J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 133/84

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

REGINA v. ARTHUR BARRETT

F.M.G. Phipps, Q.C. and Wentworth Charles for the Applicant

Miss Gloria Smith for Crown

20th March & 31st May, 1985

ROWE, P.:

The applicant Barrett, was convicted before Panton J. (ag.) and a jury in the Home Circuit Court on October 18, 1984 of the offence of wounding Floyd Symister with intent to do him grievous bodily harm and was sentenced to a term of imprisonment of five years at hard labour. His application for leave to appeal against conviction and sentence came on for hearing on March 20 last at which time the application was treated as the hearing of the appeal and the appeal was dismissed. The conviction and sentence were confirmed and following the usual practice of the court the sentence was ordered to be commenced three months after the date of conviction, that is to say, on January 18, 1985. We agreed to put our reasons in writing, a promise we now keep.

Arthur Barrett and Floyd Symister were on September 2, 1982, members of the Jamaica Constabulary Force. Both underwent training at the Police Training School, Port Royal at the same time and were known to each other. On the night of September 2, 1982 Cons. Symister, an Immigration Officer was dressed in uniform, or at least in part of his uniform, and he was a passenger in a motor car being driven along Molynes Road. That car came in collison with another motor car in the vicinity of the Shack Club. The appellant then attached to the Canine Division of the Constabulary Force emerged from the Shack Club and there was a conversation between the two constables. A police patrol car came on the scene and a constable from that car gave Symister some instructions. Symister said he was in the act of writing down the regulation number of the constable in the palm of his hand when the appellant came up, grabbed him in his shirt with both hands and said, "A oonu policeman mek civilian go on so." Cons. Symister said that he held both hands of the appellant, then raised his knee and pushed off the appellant. The appellant staggered back, and said the prosecution witnesses, as he staggered back he pulled his service revolver and fired a shot at Symister. The shot entered the body of Symister under the right breast, passed across the body, emerged under the left breast, entered the upper arm and finally lodged at another point in the left arm. After firing the shot, the prosecution alleged that the appellant said, "A who you kick?"

The appellant pleaded self-defence. He said that he had gone into the Club to purchase cigarettes and was summoned to the accident scene by the driver of the other car which had collided with the one in which Symister was a passenger, and one Mason the driver. According to the

appellant he said:

> "Gentlemen this is a minor accident it is no sense to block the entire Molynes Road, just park by the side."

Mason began to behave boisterously claiming that he was not to blame. He advised Mason thus:

> "Boss-man, no sense to behave that way, it is a minor accident, nobody dead. Just listen to me and everything will be all right."

Mason did not heed his advice but continued his boisterous behaviour which led the appellant to advise him to report the accident at the Half-Way-Tree Police Station. It was at that time, said the appellant, that Symister intervened. He said to Mason:

> "Don't move your car, yuh nuh wrong. Police have fi come to investigate it."

Up to that time the appellant said he had recognized Symister, of whom he asked:

> "How you get involved in this thing?"

As response, Symister began to "behave boisterously, miserable, cursing." On account of Symister's behaviour, the appellant said he went up to Symister, told Symister that as he was not involved he should permit the police to carry out their duties peacefully whereupon Symister boxed him. He held on to Symister and in retaliation Symister used his knee to knead him in his groin causing severe pain and forcing him to release Symister, who then kicked the appellant on his right knee. The appellant said he was feeling such severe pain in the area of his groin that he was "doubled up" and as he moved backwards he drew his firearm to keep off Symister who was still coming at him. He fired a shot to scare Symister and he had no intention to hurt anyone.

A single ground of appeal was relied upon, viz:

> "The learned trial judge misdirected the jury on the issue of self-defence.
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> PARTICULARS
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> When directing the jury on self-defence, the learned trial judge said at page 9:
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> > 'A person who is attacked in circumstances where he reasonably believed his life to be in danger or that he is in danger of serious bodily injury may use such force as on reasonable grounds he believes is necessary to prevent or resist the attack.'
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> > It is submitted that at common law the proper test is that the defendant is to be judged in the light of the facts as he honestly believed them to be, whether reasonable or not. The onus is always on the prosecution to prove that the defendant is not speaking the truth when he says that he thought it was necessary to defend himself by repelling an attack. This is the subjective test of the intent and not an objective test as to what was a reasonable belief."

