006, and in their absence, being mindful of the general principle that it is not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried, unless one of the well-known exceptions arose, and being aware that an

indictment had been preferred against Burnett for the offence of wounding Solomon with intent, I inquired of prosecution counsel whether he intended to call Solomon, as a witness, in this trial and whether he sought to rely on the evidence that he, himself, was shot. I received an answer to each question in the affirmative. Upon asking learned counsel for the defence, Mrs Pamela Elder S.C., whether objection was taken to this evidence, I was informed that she did not object, thereto, as she viewed the evidence as being part of the "*res gestae*". I then proceeded to make other enquiries of defence counsel including, *inter alia*, whether identification was in issue, whether she took objection to the "dock identifications" from two deponents who, on the face of the papers, had never been asked to attend identification parades, and whether she felt able to indicate, to the Court, what the issue in the case was.

4. I was informed that identification was not in issue, that defence counsel reserved the right to object to those particular dock identifications and that she was in a position to indicate that the issue, in the case, was one of self-defence.
5. What is important is that, following on from this relatively brief exchange, defence counsel indicated, then, to the Court, that, contrary to her earlier indication, she *did* object to the evidence of Solomon. The matter was then adjourned for various reasons, *inter alia*, so that prosecution counsel might consider whether the legal argument in respect of Solomon's evidence needed to take place, prior to his opening the case to the jury or not.
6. The matter came before me, again, on the 17 February 2006, as prosecuting counsel needed time to prepare the case and to deal with certain Notices of Fresh Evidence, foreshadowed in the depositions, when I heard oral submissions from both counsel as to the admissibility of Solomon's evidence. Mr Busby, on behalf of the prosecution, was seeking to adduce the totality of the evidence of Solomon contained within his two depositions, to be found at pages 48 and 50 of the proceedings.
7. Mrs Elder objected to that part of Solomon's deposition, to be found at Pages 50/1 of the proceedings, italicised and contained within square brackets in the following extract:

“At the time I received the second slap, he was to my extreme right. He was about arm's-length away, when I got slapped. After I got the second slap, I retaliated by slapping him back. I slapped him in his face. After slapping him with the motion I fell towards him and he also went back with the slap. *[After slapping him an object was placed towards my chest (witness demonstrates) and I heard a loud explosion and then I felt a heavy compression in my chest and was bleeding. This object was placed to the left of my chest close to the end of my chest. The accused pointed the object to my chest. I saw the object it had a short tube with a grip at*

the end. It appeared to be a gun.] It was not the only explosion I heard. I heard another explosion. I was standing right there where I first slapped him when I heard the second explosion. After first explosion the second one came within seconds of the first. The accused was in front of me when I heard 2nd explosion. The second explosion came from the same item that was placed to my chest. After the 2nd explosion, I was pulled backwards by my T-shirt by Lisa and I observed my friend Kevin Cato lying on the ground with his hands over his face."

8. Mrs Elder relied upon the well-known case of *Kuruma, Son of Kaniu v. the Queen*, [1955] A.C. 197 in support of her proposition, which was only too obvious and hardly needed supporting by authority, that the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue.
9. Mrs Elder then proceeded to indicate that all that the State needed to prove, in order to convict her client of murder was that: (i) the accused shot the deceased, (ii) unlawfully, (iii) with *mens rea*, and, therefore, she failed to see the relevance of the evidence that her client had shot Solomon. It was agreed that at that stage, the Court should enquire of Mr Busby as to how this evidence was said to be relevant to his case.
10. Mr Busby drew my attention to the case of *the King v. John Bond* [1906] 2 K.B. 389, not so much because of the facts of that case, but in so far as it encapsulates the majority of the relevant, legal principles.
11. He drew my attention to the judgment of Kennedy J., at page 397, *Ibid.*, where it is stated:

"It may be laid down as a general rule in criminal as in civil cases that the evidence must be confined to the point in issue: Roscoe's Digest of the Law of Evidence in Criminal Cases, 12th edition. (1898) pp. 78, 79. Where a prisoner is charged with an offence it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment which alone he can be expected to come prepared to answer. It is therefore a general rule that the facts proved must be strictly relevant to the particular charge and have no reference to any conduct of the prisoner unconnected with such charge...."

