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Judgment Book.

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 114/83

BEFORE: The Hon. Mr. Justice Carberry. J.A.
The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Campbell, J.A.

HUBERT EVANS v. REGINA

Mr. Enoch Blake & Mr. Bert Samuels for the Appellant

Mr. M. Dukharan for the Crown

November 27, 28, 29, 1985 &
January 30, 1986

CARBERRY J.A.

On the 11th November, 1983, in the Home Circuit Court, before Miss Justice Morgan and a jury, this appellant was convicted, after a trial that lasted three days, for the murder of Vincent Harriott on the 17th of July, 1982. He applied to this Court for leave to appeal against this conviction. We treated his application as the hearing of the appeal. The appeal was dismissed and the conviction affirmed.

We now set out the reasons for our decision.

The appellant, Hubert Evans, was the proprietor of some land at a place called Stock Farm Road, in the hills of Saint Andrew (near Golden Spring). He leased a small portion of it to the deceased, Vincent Harriott, who cleared that portion and planted on it and had a small hut thereon. Much of the adjoining land was woodland. Harriott was a member of the Rastafarian cult, and lived on the land with one Burnice Douglas as his common law wife.

Harriott, it appears, either worked for or was on good terms with the proprietor of a company called the Bernard Construction and Maintenance Company Ltd. The company had a Bedford four wheel pick-up truck, and once a fortnight Harriot had been able to use this truck to take his produce to market, usually on a Friday.

The suggestion was made in cross-examination of Burnice Douglas that Harriott in his reaping did not confine himself to the produce of his own leased land. This was denied. But it suggests that Hubert Evans his landlord suspected the deceased of reaping where he had not sown.

On the fatal day, Friday the 16th July, 1982, Harriott approached the proprietor of the Bernard Construction and Maintenance Company and evidently offered to sell them posts which would have been suitable for fence posts or for use in building construction to support decking used for concrete roofs. There was no evidence of the details of the arrangement, but the company's truck, driven by its driver Elton Brown, was despatched to Harriott's holding to pick up these freshly cut posts, with Harriott on board, and two others; Colin Bernard and Adolphus Campbell.

They arrived at the deceased's holding at about 6.45 p.m. an hour when light would have begun to fail with approaching dusk.

To reach this holding they had to pass through the surrounding land of the appellant Hubert Evans, and it appears that they actually passed him walking home to his house on their way to Harriott's holding

Evans' house was in sight of Harriott's hut, and the passing of the truck along the property road doubtless alerted Evans, and (to anticipate his own unsworn statement) on reaching

his gate he looked across and saw the truck and its occupants, including Vincent Harriott, at work loading freshly cut pieces of wood into the truck.

There are three available versions of what followed; the evidence of Burnice Douglas, the common law wife of the deceased; the evidence of the truck driver Elton Brown and the unsworn statement of the appellant Hubert Evans.

Taking first those factors that are common to all three versions, Evans asserted that the wood being loaded on to the truck had been cut by Harriott from the property, i.e. that he was stealing the wood. Evans called to his wife and sent her to a neighbour to phone for the police. In the meantime he engaged the deceased and the truck people in conversation. The deceased denied that he had stolen the wood and insisted that the loading should continue. Evans tried to prevent this, and there was some sort of physical encounter in the course of which Evans stabbed the deceased in the abdomen with a knife. The truck unloaded the lumber it had taken on, and was used to take the wounded Harriott to the University Hospital where, despite emergency surgery, he died next day (17th July, 1982). The wound had pierced the deceased's liver, and he died eventually from massive blood loss. When news of his death next day reached the area, the police arrested Evans on a charge of murder.

The summary above does not set out the details of what happened, and we now turn to a consideration of the details given in the three versions put before the jury.

