JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 135/84

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

R. v. ARTHUR CARNEY

F.M.G. Phipps, Q.C. and Delroy Chuck for Applicant

Miss Gloria Smith for Crown

March 20; & May 31, 1985

ROWE, P.: DISSENTING.

Arthur Carney, then an Acting Corporal of Police shot and killed Glenroy Biggs on January 21, 1982. At his trial for murder in the Home Circuit Court he was convicted of manslaughter on the ground that he acted under legal provocation and was sentenced to a term of fifteen years imprisonment at hard labour. Against his conviction and sentence he applied for leave to appeal which application when heard on March 20, 1985 was treated as the hearing of the appeal and by a majority, the appeal was dismissed and the conviction affirmed. The sentence was reduced to one of three years imprisonment suspended for three years. We promised then to put our reasons in writing.

Glenroy Biggs (the deceased) had for sometime been acting as someone who was mentally deranged. On the night of January 21, 1982, it was reported to one Glenville Gordon that the deceased had been tampering with his motor car which

on examination was found to have dents on the bonnet and foot-prints on the top of the car. Mr. Gordon drove to the Bull Savanah Police Station, reported the matter to the appellant, who accompanied him in the car to the village of Junction where the deceased could be located. After some search the deceased was seen walking along the roadway with a machete in his hand. Mr. Gordon stopped the car, the deceased approached, spoke to him, then he went to the side of the car where the appellant was sitting. Mr. Gordon heard a metallic sound as if some metal had hit against the car. Just then the appellant opened the door of the car to get out and simultaneously Mr. Gordon drove off. The result was that the appellant was dumped on his back in the roadway. Mr. Gordon saw the deceased standing over the appellant with the machete raised as if he were attacking the appellant. Mr. Gordon was the only witness for the prosecution who testified as to the initial attack upon the appellant and I reproduce a portion of his evidence in examination-in-chief:

> "Q: Did you see Spuck do anything with the machete apart from raising it?
>
> A: Well he actually attacked.
>
> Q: What you mean? Would you demonstrate as to what you saw, Mr.?
>
> A: I had to assume he attacked him, because Cpl. Carney was on the ground.
>
> Q: Not assume. What you saw.
>
> A: He drew the machete up and was coming towards Cpl. Carney.
>
> Q: And what Cpl. Carney did, if anything?
>
> A: He was very skilful in escaping the machete. I am not sure what he did but he managed to escape that initial attack.
>
> Q: And then what happened?
>
> A: I got very frightened and drove off."

Three other witnesses who testified for the prosecution said they heard sounds of gunshots coming from the direction of Bull Savannah - Junction main road and each eventually went out to the roadway. Mr. Nembhard, one of the prosecution witnesses observed a chase in which the appellant was running behind the deceased. Mr. Thompson saw the two men run in front of his house and he observed that the deceased had a machete in his hand, swinging it as he ran. None of them heard any further sounds of gunshot before they left their houses to see what was happening. The deceased was found injured in some bushes beside a wire fence, while the appellant was seated in the roadway. Evidence was led by the prosecution that the appellant was asked as to what had happened and the explanation he gave to Mr. Thompson is set out below:

"Q: You asked what happened. Now, did the accused respond, the accused say anything?

A: Yes.

Q: What he said to you?

A: He told me that the guy attack him with the cutlass and he tried to stop him and he wouldn't stop.

Q: He attacked him with the cutlass?

A: With the cutlass.

Q: And he tried to .....?

A: Stop Spock and he wouldn't stop.

Q: He tried to stop Spock and he wouldn't stop?

A: Yes.

Q: Did he tell you how he tried to stop Spock?

A: He said when he fall back Spock attack him with a cutlass over him and he tried to ....

HIS LORDSHIP: One second

A. In trying to .....

CROWN ATTORNEY:

In trying to - tek your time.

HIS LORDSHIP: He tried to what?

A: To shy him .....

HIS LORDSHIP: Yes?

A: ..... by shooting after him but he still insist on him still.

CROWN ATTORNEY:

Q: So, he shot him?

A: Spock still insist to come on him still.