12. Also, at page 398, *Ibid.*:

"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offences for which he is being tried: *Makin v. Attorney General for New South Wales* [1894] A.C. 57 at page 65."

13. Kennedy J. did not quote the remainder of that well-known passage, which was referred to by his brother Darling J., at page 409, *Ibid.*, to which I refer:

"On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental or to rebut a defence which would otherwise be open to the accused."

14. Also, at page 400, *Ibid.*:

"The general rule cannot be applied where the facts which constitute distinct offences are at the same time part of the transaction which is the subject of the indictment. Evidence is necessarily admissible as to acts which are so *closely and inextricably mixed up with the history of the guilty act itself* as to form part of one chain of relevant circumstances, and so *could not be excluded in the presentment of the case before the jury without the evidence being thereby rendered unintelligible*¹."

15. Also at page 401, *Ibid.*:

"In my view, if we pass from the consideration of the necessary limitations which I have just illustrated, we shall find that the cases to which Archbold refers as apparent exceptions at common law to the general rule are almost all cases in which evidence of transactions other than that which forms the subject of the indictment has been admitted as relevant to the issue as negating the defence of accident or mistake in cases in which accident or mistake, if proved, would constitute a complete defence to the accusation."

16. Also at page 402, *Ibid.* (after the words in square brackets, which I have included for completeness):

[It is really upon the same grounds that in a large number of cases, other than cases of murder, evidence of other prior acts of the prisoner, possibly themselves constituting crimes of the same nature as the charge upon which the prisoner is on his trial, has been admitted, although these prior acts do not historically form part of the circumstances of the charge]. Here again the evidence has been admitted as negating accident or mistake in regard to the occurrence which is the subject of the indictment. In all these cases it will, I think, be found that the occurrences of which evidence was admitted were occurrences connected with conduct on the part of the accused, so repeated and so closely linked in point of time as well as character with the offence for which the prisoner was on his trial, that according to the test of justice as well as of common sense, there could be no serious challenge to its relevancy to the issue as to accident or mistake on the part of the accused in the particular case which formed the subject of the indictment."

17. Mr Busby did not refer me to the passage of Bray J. at page 414, *Ibid.*, to which I make reference:

"A careful examination of the cases where evidence of this kind has been admitted shows that they may be grouped under three heads: 1. Where the prosecution seeks to prove a system² or cause of conduct. 2. Where the prosecution seeks to rebut a suggestion on the part of the prisoner of accident or mistake. 3. Where the prosecution seeks to prove knowledge by the prisoner of some fact."

¹ Emphasis mine

² As was held to apply in *Bond*, per Kennedy, Jelf and Bray JJ's, on account of the utterance allegedly spoken, by the Doctor, accompanying the first act relied upon.

18. Of course, there, Bray J. was considering the evidence of Ms. Taylor upon whom it was said the prisoner had sought to procure an abortion, nine months prior to the case under consideration by the Court and, so, it follows, in my view, that he was not dealing with a situation where the evidence was "inextricably mixed up with the history of the guilty act itself" which must, therefore, be a separate and distinct exception to the general rule, in addition to those 3 heads.

19. Mr Busby referred me to the well-known passage in the case of *R. v. Pettman*, unreported, May 2, 1985, CA (5048/C/82), in which Purchas L.J. had said, in giving the judgment of the court, that the principle is that -

"where it is necessary to place before the jury evidence of part of a *continual background of history relevant to the offence charged in the indictment* and without the totality of which the account placed before the jury would be incomplete or *incomprehensible*³, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence."

20. Mr Busby referred me, further, to that part of *Pettman* where certain phrases used by the learned trial judge, in his ruling, are set out;

" so far as those prices (*sic*) of evidence are concerned, I desire to say very little, except that, in my judgement, they are both relevant and, so far as the charges now before the Jury are concerned, important; indeed, that is conceded by Mr Butter when he says that, strictly in law, they are admissible. I say also, not only are they relevant, important and, therefore, admissible, but, in my judgement, also it is necessary and desirable that they should be before this Jury. They are, in my judgement, or may be, highly probative to the matters which this Jury have to decide; and the fact that they are, or may be, prejudicial is *nihil ad rem*. In my judgement therefore they must be -- may be adduced."