Burnice Douglas, the common law wife of the deceased, gave evidence to the effect that when the deceased returned home with the truck, he changed into his working clothes and commenced the loading of the wood onto the truck. She has the appellant Evans arriving almost at once with the truck, calling to his wife,

telling her to go and call the police. She then adds that the appellant's wife handed him something which he put into his pocket, and later in her evidence asserts that the "something" turned out to be the knife which was used to stab the deceased. She then describes the verbal confrontation that took place, with Evans asserting that the posts had been cut from off the property and that he did not intend that they should take them away, while the deceased for his part denied it and offered to take the appellant and show him where they had been cut from. The loading of the truck continued, and according to her the appellant came around to where the deceased was standing loading the truck, bent down as if to push a bit of wood out of the hand of the deceased and "then he plug out the knife and stab him." She added that the appellant wrung the knife in the wound, withdrew it, wiped it in the newspaper wrapping in which his wife had handed him the knife, and that the deceased staggered and fell at her feet while the appellant ran away. She for her part got up and went inside the hut and got a white towel with which she bound up the wound the deceased had received. The truckmen then threw out the lumber already loaded, and went off with the deceased to hospital. She learnt next day that he had died. She denied that the deceased had had his machete at the truck side, or that he had said anything to provoke the appellant, other than to tell him to "cool it man" while he had continued to load up the truck.

In cross-examination she proved an argumentative and voluble witness, determined to avenge her deceased husband. She was sitting at the doorway of the hut, and did not hear all that passed in the conversation between the parties: She denied that the deceased had ever pushed the appellant. She denied the defence suggestion that the deceased had had his machete at the truck side or had been using it there to trim the wooden posts being loaded onto the truck.

On the evidence of Burnice Douglas the appellant, having been armed by his wife, had entered into a confrontation with the deceased, asserting ownership of wood come by the deceased quite innocently and had determined to use a deadly weapon to assert his claim to ownership, and had stabbed with little or no provocation.

The truck driver, Elton Brown, gave a rather different account of the incident.

Brown described being despatched to the deceased Harriott's holding to pick up the wood, accompanied by Harriott, a son of the proprietor, Colin Bernard, and one Adolphus Campbell. On turning off into the property road they passed the appellant walking home. On arrival they commenced loading the wood that was in the yard, and the deceased changed into his working clothes and went down the hillside to bring up more of the wood to the truck. The appellant (whom he calls Byron) arrived in the midst of this activity, claimed that the wood had come off the property and was not to be taken away. The deceased in effect cheeked him off and told the appellant to go and look where the wood had come from. The appellant summoned his wife and sent her to call the police. It is to be noted that he does not suggest that the wife handed any weapon or parcel to the appellant. For his part, when this claim was made he prudently decided to stop loading up the wood. The deceased insisted that loading should continue, ignoring the protests of the appellant he continued to hand up the wood to those loading it on the truck. The appellant stepped over to where the deceased was standing handing up the wood and held on to a piece of it that the deceased was handing up. The deceased pushed the appellant off and the appellant staggered back. Both dropped the piece of wood and appellant reached into his waist and took out something, pushed his hand forward and the deceased then staggered back and fell on

his bottom. The deceased had nothing in his hand when he was struck or stabbed by the appellant with the knife which the witness now perceived in the appellant's hand; it was about 6 inches long and 3/4 of an inch wide. According to Brown Harriott then got up, rushed to his house and came back with a cutlass in his hand and chased after the appellant who had started to run away. Brown in his turn ran after Harriott and held him. He noticed that Harriott was bleeding from a wound to his side. Brown said he then called out to Burnice and told her something. She came with a towel and bandaged Harriott's waist, they put him in the cab of the truck, unloaded the wood and rushed him to the University Hospital.

Under cross examination Brown was firm that Harriott did not have a machete by the truck side: he first saw it when Harriott having been stabbed rushed to the house and emerged with it and chased after the appellant.

It will be seen that on this version there was a physical encounter between the deceased and the appellant before the knife was brought into play; and further that though the deceased chased after the appellant with a cutlass or machete, that weapon appeared on the scene only after the stabbing had taken place.

The Crown elected to close its case, (after calling the arresting constable), and declined to call the other two available eye-witnesses, or to put them up for cross-examination, but indicated that they were available for the defence if their counsel cared to use them. Defence counsel, Mr. Blake complained that these two witnesses should have been put up for cross examination and sought to postpone the opening of the defence until he had had a chance of interviewing them. The trial judge, anxious to complete the case, gave a short adjournment and pressed the defence to start its case,

promising to further consider an adjournment should it become necessary. In fact the application was never renewed, and there was no merit in the complaint.

