

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1993/J259

BETWEEN	JONATHAN JONES	PLAINTIFF
AND	LESLIE FULLERTON	1ST DEFENDANT
AND	THE ATTORNEY GENERAL FOR JAMAICA	2ND DEFENDANT

AND

SUIT NO. C.L. 1993/S269

BETWEEN	ANDRE SIMPSON (by his mother and next friend SHERYL FACEY as near relation of the late DUDLEY SIMPSON, deceased by virtue of the Provisions of the Fatal Accident Act)	PLAINTIFF
AND	LESLIE FULLERTON	1ST DEFENDANT
AND	THE ATTORNEY GENERAL FOR JAMAICA	2ND DEFENDANT

AND

SUIT NO. C.L 1995/A110

BETWEEN	THE ADMINISTRATOR GENERAL FOR JAMAICA (Administrator for the Estate of DUDLEY SIMPSON, Deceased)	PLAINTIFF
AND	LESLIE FULLERTON	1ST DEFENDANT
AND	THE ATTORNEY GENERAL FOR JAMAICA	2ND DEFENDANT

David Henry and Maurice Manning instructed by Lowell Morgan of Nunes, Scholefield, DeLeon and Company for plaintiffs

Cordell Green, Herbert Wells and Miss Carolyn Tai instructed by the Director of State Proceedings for defendants

HEARD: October 12, 13, 14, 15, 23 and December 17, 1998

WALKER J.

These proceedings embrace three consolidated actions all of which arose out of a single incident. That incident involved, among others, Jonathan Jones, the plaintiff in Suit No. C.L. 1993/J259, Dudley Simpson whose death prompted the actions in Suits Nos. C.L. 1993/S269 and C.L. 1995/A110 and Leslie Fullerton, the first named defendant in all three actions. Fullerton was then a serving member of the Island Special Constabulary Force. At the very outset of this trial Mr. Green for the defendants took the point that the action in Suit No. C.L. 1995/A110 could not be sustained as it was statute barred by virtue of the provisions of s. 2 (1) (a) of the Public Authorities Protection Act. Mr. Henry for the plaintiffs readily conceded the validity of this submission. As a result that action

was dismissed with costs to the defendants to be agreed or taxed, such costs being limited to costs incurred up to and including the date of hearing of the summons for directions. I turn now to consider the issue of liability in relation to the other two suits.

**THE PLAINTIFFS' CASE ON
THE ISSUE OF LIABILITY**

The plaintiff, Jonathan Jones, testified that at about 7 p.m. on May 13, 1993 he was injured by gunfire whilst walking along Burke Road in Spanish Town, St. Catherine in the company of his friend, Dudley Simpson and another man. All three men were walking on the left sidewalk of the road going towards the bus terminal in the town. At some distance ahead of him on the same sidewalk he observed plain clothes policemen, one of whom was Fullerton, searching some men. Suddenly he heard a single explosion. Immediately he turned and ran back in the direction from which he had been coming and at this time heard "several more gunshots". He soon realised that he had been shot in the right leg. The injury caused him to fall to the ground and, thereafter, he lapsed into unconsciousness. Upon regaining consciousness he found himself in the Spanish Town Hospital. That was the next day. Subsequently he was transferred to the Kingston Public Hospital where he remained for a period of 2 - 3 months while receiving treatment for his injured leg. Eventually, despite the best efforts of the doctors, he suffered an above knee amputation of his right leg. As to the details of the shooting incident Mr. Jones could give no further assistance by way of evidence. In particular he said that he did not see who fired the gunshots that he heard on that fateful evening.

Joy Parkes gave evidence as part of the plaintiffs' case. She testified that as a juice vendor she was plying her trade on the sidewalk along Burke Road at the time of this incident. She was positioned just outside the Tastees business premises. Quite dramatically she declared from the witness box "I saw him (referring to the first defendant) shoot that man (pointing to the plaintiff, Jones, who was then sitting in Court). This act Miss Parkes said she observed as she made her way back to her stall from the bathroom located in the Life of Jamaica shopping centre nearby where she had gone. She was then on the same side of the road where the shooting took place. At the time Fullerton's back was turned to her. He was then standing on the same sidewalk on which she was walking. She heard several gunshots after that first gunshot but saw no one apart from Fullerton with a gun that evening. She first saw Jones at the same time that she saw him fall. At that time there was a crowd of people "coming and going" on the sidewalk. She, herself, ran from the sidewalk into an empty yard nearby immediately after hearing the first gunshot and seeing Mr. Jones fall to the ground. The area was crowded and the thick crowd scattered while the gunshots were being fired. At the time that she heard the first gunshot there was a crowd of people separating Fullerton and herself, and yet another crowd of people separating Fullerton and Mr. Jones. Just before the shooting incident occurred Fullerton was engaged in searching some men.

