

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**Cr. App. No. 63 of 2004**

**BETWEEN**

**NEIL HERNANDEZ  
Also called REDMAN**

**APPELLANT**

**AND**

**THE STATE**

**RESPONDENT**

**PANEL:**

S. Sharma, C.J.  
S. John, J.A.  
A. Mendonca, J.A.

**APPEARANCES:**

Miss M. Rose for the Appellant  
Mr. B. Dolsingh for the Respondent

**DATE OF DELIVERY:** November 18, 2005

**REASONS**

Delivered by S. John, J.A.

1. The appellant was convicted of the murder of Christine Henry and her son Phillip Henry at the Port of Spain Assizes on November 29, 2004 and was sentenced to death.
2. At the conclusion of the appeal hearing on Tuesday June 21, 2005 we dismissed the appeal, affirmed the conviction and sentence and indicated that we would give our reasons at a later date. This we do now.

3. The case for the prosecution was that the appellant killed Christine Henry and her six-year-old son Phillip on May 02, 2000 at Toco. The appellant who was 32 years of age at the time of the incident lived in the remote village of Toco. Christine Henry also lived in Toco with Everton Williams also called Breddo with whom she shared a common-law relationship. Phillip and two siblings lived with Christine. Everton Williams was the overseer at Peake's estate situate at Moraldo Trace Guayamare, Toco which estate adjoined Tompire Beach.

4. On May 02, 2000 Christine together with her son Phillip went to Tompire beach to have a bath. Whilst at the beach she was attacked by the appellant who was armed with a cutlass. He dealt her several chops about her body. Phillip was also chopped several times by the appellant. Phillip died on the spot whilst Christine succumbed to her injuries on May 06, 2000.

5. The prosecution relied primarily on the evidence of Darren Lyons, Julien Des Vignes and a confessional statement given by the appellant to the police. Both Lyons and Des Vignes worked on Peake's estate. On May 02, 2000 Lyons reported for work shortly after 6:00a.m. and at about 7:30a.m. he was instructed by Everton Williams to go to Williams' home which was approximately a quarter mile from the estate. When he got there he met Julien Des Vignes who spoke to him. Both of them left immediately and ran towards the beach passing along a track. On the track leading to the beach Lyons came upon the lifeless body of Phillip Henry. He continued down to the beach where he saw his aunt Christine lying on the beach covered in blood with several chop wounds to her body. Everton Williams, Julien Des Vignes and other persons assisted in placing Christine in the tray of a pickup van to be taken to hospital. On the way to the hospital Christine was transferred to an ambulance. Lyons said that on the way to the hospital he asked her "*Aunty Christine, you know who is speaking to you?*" She responded, "*Yes, Darren*". He then asked her who had done that to her and she replied, "*Redman*". He asked her "*who Redman*" and she said, "*Redman living on the hill by Kelly*". She further told him that she knew she was going to die and to take care of her children.

6. Julien Des Vignes shared accommodation with the appellant in the village of Toco. In fact, they occupied the same room. Des Vignes said that at about 5 o'clock that morning whilst he (Des Vignes) was still lying on his bed the appellant got up and he asked the appellant where he was going at that hour of the morning. The appellant said that he was going to cut coconuts on the beach. When the appellant left he had a cutlass secured around his waist in a case. Des Vignes further said that he left for work at Peake's estate and at around 10:00a.m. he ran down to the beach and on the way he saw a little boy who appeared to be dead. He recognized him as Phillip Henry. When he arrived on the beach he saw Christine lying on the ground.

7. Des Vignes said he asked Christine who had done that to her and she said "**Redman.**" He then asked her, "**Who Redman?**" and she said, "**Redman who used to work by Breddo. Redman who used to live in the house by Kelly.**" He said that she also told him that she was going to die and to take care of her children.

8. The appellant was arrested at his home on May 02, 2000. When he was told of the report against him he told the police officer that he only uses his cutlass with a cause. He gave a written statement to the police on May 04, 2000. The statement was recorded by Corporal Wight and witnessed by a Justice of the Peace and Acting Inspector Edwards. In the statement he said *inter alia* that he was on top of the hill husking coconuts when he saw Christine and her three children on Tompire beach. He called out to them and went towards them with his cutlass in his hand. He said that Christine asked him if he was working and he said "**No**", that he was only making a hustle. She told him how he could hustle when he was not working and she threatened to report him to her husband Everton Williams who was the caretaker of the estate. A quarrel ensued between them and Christine walked off saying she was going to tell Breddo. He then swung his blade at her not intending to chop her but in the process she was chopped.