In support of this ground of appeal, Mr. Phipps submitted that, where self-defence is raised, the jury ought to be told to consider whether the prisoner honestly believed that it was necessary to act as he acted for defence of himself against an attack or apprehended attack. It does not matter, he submitted, whether it was reasonable for him so to believe even if he may have been mistaken as to the facts which called for action on his part. Honest belief was a subjective matter which related to the accused's state of mind, whereas reasonableness imported an objective test and, in his submission, it was the objective and wrong test which the learned trial judge applied.

In support of these submissions, Mr. Phipps referred to a number of recent decisions from the English Court. Albert v. Lavin [1981] 72 Cr. App. R. 178 a decision of the Divisional Court provides a convenient starting point. A BBC employee (the defendant) on his way home from work was in a bus queue at a stop, which served several buses. When his particular bus arrived, he pushed his way past other people higher in the queue in such a manner as to cause them to object. A police constable (the prosecutor) in plain clothes observed the incident and reasonably believing that a breach of the peace was about to take place obstructed the defendant's entry to the bus, whereupon the defendant pushed past the prosecutor on to the first step of the bus, then turned, and grabbed the prosecutor's lapel with his right hand. The prosecutor pulled the defendant into a nearby shop door-way, and in the meantime, the defendant highly excited, tried to hit the prosecutor. When the defendant had calmed down, but while both men were still holding on to each other, the prosecutor told the defendant that he was a police constable. Asked to produce his warrant card, the policeman having no free hand to do this, did not comply, and the defendant not believing the prosecutor to be a police constable, hit him 5 or 6 times. The defendant was subdued, and on his prosecution for assaulting a constable in the execution of his duty, the Justices stated a case for the opinion of the Divisional Court. They asked whether:

> "(a) A constable who reasonably believes that a breach of the peace is about totake place is entitled to detain any person without arrest to prevent that breach of the peace in circumstances which appear to him to be proper; and
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> (b) a person being detained in the circumstances set out above but who does not accept that the person detaining him is a constable, may be

> "convicted of assault on a constable in the execution of his duty if he uses no more force than is reasonably necessary to protect himself from what he mistakenly and without reasonable grounds believes to be an unjustified assault and false imprisonment?"

Hodgson J. rephrased the second question thus:

> "Whether in the circumstances set out, a person's belief is of itself sufficient to render him not guilty or whether that belief must be a reasonable belief or, which is the same thing, a belief based on reasonable grounds."

After reviewing a large number of cases, Hodgson J. at page 190 said:

> "It seems to me that the law is that one has to distinguish between the mens rea required for the basic elements of the offence and that required for a defence. In the absence of express words in any offence created by statute (e.g. Criminal Damage Act 1971, s. 5) where the issue is whether a defence is made out then mistake avails a defendant nothing if it is an unreasonable (and therefore negligent) one."

The court held that a person in the position of the defendant could be convicted of assault on a constable in the execution of his duty if he uses no more force than is reasonably necessary to protect himself from what he mistakenly and without reasonable grounds believes to be an unjustified assault and false imprisonment.

This case decided that a belief based upon a mistake of fact, must be reasonable, so as to support action taken upon such belief. An appeal to the House of Lords was dismissed, but their Lordships declined to deal with the question of belief.

In R. v. Harold Phekoo [1981] 73 Cr. App. R. 107, the appellant was charged under the Protection from Eviction Act for doing acts calculated to interfere with the peace and comfort of residential occupiers of certain premises.

The question for the court was whether on a proper construction of the section of the Act and in the light of decided cases, where the issue has been raised, the prosecution has to prove that the appellant did not honestly believe that

the person harassed was not a residential occupier. The question whether such belief should be on reasonable grounds was not necessary for the decision but the court decided to give guidance thereon. At p. 116 Hollings J. said:

> "As has been said earlier it is not strictly necessary for the purposes of this appeal to decide whether, in his summing-up, the learned judge should have ruled that honest belief, whether reasonably held or justified on the facts or not, had to be disproved by the prosecution or whether he should have ruled that such belief should have been held reasonably and on reasonable ground. Although reference was made in the course of the appeal to this aspect, no argument was in fact addressed to us upon this point. We consider, however, that having reached the decision which we have, we ought to give guidance on this aspect.
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> "Tolson [1889] 23 Q.B.D. 165; until the decision of the House of Lords in Director of Public Prosecutions v. Morgan [1975] 61 Cr. App. R. 136; [1976] A.C. 182, has generally been accepted by the court as governing this aspect of mens rea. In Tolson, Cave J. in concurring with the majority of the judges that a belief on reasonable grounds that the first spouse is dead is a good defence to bigamy said, [1889] 23 Q.B.D. 168,181:
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> > 'At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act has always been held to be a good defence. This doctrine is embodied in the somewhat uncouth maxim 'actus non facit reum, nisi mens sit rea.' Honest and reasonable mistake stands in fact on the same footing as absence of the reasoning faculty, as infancy, or perversion of that faculty, as in lunacy. Instances of the existence of this common law doctrine will readily occur to the mind. So far as I am aware it has never been suggested that these exceptions do not equally apply in the case of statutory offences unless they are excluded expressly or by necessary implication.'
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> Strong support was given for this view by Lord Diplock in his speech in Sweet v. Parsley [1969] 53 Cr.App.R. 221, 244-251; [1970] A.C. 132, 162-165. See also Bank of New South Wales v. Piper [1897] A.C. 383 and Gould [1968] 52 Cr. App. R. 152 [1968] 2 Q.B. 65.
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> "Director of Public Prosecutions v. Morgan [1975] 61 Cr. App. R. 136 [1976] A.C. 182 concerned the offence of rape and whether the belief that the complainant was consenting should be upon reasonable grounds or whether the test was subjective. The majority decided that in the case of rape the prosecution must disprove an actual belief, however unreasonable it

> "appeared, but it seems to us clear that this decision was confined and intended to be confined to the offence of rape, e.g., Lord Cross at pp. 139-141 and pp. 199-201, Lord Hailsham at pp. 150-151 and 214-215, Lord Fraser at pp. 168-169 and pp. 237-238 respectively. Lord Cross (who was otherwise in agreement with the other two who with him made the majority), and Lord Simon and Lord Edmund-Davies, who dissented, all confirmed the general application of the principle of Tolson supra."

In conclusion the court held that there must be a reasonable basis for the asserted belief.

Then followed the case of R. v. Kimber [1983] 77 Cr. App. R. 225 where the applicant was convicted of an indecent assault on a woman who had been a patient in a mental hospital for many years. The jury were directed that:

> "It is no defence that the defendant thought or believed Betty was consenting. The question is: was she consenting? It does not matter what he thought or believed."

Counsel for the prosecution conceded that that was an erroneous direction but submitted that the direction to the jury should have been that the defendant had a defence if he had believed that Betty was consenting and he had had reasonable grounds for thinking so. The court held that:

> "It is the defendant's belief, not the grounds on which it is based, which goes to negative intent."

Lawton, L.J. who delivered the judgment in Kimber's case at page 230 referred to a passage from the judgment in Albert v. Lavin (supra) in which Hodgson J. had said:

> "In my judgment Mr. Walker's ingenious argument fails at an earlier stage. It does not seem to me that the element of unlawfulness can properly be regarded as part of the definitional element of the offence. In defining a criminal offence the word 'unlawful' is surely tautologous and can add nothing to its essential ingredients ... and no matter how strange it may seem that a defendant charged with assault can escape conviction if he shows that

> "he mistakenly but unreasonably thought his victim was consenting but not if he was in the same state of mind as to whether his victim had a right to detain him, that in my judgment is the law. "

And commented as follows:

> "We have found difficulty in agreeing with this reasoning, even though the learned judge seems to be accepting that belief in consent does entitle a defendant to an acquittal on a charge of assault. We cannot accept that the word 'unlawful' when used in a definition of an offence is to be regarded as 'tautologous.' In our judgment the word 'unlawful' does import an essential element into the offence. If it were not there, social life would be unbearable, because every touching would prima facie amount to a battery unless there was an evidential basis for a defence."

Lawton L.J. also referred to the dictum of Hollings J. in Phekoo (supra), where the judge in reference to the decision in Morgan's case [1975] 61 Cr. App. R. 136 had said:

> "It seems clear to us that this decision was confined and intended to be confined to rape."

Lawton L.J. strongly disapproved of this dictum which in any event he considered to be clearly obiter and refused to accept that this dictum was a legitimate limitation on the applicability of that decision, as in his view Lord Hailsham made it plain that the issue of belief was a question of great academic interest in the theory of English Criminal Law.