Another witness for the plaintiffs was Mr. Waltman Hill, a peanut vendor. He stated that on the evening in question he was selling his peanuts at the bus terminal on Burke Road. While so engaged he said "I only feel when I get a gunshot". As it turned out the witness had been shot in his right arm. Immediately after sustaining this injury he

said he heard "plenty gunshots firing" which caused him to lie flat on the ground for his own safety. From this position he saw Fullerton "firing gunshots in the crowd". There were lots of people running up and down during the shooting. He saw no one else apart from Fullerton firing a gun that evening. He actually saw the gun in Fullerton's hand as he (Hill) was positioned in front of Fullerton and only approximately 25 feet to 30 feet away from him at that time. There were crowds of people on both sides of the road and "a whole heap of people" between himself and Fullerton at the time. After the incident he said he was admitted to the Spanish Town Hospital where he spent eight days while receiving treatment for his injury. Upon being discharged from hospital he gave a written statement to the police concerning the matter. When confronted with that statement which was admitted in evidence as exhibit 10 the witness denied telling the police that he did not see anyone with a gun during the incident.

Alvin Tucker, a security guard, was also called as a witness on behalf of the plaintiffs. He testified that he was standing on the sidewalk along Burke Road in the company of the plaintiff, Jones, and the deceased, Dudley Simpson when, for about two minutes, he observed a man dressed in a raincoat and with both hands tucked in his pockets come across the road. Previously he had seen the first defendant, Fullerton, and another policeman searching men on the same side of the road on which he was standing. The man who crossed the road approached the policemen, took a gun from his pocket and

from a distance of approximately 15 feet away, pointed the gun at the policemen and fired a single shot. The man then turned and ran back in the direction from which he had come. The witness, himself, turned around and ran off for a short distance before stopping. After stopping he heard many more gunshots. He saw the gun with which the man in the raincoat was armed. It was a .38 calibre firearm. He also saw Fullerton with a firearm that evening. That was a 9mm firearm. After hearing the first shot he heard another five or six shots which were heavier in sound than the first shot. A 9mm semi-automatic weapon when fired, he said, produced a louder sound than a .38 calibre revolver. His experience in firearms had been gained through his work as a security guard with Guardsman Limited. As soon as everything "cooled down" he returned to the spot where he had previously been standing and saw the body of his erstwhile companion, Simpson, being placed in the trunk of a car by the police. Simpson appeared dead at this time. Burke Road, the witness said, was very crowded that evening. It was a busy evening and there were many vehicles on the road. People ran to and fro as the gunshots were being fired. Fullerton and the man in the raincoat were the only two persons he saw with guns that evening. The man in the raincoat crossed the road diagonally and approached Fullerton on Fullerton's right side which was the same position vis-a-vis Fullerton in which the witness and his companions, including the plaintiff, Jones, were at this time.

Aside from the evidence of this witness there was other credible evidence to establish that at the time of this incident Fullerton was, indeed, armed with a loaded 9 mm service pistol. There was also unchallenged evidence to establish that subsequent to the

incident Fullerton handed over his firearm together with a magazine containing 9 rounds of ammunition.

THE DEFENDANTS' CASE
ON THE ISSUE OF LIABILITY

Detective Corporal Paul Roberts alone gave viva voce evidence on the defendants' behalf. There was also the evidence of Cliff McCallum and Special Constable Fullerton as contained in their statements which were admitted in evidence as exhibits 1 and 2, respectively. That evidence revealed that on May 13, 1993 Roberts and Fullerton, both attached to the Spanish Town Police Station, were dispatched on foot patrol duty in the town of Spanish Town. At about 7 p.m. that evening they were walking along Burke Road on their way back to the station. They were then walking in the company of three other men, namely Cliff McCallum, Gregory Simpson and the plaintiff, Jonathan Jones. Roberts walked at a short distance ahead of the others. Roberts testified that at a certain point in time he heard a number of explosions which caused him to pull his service revolver and to turn around. On turning around he observed a man armed with a gun retreating into a crowd of people while at the same time pointing the gun and firing shots at Fullerton. At this stage Roberts, gun in hand, dived to the ground for his own safety. According to Roberts, the man fired several shots in quick succession at Fullerton who retaliated in like manner firing several shots at the man. Eventually this man disappeared into a crowd of people on the road. After the shooting ceased Roberts next saw Fullerton at the Spanish Town Hospital at which time he observed Fullerton bleeding from a wound

in the region of his mouth. He was unaware of anything that may have transpired between Fullerton and anyone else before he spun around having heard the explosions he described. Fullerton, he said, was armed with a 9 mm pistol that evening. As to the capacity of the magazine used in a 9 mm firearm of the type that Fullerton was carrying, Roberts, a member of the Jamaica Constabulary Force of 24 years standing, said that such a magazine held 13 rounds of ammunition. There was also in existence an extended magazine which could accommodate even more than 13 rounds of ammunition.