21. Mr Busby referred me to the case of *R. v. Campbell* (unreported), which was referred to by Purchas LJ, in *Pettman*:

"In a case such as this which depends upon the relationship between the parties as part of a continuum the excision of one isolated part of the history would, in our judgement, inevitably have caused *distortions of the account*⁴ placed before the Jury and would have prevented them from being in a position to judge the actions of the appellant in and about the early days of October in their true setting. The exercise of balancing the importance of the evidence as being relevant to an issue before the Jury, namely their consideration of the conduct of the accused in the immediate context of the offence in October, is one that is essentially for the exercise of discretion by the trial Judge, who is necessarily in the best position to judge."

22. Mr Busby made reference to passages in *Blackstone 2006*, viz., A3.35, F12.3 & F12.8. He raised the question of, Burnett having fired the gun once, why fire it again and referred to: the subjective element in self defence, the need to prove that neither Solomon or Cato had a knife, the fact that the shooting of Solomon was

³ Emphasis mine

⁴ Ditto

- such an integral part of the transaction that it affected the credibility of all the witnesses and that to do justice to the case it was necessary to have the shooting/wounding of Solomon before the jury and that this could be used, by the State, to prove unlawfulness and *mens rea*.
23. During the course of his argument, it became clear that Mr. Busby relied upon the evidence of the shooting of Solomon under more than one of the heads of the common law exception. Firstly, he argued that the evidence of the shooting of Solomon was part of the transaction which is the subject of the indictment and was so closely and inextricably mixed up with the history of the guilty act itself so as to form part of one chain of relevant circumstances.
 24. The case of *Campbell*, to which he had referred me, concerns an incident, said to be part of the history between the defendant and the victim, which occurred six months prior to the date of the commission of the alleged offence. The relevant evidence in *Pettman* concerns an incident which was said to show a conspiratorial association a matter of a few days apart from another incident relied upon. In my judgement, whilst Mr Busby can pray in aid a continuous background of history, his case seems more aptly covered by the principle to be found, in *Bond*, referred to at paragraph 14, *supra*.
 25. Whilst conceding that the disputed evidence *did* form part of the same transaction, Mrs Elder argued that the shooting of Solomon was not inextricably mixed up, was inadmissible and not relevant to any fact, and that the evidence could be presented in a logical and coherent manner with no reference thereto. In fact, at one stage she alleged that I had summarised, the case, in such a manner, in dialogue with her. I referred her to the fact that her proposed editing left in the fact that there were 2 explosions, although she proposed to edit out the first explosion, at the time Solomon was shot. I note that Mrs Elder's proposed editing also left in a reference to "the same item that was placed to [Solomon's] chest". (See underlined text, at paragraph 7, *supra*). To my mind, these are examples of just how inextricably mixed up these matters are and how the proposed editing distorts Solomon's evidence.
 26. Mrs Elder argued, further, that the case at bar could be distinguished from the precedents, in so far as the same victim was not involved, and referred, *en passant*, to *King v. R.* (1970) 16 WIR 418. I beg to differ with Senior Counsel's view that such evidence is to be restricted to incidents in relation to the same virtual complainant; one need only refer to *Bond*, *supra*, where the evidence related to what Dr Bond had done to 2 (and more) young women.
 27. Mrs Elder referred me to paragraph F12.30, *Blackstone 2006*, where it is pointed out that several cases caution against "the confusion of the similar fact and background evidence rules", where there is a discussion of the more recent case of *Dolan* [2003] 1 Cr.App.R. 281 and where it is said that the Court of Appeal held that the touchstones of the background evidence principle are "relevance and