After the Crown had closed its case, and there had been a short adjournment, Mr. Blake on behalf of the appellant made a no-case submission. He rested it mainly on the second limb of Lord Parker's Practice direction reported at (1962) 1 All E.R. 448, and suggested that this was a case where "the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it." He also added that he relied on the first limb, "There has been no evidence to prove an essential element in the alleged offence:" and suggested that the Crown had failed to negative self defence and or defence of property. As to the first he relied on the differences between the evidence of Burnice Douglas and the truck driver Elton Brown. The trial judge did not accept the submission and ruled that there was a case to answer. Before us this ruling has been attacked and forms one of the grounds of appeal.

There was no merit in this submission. There were certainly differences between the evidence given by these two eye witnesses, but on either or both versions there was clearly a case to answer, and it was a far cry from the situation referred to in the second limb of Lord Parker's practice note. The trial judge's ruling was clearly right. The topic of no-case submissions was recently reviewed by Lord Diplock in the Privy Council case of Haw Tua Tau v. Public Prosecutor (Singapore) reported at (1982) A.C. 136: see his remarks at page 151. Further in R. v. Clanville Henry et al S.C. Criminal Appeal p. 8-11, 1982 this Court conducted a similar review: see the judgment of Kerr J.A. delivered on 21st June, 1985 pp. 16-19.

At this stage the defence elected that the appellant would make an unsworn statement from the dock. The wisdom of this election is something that must necessarily be the prerogative of the defence, but we can not refrain from noting that in a closely contested case such a choice not only prevents the jury from seeing and hearing the accused's statement tested by the cross-examination, but deprives the accused himself of the assistance of his own counsel in putting forward the details of his case: assistance that is particularly necessary when we are dealing with an incident that took place in a comparatively short period of time and in which the sequence of events is of the greatest importance. It also may, and it happened here, leave some of the important background questions unanswered. The jury themselves were anxious to know and asked whether the wood in fact came from the appellant's property.

Be that as it may, the appellant, Hubert Evans, in his unsworn statement gave his version of the incident. Coming from work and walking along the property road, he saw a truck pass by with four men on it. He continued past the gate to his house to where the truck was parked at the yard of his tenant the deceased Vincent Harriott. He saw that they were loading wood on to the truck, Harriott was handing the wood up to those on the truck. He approached and asked Harriott where the lumber came from. Harriott replied off the property. He then asked him who had given him permission to cut them, and Harriott answered by abusing him. Appellant then called to his wife, sent her to a neighbour to call the police, taking a dollar out of his pocket and giving it to her to pay for the call.

According to the appellant the deceased had armed himself with two stones, and then went to his hut, changed and emerged with a machete. He states that Eurnice Douglas also had a machete. The deceased went down the hillside and brought up

more wood, with his machete underneath the wood. He noticed that the driver had ceased to load the truck, and asked why? The driver replied that appellant had sent for the police. Deceased used more bad language, observing "if a capitalist (meaning appellant) want stop rasta man from live, me a go see today." Deceased abused the truck men and demanded that loading continue.

Appellant stated that Harriott made to pick up more wood for the truck, but that he, (appellant), realizing that he was reaching for his machete which was on the ground by the wood, stepped forward and attempted to stand on the machete. Harriott pushed him (to free the machete), he staggered back, and seeing Harriott picking up the machete he, to use his own words "I had a little knife there and I push and push him down and ran." Harriott then ran after him with the machete and he ran to a neighbour's house to call the police again. After he had done so he saw the truck leaving the premises. Appellant says that he told the police what had happened, was taken to the station and later released. Next day, on the news of Harriott's death he was taken into custody.

The appellant in short raised issues of self defence, and defence of property, i.e. the wood.

Also raised was of course the issue of whether there was provocation which might reduce murder to manslaughter.

Grounds of appeal were filed by the appellant himself, and by both of the defence counsel. Those filed by the appellant were abandoned, as were some of those filed by counsel. Others of the grounds filed by counsel were tacitly abandoned during the course of the argument: many consisted of isolating remarks made by the judge out of their context and then arguing that they amounted to misdirections - they were not.

Ultimately, there were two grounds seriously argued: first that there should have been clearer and separate directions to the jury on the right to defend one's property, and secondly that the verdict was unreasonable.