9. He further said in the statement that his intention was to "planass her" (to strike her with the flat side of the cutlass). He said that on hearing her tell Phillip to call Breddo he swung the blade with the intention of planassing Phillip but he got chopped.

10. The appellant gave evidence on his own behalf and called witnesses. He raised the issue of alibi stating that on the day in question he had left home very early to go and husk coconuts along the beach. He returned home about 11:30a.m., took a bath then he had a rest. About 3:00p.m. he was awakened by police officers and taken into custody. He alleged that he was tricked into signing the statement.

### The Appeal

11. The following grounds of appeal were filed on the appellant's behalf. With the leave of the court grounds 1 and 2 were argued together as they both related to the issue of the intention of the appellant.

#### Ground 1

*“The learned trial judge failed to direct the jury on the issue of accident which was expressly raised on the alleged written statement of the appellant thereby depriving the appellant of the opportunity to be acquitted on that basis.”*

#### Ground 2

*“The learned trial judge failed to properly and/or adequately direct the jury on the mens rea for murder as it related to the facts of the instant case.”*

Counsel for the appellant submitted that the issue of accident arose on the appellant's confessional statement and accordingly the judge ought to have left the issue for the jury's consideration. In support of the submission she relied on the following passage in the written confessional statement where he said, ***“And then I swing meh blade at her, not with the intention of chopping her but in the process she got chop. My intention was to planass her but not to chop her. She then sent the little boy to call Breddo. By this time I and she was having a struggle on the ground. I then swing with the blade to planass the little boy and he got chopped and fell on the ground.”***

She further submitted that that passage was the only evidence from which the intention of the appellant could be inferred.

12. It is beyond dispute that both Christine and Phillip sustained multiple chop wounds. Phillip sustained the following injuries:

- (a) 9.0cm laceration over the back of the left side of the head.
- (b) 13cm laceration across the back of the head. That chop wound was associated with a 12cm fracture that penetrated the full thickness of the skull.
- (c) 9.0cm laceration across the back of the head.
- (d) 5.0cm laceration horizontally across the back of the right side of the upper neck.

Christine injuries were as follows:

- (a) 9.5cm laceration of the front of the right side of the head.
- (b) 14cm laceration at the left side of the head curving over the top and extending forward and backward.
- (c) 14cm laceration across the back of the lower skull.

13. Those injuries were in our view quite inconsistent with a person planassing or intending to planass another. It was certainly open to the jury to find that whoever inflicted those injuries evinced a clear intention to kill or at least cause serious bodily injury. Any direction on the issue of accident would have had to be accompanied by an analysis of the evidence in support of the issue. Having regard to the injuries sustained, any such direction would have been, in our view, quite unnecessary and a clear misdirection and would have served only to cause conflict in the minds of the jury.

14. In his statement to the police the appellant said that he and Christine were involved in a struggle, he got away from her and she was coming towards him and he hit her a lash with the cutlass to her face and she fell to the ground. If the jury accepted that statement as true it was certainly evidence from which they could find that he had the intention to at least cause her grievous bodily harm. We, therefore, found no merit in those grounds and they were accordingly rejected.

### Ground 3

15. *“The learned trial judge erred in law when he failed to leave the issue of manslaughter to the jury.”*

It is well settled in England that if there is no evidence on which a verdict of manslaughter can properly be found, it is the duty of the judge not to leave the question of manslaughter to the jury<sup>1</sup>. On the other hand if there is such evidence then it is the duty of the judge to leave the question to the jury, notwithstanding that it has not been raised by the defence, and is inconsistent with the defence which is raised<sup>2</sup>. In *Bullard v The Queen*<sup>3</sup> Lord Tucker said: *“It has long been settled law that if on the evidence, whether of the prosecution or of the defence, there is any evidence of provocation fit to be left to a jury, and whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused has said in terms that he was provoked, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked.”*

See *R v Cambridge*<sup>4</sup>.