For his part Fullerton described the events thus:

"Roberts called me and told me we should now go back to the station. We both walked off. Roberts was ahead of me. One of the men whom I had searched earlier on rushed me and grabbed on to my pouch which had in two pistol magazines which both contained twenty live rounds between them both. I held on to his hand and magazines.

Just then I felt someone pulled my shirt pulling me backwards. Simultaneously with this pull I heard some-one said look out. In the same breath I glanced to my right and I saw a man with a gun just a few inches away from my face followed by several explosions. I was shot and injured. I got shot in my face. I pulled my service pistol which was in my waist and I fired some shots at the man who shot me."

McCallum's recollection of the incident was somewhat different. It was stated in this way :

"Whilst walking along Bourke Road, Det. Cpl. Roberts was walking in front of Spl. Cons. Fullerton, Gregory Simpson, Jonathan Jones and myself.

Spl. Cons. Fullerton then stop a young man and started him whilst Simpson, Jones and myself stood back watching him.

Whilst Spl. Cons. Fullerton was searching this young man I saw a man came up with a snub nose .38 revolver in his right hand and pointed it at me.

When he pointed it on me I said police and he removed off me than pointed it on Spl. Cons. Fullerton, I shouted Fullerton by saying look out and I ran behind a bus which was nearby.

Shortly after I heard several explosions which sounds like that of gun shots.

After hearing these explosions I ran to the shopping Center because I did not want to get shot.

After the shooting was over I came back on the spot and I saw Gregory Simpson lying floure on the sidewalk on his face, Spl. Cons. Fullerton at the Gas Station but I did not Detective Corporal Roberts or Jonathan Jones.

I went to Spl. Cons. Fullerton and ask him if he got shot and he said yes at the right side of his mouth."

Now the plaintiffs' claims in these proceedings sound in assault and battery and negligence. In their defence the defendants rely on a plea of self-defence. If it succeeds, the defendants' plea provides a complete answer to the plaintiffs' claims. Accordingly, I must now consider the law of self-defence and, having done so, apply that law to such facts as I find to be proved on a balance of the probabilities.

THE LAW OF SELF-DEFENCE

A clear statement of the law of self-defence is to be found in *Palmer v Reginam* (1971) 1 All E.R. 1077. Here, in delivering the opinion of their Lordships' Board, Lord Morris had this to say (at p. 1088):

"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend on the particular facts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction. If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken."

In the instant case it was argued that the use of force by the first defendant, Fullerton, went far beyond what was necessary in the circumstances to defend himself from attack and was unreasonable. The test of reasonable force was recently considered in *Director of Public Prosecutions v Brown*, The Times Law Report, October 26, 1998. In that case the Queen's Bench Divisional Court (Lord Justice Brooke and Mr. Justice Sedley) held that the question whether the force used by a defendant accused of battery who claimed he was acting in self-defence was reasonable, should be assessed in an objective sense as to whether it was reasonably necessary in the circumstances as the defendant subjectively believed them to be.

FINDINGS OF FACT

It is an incontrovertible fact that while on duty Special Constable Fullerton was shot in his face by an unknown assailant. All the evidence which I accept proves that, having been shot, in retaliation Fullerton drew his service revolver from which he discharged several rounds of ammunition. It is, I think, of some significance that Fullerton resorted to the use of his firearm only after receiving the injury to his face, and not before. I find as a fact that Fullerton saw his assailant, as did the witness, Roberts, and that, in shooting, Fullerton was pointing his gun at his attacker. Relative to this aspect of the matter the evidence of the witnesses Joy Parkes, Waltman Hill and Alvin Tucker must be given the closest scrutiny. Miss Parkes was, to say the least, a pathetic witness. I reject entirely her evidence to the effect that she saw Fullerton shoot the plaintiff, Jones. Having entered the witness box, in short time she hastened to give that evidence. In so doing she gave the distinct impression that that was her sole purpose in coming to court. Later on it became clear on her own evidence that she first saw Jones after he had been shot and was falling, or had fallen, to the ground.