Authority as to the extent of the right to defend one's property is extremely scant. We were referred to the 4th Edition of Halsbury's Law of England, Vol 11: Criminal Law, para. 1218 Defence of property. It reads:

> "A person is justified in using reasonable force in defence of his property, as for instance in removing a trespasser or preventing his entry or restraining another from taking or destroying his goods. No more force may be used than is necessary for this purpose."

In particular we were referred to R. v. Hussey (1924) 18 Cr. App. R. 160; 41 T.L.R. 205: It decided that a householder may use all necessary force against a trespasser who invades his house. This did not arise in this case, and a distinction is to be made between protection of one's home and protection of one's property outside of it. Hussey's case is still good law, but it should be contrasted with Taylor v. Mucklow (1973) Cr. Law Rev. 750 in which it was held that pointing an air gun at a contractor who was knocking down part of an extension he had just built for a houseowner who was disputing his charges was not a reasonable use of force or the threat of it on the part of the homeowner. Hussey's case may not have been cited, but it does show an increasing disapproval of self help remedies.

We were also referred to R. v. John Scully (1824) 1 C & P 319; 171 E.R. 1213; and to R. v. Dadson (1850) 20 L.J.M.C. 57. In the former it was held that a watchman set to watch his master's yard was not justified in shooting a thief entering the hen house, but that in the circumstances here where he heard the thief call to another person to shoot, and fearing for his life

fired into the darkness and struck an accomplice of the thief he might justify through self defence. If he had merely fired rashly it would have been manslaughter.

Dadson's case also involved a watchman, set to guard a copse from which wood was being stolen, he saw a thief emerging therefrom, called on him to stop and when the man ran away, having no other means of catching him, he fired at him and wounded him in the leg. Held that this was felonious wounding. Stealing wood as a first offence was only a misdemeanour, which did not justify shooting to prevent escape; though this was not a first offence and was therefore a felony, the accused could not rely on it as a justification as it was unknown to him. The report seems silent as to what punishment, if any, was awarded.

It appears to us that the probable reason for the lack of authority is that most cases involving defence of property in fact involve self defence, or defence of another's life, or defence of one's home, and that they therefore fall to be considered under the general rules relating to self defence.

As to the Trial Judge's directions on self defence no complaint was raised, the complaint was that there should have been separate and special directions in respect of the defence of property.

It is clear that those directions would have required the jury to consider that no more force should be used than was necessary for the purpose. This would have, to a considerable extent, overlapped with the normal directions as to self-defence. It is clear that the jury did consider this element: They are reported to have asked whether the wood was indeed the property of the appellant. In response the trial judge pointed out in her summing up that no actual evidence to this effect had

been given, but she invited the jury to assume it in favour of the appellant. At pp. 152, 153, 154 & 155 the trial judge said:

> "The general principle in self-defence is, it is like this, a man who is attacked in circumstances where he reasonably believes his life to be in danger, or that he himself is in danger of serious bodily harm, he may use such force as on reasonable grounds he believes is necessary to prevent and to resist the attack, and if he uses such force and he kills his assailant, he is not guilty of any crime, even if the killing is intentional.
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> But in deciding whether it was reasonably necessary to have used as much force as in fact he did use, regard must be had to all the circumstances, including the possibility of retreating without any danger to himself or without yielding anything that he is entitled to defend.
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> Suppose you were to conclude that he stabbed the deceased that the deceased had a machete on the ground, that he reasonably believed that the deceased was in the act of getting to the machete to use it to chop him, and that in those circumstances he stabbed him, in those circumstances it was reasonably necessary for him to stab him, then he would be justified in doing what he did and you would have to acquit him.
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> So too, if you are not sure about it, you have to acquit him. But the crown says that there was no machete, the crown says that there was no attack attempted upon him or manifested against him, but if you find there was, and if you find that he acted, he must have done so in necessary self-defence, so to find that he acted in necessary self-defence, you must be satisfied that there was an attack upon him, or a fear of an imminent attack; that as a result of that he believed on reasonable grounds that he was in imminent danger of death; that is death was soon to happen to him or serious bodily injury.
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> You must also be satisfied that the force that he used must have been used to protect himself from the death or the serious bodily injury which was intended towards him by the deceased, or from some reasonable apprehension, some reasonable fear was going to happen and that fear must have been either from the words of the deceased or conduct of the deceased, even though the deceased himself by his conduct may not in fact have intended death or serious bodily injury.