16. In *Fazal Mohammed v The State*<sup>5</sup> the appellant was convicted of the murder of his common-law wife by cutting her throat with a razor. In addition, there were other cuts to the head, face, chest and the hand, which the doctor regarded as defensive. According to the doctor, the principal wound could not have been caused accidentally. The Court of Appeal upheld a submission that the judge should have left the issue of manslaughter to the jury upon the basis that that issue was raised by the form of the appellant’s statement. Nevertheless, the court upheld the conviction for murder by the application of the proviso to section 44(1) of the Supreme Court of Judicature Act. On appeal to the Privy Council the question raised was whether the trial judge should have left manslaughter to the jury. Their Lordships disagreed with the Court of Appeal that

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<sup>1</sup> *R v Thorpe* (1925) 18 C.A.R. 189, at p. 61 (no evidence in provocation)

<sup>2</sup> *Ibid*

<sup>3</sup> [1957]A.C. 635 at page 642

<sup>4</sup> [1994] 1 WLR 971 at p. 976

<sup>5</sup> [1990] 37 WIR 438

the judge was under a duty to leave such a verdict to the jury. The Board opined: *“the medical evidence established beyond any possible doubt that the terrible injury to the throat could not have been accidentally inflicted; the woman’s throat had been cut down to the level of her back bone. Whoever inflicted that injury must have intended to kill or at least cause serious injury. The defence did not raise the issue of manslaughter; the defence was “I was not there, I had nothing to do with the attack.” The issue the jury had to decide was whether or not the defendant was the man who attacked the deceased. If the jury found that he was the attacker a verdict of murder was inevitable. For the judge to have suggested to the jury that they should consider the possibility that such a wound could have been unlawfully inflicted without intention to cause serious harm would have been to introduce a wholly unrealistic and totally unnecessary conclusion into the clear-cut decision that the jury had to make, which was, whether the prosecution had proved that the defendant was the attacker. The judge was right to leave murder to the jury without the alternative of manslaughter.”*

17. In *R v Acott*<sup>6</sup> the defendant was convicted of the murder of his mother with whom he lived. On the evening of her death the defendant telephoned for an ambulance, saying that his mother had been injured in a fall. She was found dead on the floor of the hallway of her bungalow, having suffered multiple injuries, particularly in the region of the head, face and neck. The preponderance of the medical evidence given at the trial was that the deceased had been a victim of a sustained attack. The defendant was of good character and of mild disposition. On appeal it was said that the Crown in cross-examination had repeatedly put to the defendant that he had lost his self-control and attacked his mother because of her behaviour towards him, thereby making provocation an issue which should have been left to the jury in accordance with section 3 of the Homicide Act 1957. The Court of Appeal dismissed the appeal. He appealed to the House of Lords: Lord Steyn in dismissing the appeal said at page 313:

*“It follows that there can only be an issue of provocation to be considered by the jury if the judge considers that there is some evidence*

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<sup>6</sup> [1997] 1W.L.R. 306

*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 had 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. I would hold that in such circumstances our law of provocation knows no principle that “the jury must not be deprived of their opportunity to return a perverse verdict:”*

18. The question, therefore, was whether there was any evidence of provocation to be left to the jury or whether there was any evidence to negative an intention to kill or cause grievous bodily harm. In our view the evidence in this case did not justify an inference of provocation. It was not a reasonable possibility arising on the evidence, it was nothing more than mere speculation. The attack upon both Christine and Phillip was unprovoked and brutal. The injuries were indicative of nothing less than an intention to kill or to cause grievous bodily harm. It followed therefore, that the trial judge was correct in not leaving the issue of manslaughter to the jury. Accordingly, we found no merit in that ground.

#### Ground 4

19. *“The learned trial judge erred in law when he wrongly admitted into evidence:*

*(i) the cutlass; and*

*(ii) the photographs of the deceased persons.”*

Counsel for the appellant argued that the trial judge had a duty to exclude evidence which could not prove that which it was adduced to prove. She further submitted that there was insufficient evidence before the court to support the inference that the cutlass seized from the appellant’s home was the murder weapon.

20. The evidence was that upon the appellant's arrest the police seized a cutlass from his home and he told them that he only uses his cutlass with cause. In his confessional statement after admitting that he had chopped both Christine and Phillip he went on to say, ***"I then ran and went home and sometime later the police come and I give up myself, and I handed the cutlass in the leather case to the police....."*** If the jury accepted that statement there was ample evidence upon which they could have found that that was the murder weapon. In those circumstances, the complaint that the appellant may have been prejudiced by the admission of the cutlass into evidence is ill founded and without merit.

21. Counsel also argued that the photographs shown to the jury were so heinous and grotesque that their prejudicial effect outweighed their probative value. The deceased met their deaths at the hands of the appellant in a most barbaric fashion and while the evidence of the photographs might not have been absolutely necessary, we, however, did not see it as being prejudicial to his case. The photographs represented a true picture of the gruesome acts committed by the appellant.