This is not surprising since Miss Parkes admitted in cross-examination that at the time of the shooting there was a crowd of people positioned between Fullerton and herself, and yet another crowd of people separating Fullerton from the plaintiff, Jones. I reject Miss Parkes as a witness of truth. Mr. Hill swore that he saw Special Constable Fullerton firing gunshots in the crowd, that he actually saw Fullerton's gun and that he saw the gun pointed towards him (Hill) and the crowd, all of this in conditions where, as he admitted, there was "a whole heap of people" between Fullerton and himself. Worse

yet, in a glaring contradiction as I find it to be, this witness denied that part of his written statement to the police given one week after the event wherein he stated "I did not see anyone with a gun". When invited to explain this contradiction the witness said that he felt nervous at the time he was in the room giving the statement to the police and feared that the police would "take me away go kill me". I regard this explanation as wholly unacceptable. Indeed, his own evidence of "a whole heap of people" separating him from Fullerton at the material time suggests that Mr. Hill would not have been able to see as much as he claimed to have seen. I also reject Mr. Hill as a truthful witness. The evidence of Mr. Tucker of seeing the man in the raincoat strained the credulity of the court. That evidence came across as the expression of a figment of the witness's imagination. It was fanciful evidence and smacked of the script of an old fashioned Hollywood movie, western style. How could the witness have made such an observation in the context of a crowded street at 7 o'clock in the evening one might ask. What is more Mr. Tucker swore that he had sight of the gun that the man in the raincoat was carrying, enough to be able to identify the firearm as of .38 calibre. I found this evidence to be incredible. This witness went on to say that Fuller, himself, was armed with a 9 mm firearm that evening, and to compare the relative sounds of the two different firearms when fired. I find myself reluctant to accept the professed expertise of Mr. Tucker on this particular subject matter, and I expressly decline to draw any inference therefrom that is unfavourable to the defendants. Indeed, I think it might fairly be contended that in some respects the evidence of this witness supports the evidence of the defendants' witness, Roberts, that in returning to the Spanish Town Police Station he (Roberts) was walking in front of Fullerton and the

man, McCallum. I have come to this conclusion since Tucker's evidence makes it clear that he (Tucker) regarded McCallum as a policeman at the time, McCallum having on a previous day been introduced to him as such. In the result I do not find Mr. Tucker to be a credible witness as to the circumstances of the shooting.

On the other hand, I am prepared to accept the defendants' case. In particular I believe to be true the testimony that Fullerton's assailant fired several shots in quick succession at him. I find as a fact that in that moment of crisis Fullerton in turn fired several shots at his assailant. In this regard I expressly reject the evidence that Fullerton fired his gun indiscriminately and randomly into the crowd of people using Burke Road at the time. Accepting, as I do, the unchallenged evidence of Detective Corporal Roberts as to the full capacity of a regular 9 mm magazine (13 rounds of ammunition) and there being no other evidence to suggest that Fullerton was carrying an extended magazine at the material time, and also accepting the evidence that after the incident Fullerton handed over his firearm and a magazine containing 9 rounds of ammunition, I am prepared to infer that in all probability Fullerton fired no more than four shots at his assailant. The question now arises whether in doing so Fullerton was acting in lawful self-defence. It is common ground that this incident occurred on a crowded thoroughfare. Undoubtedly, having been shot in his face, Fullerton had a legal right to defend himself. Could the presence of a crowd of people diminish or extinguish that right? Unreasonable conduct may destroy an otherwise good defence of self-defence which, indeed, was the argument of counsel for the plaintiffs. I entirely agree with that argument. It seems to me, therefore, that the real question must be whether in all the circumstances of this case

circumstances of this case Fullerton's action in defence of himself was reasonably necessary. I would resolve this question by applying the principle of law enunciated in *Director of Public Prosecutions v Braun* (supra), In my opinion having been shot in the face by a man who continued to shoot at him Fullerton was entitled to believe and, as I am prepared to infer, did in fact believe that his attacker intended either to kill him or, at the very least, to cause him really serious bodily harm. I conclude that in all the circumstances of this case Special Constable Fullerton did act reasonably in retaliating in the manner he did. The defendants' plea of self-defence must, therefore, succeed and they must have a judgment in their favour. Having determined the issue of liability as I have done the plaintiffs' claims for damages now become of academic interest only. Accordingly, I find it unnecessary at this time to make any finding on this aspect of the matter.

There will, therefore, be judgment for the defendants in each of the two relevant suits with costs to be agreed or taxed.

I make one last comment before parting with this case. In spite of this judgment to which I have been compelled by the evidence, I feel very strongly that the plaintiffs, who are really innocent victims, are most deserving of ex-gratia awards from Government. I unreservedly recommend such awards which I would hope will be generous and realistic and not merely token. The finding of this court is, of course, that the plaintiff, Jones and the deceased, Dudley Simpson were both casualties of Special Constable Fullerton's action taken in lawful self-defence.