"The force that is used cannot be excessive because if excess force is used, the act would not have been done in necessary self-defence and the defence will not avail the accused. He must believe on reasonable grounds that the force that he used was necessary to prevent the attack or to resist the attack.

and when you come to consider whether it was reasonably necessary, you have to take all the circumstances into account. There is the possibility of retreating, but then you can't retreat if when you retreat you are going to expose yourself to danger, because if you find that a machete is there and forced him to run, the possibilities are that the machete would be thrown at his back. If the fear that he has that the machete is going to be thrown on him, he may expose himself to danger if he turns and runs. So Madam Foreman and members of the jury, there must be a reasonable proportion between the type of attack raised and the type of resistance together, so you have to take everything into account.

Now, the other thing that was raised was that he was defending his property, but the accused man gave a very long statement and he has not told us anything at all in that statement about the property, that the property was his, nevertheless you have to infer it from his conduct, or you may infer it from his conduct that what he was doing was preventing them from taking away wood which he said was his.

Now, it is a good defence that an assault is committed in the course of defending your property, that is property which you possess; that the act was committed while the person was-well, the property was already destroyed and was being taken away, so what he was doing was to restrain him from further injury to his property.

In such a case what the law requires is that you must do something to restrain him, and if he persists then he is entitled to use force against force and if in using force against force the opponent is wounded, he may be justified as acting in self-defence.

"Now, if you find that that is what he was doing you have to go on to consider whether or not it was reasonably necessary to use as much force as he did use, for, as I have said, if excessive force was used when you look at all the circumstances of the case, then the act would not have been done in necessary self-defence and then that defence would be of no avail to the accused. So what you will have to consider is whether or not excessive force was used. In this case he says that the machete was on the ground and he feared that the man was going to take up the machete so he jooked him. You see, if a man has your goods and the goods are of a nature that it can be replaced and he can be compensated for, or that you can get help from the police in getting it back, particularly considering that the man is known, you may probably think that to use force in such circumstances may amount to revenge, and, of course, for self-defence to be of avail to him the force must not be by way of revenge.

Now, Mr. Foreman and members of the jury, if it was reasonably necessary, or you are in doubt, you must say that he acted in self-defence and you must acquit him.

But the fact that he stabbed the deceased with the necessary intention required to establish the charge of murder and was not acting in self-defence does not mean that he has committed murder because if he stabbed him and he caused his death as a result of legal provocation, then any offence committed would be manslaughter and not murder. So let's consider the question of legal provocation. There again it is for the prosecution to prove that the accused was not provoked."

The judge then directed the jury on the issue of provocation. Though this aspect of the defence of property was eventually subsumed under the general directions as to self-defence, it was left to the jury as favourably as it could have been, and no injustice was thereby done.

The other main attack on the verdict was the omnibus ground that the jury's verdict was unreasonable; they ought to have acquitted on the issues of self-defence and or defence of property, or at worst to have found manslaughter on the grounds of provocation.

There were facts in evidence in the Crown's case that raised an issue of provocation for consideration by the jury. Praedial larceny in this country, at this time, constitutes for land owners a very real provocation, and there was here, prima facie, a genuine suspicion by the appellant that the deceased was stealing his wood. Words were exchanged which fanned that suspicion. There was evidence that the appellant was pushed when he attempted to stop the deceased from loading wood on to the truck. The appellant's blow was a single one, struck on a sudden impulse. Some juries might have brought in a manslaughter verdict, in spite of the fact that this court deplores self help remedies taken by some land-owners or farmers towards suspected thieves.

Unfortunately for the appellant it cannot be said that there was no material on which the jury could have brought in a verdict of murder, accepting the evidence of Burnice Douglas or even Elton Brown. It is true that all agree that the appellant sent his wife to call the police, and that in a relatively

remote area such as this there might be considerable delay in their arrival.

Still, the appellant had entered into this confrontation armed with a deadly weapon, whether given to him by his wife or already on his person.

These were issues of fact for the jury, and it is not possible to say:

> "That the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence."

We had therefore no other course but to dismiss the appeal and to confirm the conviction. The sentence is one fixed by law, and representations as to this must be addressed elsewhere.