#### Ground 5

*"The learned trial judge erred in law when he permitted the prosecution to lead evidence from Darren Lyons who had not given evidence at the committal proceedings and such evidence served to deprive the appellant of a fair trial."*

22. Under this ground counsel argued that in accordance with the right of an accused to a fair trial the prosecution was under a duty to lead all available evidence at the preliminary enquiry to ensure that the appellant was not taken by surprise at the trial. She referred to section 27(1) of the Indictable Offences (Preliminary Enquiry) Act Chap. 12:01 which provides for the Director of Public Prosecutions to refer a case back to the Presiding Magistrate even after the committal proceedings have come to an end in order to take further evidence. Section 27 (1) provides as follows:

***"27(1) At any time after the receipt of the depositions and other documents mentioned in section 25 and before the indictment is filed, the Director of Public Prosecutions may, if he thinks fit, refer back the***

*case to the Magistrate with directions to reopen the enquiry for the purpose of taking further evidence, and with such other directions as he may think proper. Where a case is referred back as herein provided, the enquiry shall be re-opened, and the case shall be dealt with in all respects as if the accused person had not been committed for trial.”*

23. In this case a statement was recorded from the witness Darren Lyons on May 02, 2000. In that statement he said what Christine had told him as she lay on the beach. In an affidavit sworn by Corporal Anthony Wight he deposed that the police prosecutor at the Sangre Grande Magistrate’s Court did not call Darren Lyons because the evidence of Julien Des Vignes was of a similar nature.

24. It is quite obvious that the prosecutor, not being a legally trained person, made a wrong decision when he decided not to call Darren Lyons to give evidence at the preliminary inquiry. Lyons’s evidence would have corroborated the evidence of Julien Des Vignes. It was therefore, most important to the State’s case.

25. Corporal Wight further deposed that in accordance with the provisions of section 27 (1) of the Indictable Offences (Preliminary Enquiry) Act Chap. 12:02 the matter was remitted to the magistrate to take further evidence from Everton Williams, Julien Des Vignes and Darren Lyons. Corporal Wight also said that he made several attempts to locate Darren Lyons but without success.

26. In support of her submission, counsel for the appellant relied on the case of *R v Gomes*<sup>7</sup>, a decision of the Supreme Court of Guyana where the court held that “*Where evidence is available to the prosecution at the time of the preliminary enquiry and not led, such evidence is not admissible at the trial in the Supreme Court.*”

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<sup>7</sup> [1962] 5 W.I.R.

27. It must be remembered that the whole purpose of committal proceedings is to produce a prima facie case. Nothing more is required. However, since the decision in Gomes (*supra*) there have been several cases where the courts have allowed new or additional evidence to be introduced at the trial notwithstanding the fact that such evidence was available at the committal proceedings.

28. In *R v Clarke*<sup>8</sup> the appellant was convicted on an indictment charging him with rape. At his trial the prosecution adduced additional evidence through two witnesses neither of whom had testified at the preliminary examination. One of those witnesses had been available to give evidence at the preliminary examination. Notice of intention to adduce additional evidence together with a copy of the evidence which those witnesses would give, had been served on the appellant before the trial. On appeal against conviction it was contended that the evidence given by those witnesses was inadmissible. In delivering the judgment of the court Shelly J.A. said at page 61:

*“... We hold that failure to call a witness at the preliminary examination does not preclude the prosecution from calling that witness at the trial provided notice of intention to do so is duly served. To obtain an order of committal for trial the prosecution is not obliged to offer every bit of evidence at the preliminary examination but only sufficient to raise a prima facie case against the accused.”*

29. In *R v Epping and Harlow Justices ex parte Massaro*<sup>9</sup> Lord Widgery C.J. said:  
*“For my part I think it is clear that the function of committal proceedings is to ensure that no one shall stand his trial unless a prima facie case has been made out. The prosecution have the duty of making out a prima facie case, and if they wish for reasons such as the present not to call one particular witness, even though a very important witness, at the committal proceedings, that in my judgment is a matter within their discretion, and their failure to do so cannot on any basis be said to be a breach of the rules of natural justice.”*

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<sup>8</sup> (1970) 16 W.I.R. 59

<sup>9</sup> (1973) 57 Cr. App. Rep. 49

30. In *Abdool Salim Yaseen and Thomas v The State*<sup>10</sup>, a decision of the Court of Appeal of Guyana, George J.A. in an extensive review of the authorities including the judgment of Bollers J. in Gomes' case said:

*“There could be several good or excusable reasons for the omission to lead a certain witness at the preliminary inquiry. For example, it may well be that there was sufficient other evidence led on a particular issue as not to require the testimony of yet another witness; but at the trial the evidence led at the preliminary inquiry may become unavailable due to the death or absence of the witness who testified at the inquiry; or the evidence omitted may only have become relevant during the course of the trial; or it may have been omitted through inadvertence due to the large volume of evidence that had to be presented. Further, and I think that in this regard one must be pragmatic, prosecutors in the magistrates’ court are police officers and although several of them are quite competent, others lack the required skill and experience. In some instances, a rank as low as that of corporal has been called upon to prosecute in these courts. Should an accused person be allowed to benefit from the failure of such a prosecutor to appreciate the importance of a particular witness’s evidence? I think not. If, however, there is evidence that the omission to call an important witness or to lead an important piece of evidence at the preliminary inquiry was deliberate and not otherwise excusable, then it may well be that this would amount to such unfairness, even if adequate notice is given, as to justify a judge in exercising his discretion to exclude the evidence.”* (emphasis)

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<sup>10</sup> 44 W.I.R. 219

31. In light of the foregoing, it is clear to us that the failure to call Darren Lyons at the preliminary enquiry was not deliberate and could not result in a miscarriage of justice to the appellant. Accordingly, that ground also fails.

Ground 5

*“The appellant was deprived of his right to a fair trial by the failure of the prosecutor to disclose the original statement of the prosecution witness Julien Des Vignes.*

Ground 6

*A miscarriage of justice occurred from the fact that no evidence was adduced before the jury with respect to the previous inconsistent statements made on oath by the witness Julien Des Vignes relating to the substance of the alleged dying declaration which would have served to render the declaration manifestly unreliable.”*

32. Ground 5 and 6 were considered together as they related to the evidence of the witness Julien Des Vignes.

33. It is now well accepted that the prosecution’s duty of disclosure only applies to those documents which are relevant, that is to say, likely to assist the defence or to undermine the prosecution. In *Fergusson v A.G.*<sup>11</sup>, the Court of Appeal stated that in addition to the situation where a witness’s evidence departs from his statement only material statements of persons who are not called as witnesses by the prosecution, and which are helpful to the defence, must be disclosed to the defence.

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<sup>11</sup> [1999] 57 W.I.R

34. As de la Bastide C.J. said at page 421:

***“Breach of that duty, however, does not automatically entitle an accused person to a remedy, whether by way of having a conviction quashed or under s 14 of the Constitution. In order to justify the granting of such relief the person complaining must prove that he has suffered prejudice. This he may do either by showing that, but for the non-disclosure, he would not have been committed at all or that he would have been committed for a bailable instead of a non-bailable offence, typically manslaughter instead of murder, or that the failure to disclose at that early stage impaired in some significant way his chances of an acquittal at a subsequent trial at which he was convicted.”***

35. The questions, therefore, which we had to decide were as follows:

1. Was there a material departure by the witness Julien Des Vignes from his statement when he gave his evidence in chief?
2. If there was such a departure, did it result in any prejudice to the appellant?

36. Counsel for the appellant in her skeleton arguments referred to several authorities on the issue of disclosure but failed to establish that there was in fact a material departure by the witness from his original statement. Additionally, there was nothing on the record to show that at the time Des Vignes gave evidence at the trial, counsel raised any issue about the evidence being materially different from that which he gave at the preliminary enquiry. In fact at one stage during the cross examination of Des Vignes, trial counsel for the appellant sought to elicit from him that at the Magistrate’s Court he had said that he, Des Vignes knew the appellant only by the name ‘Neil Hernandez’.

37. In his evidence in chief at the trial Des Vignes said he had known the appellant by the name ‘Redman’. At page 63 of the record the court posed the following question to trial counsel, ***“ Do you wish to impeach the witness as a contradiction?”*** Counsel

answered in the affirmative and the judge then told him that he should put the entire passage to the witness. Counsel then responded, *“In that case I will pass on, My Lord.”*

38. In all the circumstances, we are satisfied that in this case there was no miscarriage of justice and for all the reasons given we dismissed the appeal and affirmed the conviction and sentence.

S. Sharma  
Chief Justice

S. John  
Justice of Appeal

A. Mendonca  
Justice of Appeal