We come now to the most recent of the cases cited before us, that of R. v. Gladstone Williams [1984] 78 Cr. App. R.276. There a youth was seen by one Mason to rob a woman in the street. Mason caught and held the youth who broke free and ran. Mason chased and caught the youth again and knocked him to the ground at the same time twisting one of the youth's arms behind his back. The youth was struggling and calling for help. Upon the scene came the appellant who, riding by in a bus, saw Mason dragging the youth along and striking him again and

again. The appellant got off the bus, made his way to the scene and asked Mason what on earth he was doing. Mason said he was a policeman arresting the youth for mugging a woman but failed to produce his identification on demand. A struggle followed in which the appellant punched Mason occasioning to him actual bodily harm. Mason was not in fact a policeman. At trial a central issue was how to treat the question of the appellant's belief. The learned Recorder's final direction to the jury on this issue was:

> "If you think the position is, or the position may be, that the defendant Mr. Williams had such an honest and genuine belief based on reasonable grounds that Mason was acting unlawfully, then you go on, to ask yourselves: Was Mr. Williams' use of force to be excused because again in all circumstances - it was a reasonable use of force and directed to no more than preventing the commission of a crime?"

On a concession by the Crown that this direction was not in keeping with the decision of the Court of Appeal in Kimber's case and that Kimber's case was a binding precedent, the Lord Chief Justice after giving a definition of assault and enumerating some of the circumstances in which force may be used against another lawfully, went on to deal with the mental element necessary to constitute guilt in a prosecution for assault. At p. 280 he said:

> "The mental element necessary to constitute guilt is the intent to apply unlawful force to the victim. We do not believe that the mental element can be substantiated by simply showing an intent to apply force and no more.
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> "What then is the situation if the defendant is labouring under a mistake of fact as to the circumstances? What if he believes, but believes mistakenly, that the victim is consenting, or that it is necessary to defend himself, or that a crime is being committed which he intends to prevent? He must then be judged against the mistaken facts as he believes them to be. If judged against those facts or circumstances the prosecution fail to establish his guilt, then he is entitled be be acquitted.

"The next question is, does it make any difference if the mistake of the defendant was one which, viewed objectively by a reasonable onlooker, was an unreasonable mistake? In other words should the jury be directed as follows:

> 'Even if the defendant may have genuinely believed that what he was doing to the victim was either with the victim's consent or in reasonable self-defence or to prevent the commission of crime, as the case may be, nevertheless if you, the jury, come to the conclusion that the mistaken belief was unreasonable, that is to say that the defendant as a reasonable man should have realised his mistake, then you should convict him.'

"In our judgment the answer is provided by the judgment of this court in Kimber [1983] 77 Cr. App. R. 225."

The Lord Chief Justice then quoted with approval the passage from the judgment of Lawton L.J. in R. v. Kimber at p. 230 of the Report, already extracted herein, and continued:

"We respectfully agree with what Lawton L.J. said there with regard both to the way in which the defence should have been put and also with regard to his remarks as to the nature of the defence. The reasonableness or unreasonableness of the defendant's belief is material to the question of whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, is neither here nor there. It is irrelevant. Were it otherwise, the defendant would be convicted because he was negligent in failing to recognise that the victim was not consenting or that a crime was not being committed and so on. In other words the jury should be directed first of all that the prosecution have the burden or duty of proving the unlawfulness of the defendant's actions; secondly, if the defendant may have been labouring under a mistake as to the facts, he must be judged according to his mistaken view of the facts; thirdly, that is so whether the mistake was, on an objective view, a reasonable mistake or not.

"In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury came to the conclusion that the defendant believed, or may have believed, that

> "he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If however the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected."

So the Court of Appeal in England has firmly decided that where the belief of an accused person is asserted, it need not be on reasonable grounds in order to provide him with the protection of the criminal law. Whether the accused held the particular belief is still a matter to be determined by a jury and as the Lord Chief Justice said, the unreasonableness of the circumstances might lead them to conclude that the asserted belief was not honestly held. It seems to us that the adjective "honest" is being used to qualify "belief" and soon the argument will be not whether the belief was held by the accused but whether it was "honestly" held. Then through whose eyes are the circumstances to be examined to determine their unreasonableness? Is it the reasonable-man test that should be employed or the test used by the accused? It cannot be the test of how the circumstances appeared to the accused because in each such case he would be his own judge and jury. The reasonableness or not of the circumstances must be determined objectively and so it seems that a test which is thrown out the front door creeps in back through the back door.