- necessity".
28. Mrs Elder considered the first shooting, of Solomon, to be the commission of a crime, not the subject of the indictment, which demonstrated, or might be taken by the jury to show, that the accused had a propensity, or a disposition, to commit a crime of the type he is said to have committed upon Cato and, as such, was highly prejudicial, with no probative value.
 29. As Mr Busby argued, it would be hard to imagine two offences of violence more closely connected in time than these and, whilst Mrs Elder's submission would have had some force, if the intervening time interval had been one of days, weeks, or months, as in *Bond*, it seemed to ignore the fact that the acts were said to be seconds apart and seemed, to me, to be a *non sequitur*. After all, how could a Police Officer, *a man of presumed good character*, be said, with any degree of seriousness, to have acquired such a disposition, a second or two before he shot and killed Cato, which prejudices him on his trial for that offence.
 30. Secondly, Mr Busby sought to rely on the disputed evidence as bearing upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental. The Court pointed out, to him, that Mrs Elder had been willing to indicate that her defence was one of self defence and that accident or mistake had not been referred to. The Court reminded him of the *dictum* of Lord Sumner, in *Thomson v. R.* [1918] AC 221 at 232: "... the prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice." However, Mr Busby was being cautious and, clearly, in the past, from what he said, had had experience of changes of instructions during the course of a trial, or other defences emerging as the trial was in progress.
 31. Whilst I wish to make it abundantly clear that no aspersions are cast upon Mrs Elder, whatsoever, it seems, to me, that Mr Busby is well justified in being cautious as to whether the defence is/will finally be self defence, *simpliciter*, as indicated, or whether, during the course of the trial, it may emerge that, whilst Burnett may allege that he was under attack by a group of knife wielding patrons, as he told Lezama, and that he was, thus, acting/preparing to act in self defence when he produced his weapon, his evidence may go further and suggest that the gun went off accidentally, or by mistake, in the struggle spoken of by Fermin. After all, the statement allegedly made to Lezama was far from unequivocal: "[He] believed he had shot one of them". To my mind, Mr Busby could not be said to be "credit[ing] the accused with [a] fancy defence." It seems, to me, that accident or mistake is foreshadowed in the deposition of Lezama, as equally as self defence, when viewed, in the context of the evidence, on deposition, as a whole, and, in my judgement, Mr Busby is entitled to seek to negative those defences.
 32. Whilst Mr Busby did not seek, initially, to rely upon the disputed evidence as

negating self defence, relying upon mistake or accident, the Court raised with him, the question of whether or not it could be said to do so. It seems, to me, that the evidence of Solomon, describing his being shot, when taken with the evidence of the struggle, with Cato joining in, demonstrates that Burnett, far from responding to a group of knife wielding patrons, simply dealt with his being slapped once, by Solomon, and the ensuing struggle, involving Cato, (neither said to have anything in their hands), by the production and discharge of a lethal firearm. Accordingly, this evidence, in my judgement, *does* go to negative self defence or demonstrate the use of excessive, unreasonable force and, eventually, Mr Busby, indicated, to the Court, that, additionally, he relied upon it, in that regard.

33. In reply, Mrs Elder seemed to be taken aback by the potential use to be made of this evidence, if ruled admissible, arguing that, at the Magistrates' Court, it was never regarded as any more than mere background⁵ and that if it was now to be regarded in the manner suggested by the prosecution, and the Court, then she would be entitled to disclosure of "the forensics and the medicals" in relation to Solomon and that the trial would now be protracted with what amounted, in reality, to two trials being conducted at the same time with the result that the trier of fact would be distracted.
34. The Court took pains to indicate that it did not agree with this suggestion as, aside the Notices of Fresh Evidence that Mr Busby had indicated that he would file, foreshadowed in the depositions, to which Mrs Elder had indicated she thought there would be no objection, Mr Busby's case would be confined to the four corners of the depositions and, as experienced Senior Counsel, she had known the extent thereof all along and was, no doubt, fully prepared to meet the same. In those circumstances, the extent to which the trial would be protracted, by the inclusion of Solomon's evidence, rests, in my view, entirely in the hands of Mrs Elder.
35. I reminded Mrs Elder that the admissibility of this evidence had first been raised, not by the Defence, but by the Court, *ex-proprio motu* and *ex abundante cautela*, and that, initially, Mrs Elder had conceded admissibility. Mrs Elder was frank enough to indicate that she had not sought disclosure of the forensics or the medicals in relation to the shooting of Solomon, hitherto, but, nonetheless, she was ready to proceed, in the event that the evidence was ruled admissible. As was indicated, the Court could not help thinking that Mrs Elder was simply [taking advantage of what was, no doubt, perceived to be a favourable wind or, to use the vernacular,] "jumping on the bandwagon".
36. When sensing, no doubt, that the Court was against her submissions as to lack of relevance, Mrs Elder prayed in aid, and focussed her attention on, the well-known

⁵ The Court pointed out to Mrs Elder that state counsel, at the PI, was relatively junior, and that the State could not be prevented from relying on the evidence now in a way said to be different than in the court below.

exclusionary principle, found in *Sang*, in cases where the prejudicial effect of the evidence outweighs its probative value. In argument, Mrs Elder had referred me to the Privy Council case of *Junior Cottle and Lorraine Laidlow v. R.* (1976) 22 WIR 543. This concerned a trial of two noncapital counts joined in an indictment charging murder, in contravention of the St. Vincent Jury Ordinance. The appeal, before the Board, turned upon the effect of the evidence on the trial of the two noncapital counts, declared to be a nullity, upon the capital offence upon which the defendants were convicted. The Court of Appeal had not considered whether all or any of the evidence, on those two counts, would have been relevant and admissible evidence on the count of murder. The Board stated that "it may be that some of that evidence would have been admissible against one or other of the appellants as showing them to be together in possession of the firearm and acting in concert shortly after the shooting of [the deceased] and thus of some probative value in rebutting a possible defence of mistaken identity or absence of common purpose". The only point which Mrs Elder relied upon, from the judgment, was where Lord Diplock stated, at page 545: "but in the case of evidence likely to be so prejudicial to the accused, it is the duty of the judge to exercise a discretion in deciding whether or not its degree of relevance is so great as to make it in the interest of justice to admit it, notwithstanding its prejudicial propensity."

37. I remind myself of the fact that evidence highly probative to the matters which the Jury have to decide; and the fact that they are, or may be, prejudicial "is *nihil ad rem*", to quote the words of the trial Judge in *Pettman*.
38. If the evidence is admitted, the Jury, will hear that Burnett shot Solomon a second or two before shooting Cato, during the same transaction. To my mind, this is far less prejudicial than would be the case if the shootings were separated in significant time and place. Once all the evidence has been heard, if the Prosecution needs to rebut accident or mistake or negative self defence, by reference to the disputed evidence, then, of course, the jury will be directed, as appropriate, in my Summation. If it transpires that the Prosecution do not need to rely upon this evidence, in this manner, then I shall direct the jury that they have only heard of this evidence, as the shooting of Solomon was so inextricably mixed up with the shooting of Cato, that it forms part of the general picture and that is why they have heard about it and that Burnett is not charged with that offence, before the Court. Naturally, the precise wording of such directions would be canvassed with Counsel on both sides, before their addresses. Additionally, the jury will not need to speculate as to what happened to Solomon as they will, presumably, see that he has made a full recovery, by way of his appearance, before them, to give evidence.
39. In my judgement, this evidence is admissible under the three heads of exception to the general rule, referred to, herein, viz.:
 - i. the act of shooting Solomon ("the act") is so closely and inextricably mixed up with the history of the shooting of Cato itself

- as to form part of one chain of relevant circumstances, and so could not be excluded in the presentment of the case before the jury without the evidence being thereby rendered unintelligible;
- ii. the act bears on the question whether the crime charged in the indictment was designed, accidental, or the subject of a mistake;
 - iii. the act is capable of rebutting self defence and bears on the issue of reasonableness of force used;

and, weighing the probative value of the evidence as favouring the State, against the prejudicial effect, thereof, to the Defendant, I am firmly of the view that the prejudicial effect does not outweigh the probative value and that its degree of relevance is so great as to make it in the interest of justice to admit it, notwithstanding its prejudicial propensity. Accordingly, I so exercise my discretion and the evidence will be admitted.

Brook J. (Ag.)

20th February 2006