What is the situation in Jamaica? This court has repeatedly held that the belief in apprehended danger must be held on reasonable grounds. In 1960, Marnan J. delivering the judgment of the Federal Supreme Court in DeFreitas v. R. [1959-60] 2 W.I.R. 523 expressly approved the dictum of Menzies J. in R. v. Howe [1959] 31 A.L.J. 212 at p. 219. Marnan J. said:

> "Menzies J., gives a concise and lucid account of the law relating to self-defence which might usefully serve as a direction to a jury where that defence is raised.
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> > 'A man who is attacked may use, such force as on reasonable grounds he believes is necessary to prevent and resist attack, and if in using such force he kills his assailant, he is not guilty of any crime even if the killing is intentional. In deciding in a particular case whether it was reasonably necessary to have used as much force as in fact was used, regard must be had to all the circumstances, including the possibility of retreating without danger or yielding anything that a man is entitled to protect.'
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> This is a perfectly clear and, in our view, a correct direction." (Emphasis supplied).

DeFreitas case was not referred to by Lewis J.A. in the course of his judgment in R. v. Shaw (No.2) (1963-64) 6 W.I.R. 17 but the learned Judge of Appeal used language to indicate that in a case of self-defence the alleged belief must be based on reasonable grounds. Shaw had been convicted of murder and one of the issues in the case was whether he had an obligation to retreat in the circumstances of attack made upon him. At page 21, Lewis J.A. said:

> "In our opinion the authorities referred to above establish that for the prevention of, or defence of himself or any other person against, the commission of a felony where the felon so acts as to give him reasonable ground to believe that he intends to accomplish his purpose by open force, a person may justify the infliction of death or bodily harm, provided that he inflicts no greater injury that he in good faith might in the circumstances reasonably believe to be necessary for his protection; and that in such cases he is under no duty to retreat but may stand his ground and repel force by force." (Emphasis supplied).

Moody, J.A. quoted the above passage in R. v. Osbourne Ellis Supreme Court Criminal Appeal 203/1967, adding that this direction had on a previous occasion been approved by the court as a fair statement of the law.

Certainly since the decision in DeFreitas (supra), Judges in Jamaica have summed up to juries indicating that in self-defence the belief must be held on reasonable grounds. Robotham J. followed this practice in Palmer v. R. [1971] 55 Cr. App. R. 229 where he summed up thus:

> "A man who is attacked in circumstances where he reasonably believes his life to be in danger or that he is in danger of serious bodily harm, may use such force as on reasonable grounds he believes is necessary to prevent and resist attack. And if in using such force he kills his assailant, he is not guilty of any crime even if the killing was intentional. And in deciding on a particular case whether it was reasonably necessary to have used such force as in fact was used regard must be had to all the circumstances of the case including the possibility of retreating without danger or yielding anything that he is entitled to protect. Now self-defence, members of the jury, consists of the following: that is what you have to consider: One, that there was an attack upon the accused and that as a result the accused must have believed on reasonable grounds that he was in imminent danger of death or serious bodily harm. The force used by the accused must have been used to protect himself either from death or serious bodily injury intended toward him by his attacker or from the reasonable apprehension of it induced by the word and conduct of the attacker, even though the latter may not have in fact intended death or serious bodily injury. So it is not a question of what the attacker intended, but did he have a reasonable apprehension that he was in danger of death or serious bodily harm - imminent danger, impending?" (Emphasis supplied).

This passage was quoted by Lord Morris of Borth-y-Gest when the case reached the Privy Council and at page 231 Lord Morris said:

> "Their Lordships conclude that there is no room for criticism of the summing-up or of the conduct of the trial unless there is a rule that in every case where the issue of self-defence is left to the jury they must be directed that, if they consider that excessive force was used in defence, then they should return a verdict of manslaughter."

The authorities cited above which relate to decision in the Jamaican courts are binding on us. We regard them as easy of application and as Lord Morris said in R. v. Palmer (supra), at p. 241:

> "The defence of self-defence is one which can be and will be readily understood by any jury. It is a straight forward conception. It involves no abstruse legal thought."

To convert the well-accepted notion that in self-defence the belief must be based on reasonable grounds to one that if the accused asserts a belief the prosecution should adduce evidence or arguments to show that he could not have entertained that belief, would in our view render the concept of self-defence less understandable by a jury. We consequently elected to follow the decisions of our own courts rather than the approach of the Court of Appeal in England in R. v. Gladstone Williams (supra).

As the summing-up was in all other respects full and accurate, we treated the hearing of the application for leave as the hearing of the appeal and dismissed the appeal against conviction. We did not think that a sentence of five years imprisonment at hard labour was in any sense manifestly excessive and the appeal against sentence was also dismissed.