Q: Spock, the deceased, still insist, this is the story he is giving you, that he insist in attacking him?

A: Yes.

HIS LORDSHIP: To come on him still.

CROWN ATTORNEY:

Q: To come on him still, and he did what?

A: Fire a shot.

Q: And he fired shots?

HIS LORDSHIP: And he what?

A: He fired shots.

HIS LORDSHIP: Fired a shot?

A: Fired a shot, sir.

HIS LORDSHIP: Yes?

CROWN ATTORNEY:

Q: Now, this was how long after you had heard those shots that you were told this by the accused?

A: Not long, about two minutes.

Q: About two minutes after?

A: Yes.

Q: Now, did you notice anything the matter with the accused?

A: You mean, Mr. Carney?

Q: Yes.

A: Yes, I saw a weal like over on his hand.

Q: A weal, where did you see the weal?

A: On one of his hands, I don't really remember which hand.

"Q: You saw like a weal over one of his hands?

A: Yes. "

Mr. Lewis described the injury to the appellant as "a wound but not a deep, deep cut." He did not see blood but he saw where the appellant had got some kind of injury.

No prosecution witness saw when the fatal shots were fired, However, the medical evidence became of the first importance. Dr. Ramu who performed the post-mortem examination found on external examination of the body of the deceased two injuries: (a) A firearm entry wound on the right side of the back in the shoulder region. The wound was circular, quarter of an inch in diameter. On dissection, the projectile was seen to pass through the muscle and exit on the front side of the chest along the anterior axillary line. This bullet passed straight through the body. (b) A firearm entry wound to the right side of the back below the shoulder region. On dissection of this wound, the projectile was seen to pass through the fifth intercostal space, the lung and to exit on the front side of the chest in the fourth intercostal space four inches away from the mid-line of the body.

In the opinion of the pathologist both entry wounds were at right angles to the body, which means that the bullets must have been discharged behind the deceased and the absence of powder marks led to the conclusion that the firearm was more than 18 inches from the deceased at the time of its discharge. As there was no injury to the shoulder blades the doctor concluded that the arm must have been away from the side of the body when the bullets entered. This could occur if the right arm of the deceased was upraised when he received the first injury or while the deceased was in the act of running.

The appellant elected to make an unsworn statement from the dock. He related how he was summoned from the Police Station by the motorist, Mr. Gordon, and how eventually they came upon the deceased in the roadway. He continued:

"ACCUSED: .... At that time I pulled the door and put one foot on the ground and about to get out when Biggs drew a machete from his waist and chopped me on my right forearm. Mr. Gordon suddenly drove off the car causing me to fall on my back on the asphalt. Biggs came over me with the right hand raised in a chopping position. I used my left hand and pulled my service revolver and fired two shots at Biggs.

HIS LORDSHIP: Two shots?

ACCUSED: Yes, sir.

HIS LORDSHIP: Yes.

ACCUSED: Biggs then turned to run off when he spun around suddenly raised the hand again chopping at me again, when I fired .....

HIS LORDSHIP: One second.

ACCUSED: Straightened himself and turned to chop at me again .....

HIS LORDSHIP: And turned what?

ACCUSED: .... When I fired two more shots ....

HIS LORDSHIP: Turned what?

ACCUSED: Raised his hand to turn to chop at me again when I fired two more shots at him.

HIS LORDSHIP: Yes.

ACCUSED: When he ran off, when he ran towards Mr. Nembhard's house I then gave chase. When I stopped at the corner of Mr. Nembhard's house, Biggs continued. I didn't fire no more shots."

Finally, he said, that where he got chopped his hand was bruised and swollen.

The learned trial judge left to the jury the defences of self-defence and provocation. By their verdict the jury rejected the defence of self-defence and accepted that the appellant acted under circumstances, amounting to legal provocation.

The grounds of appeal argued before us were:

"(a) The verdict is unreasonable and cannot be supported having regard to the evidence."

Particulars of this ground were supplied and the one material for the purposes of this judgment reads:

> The statement by the applicant in his defence at trial was consistent with the plea of self-defence and could not be rebutted by any evidence adduced by the prosecution. In these circumstances and in the absence of evidence to show that the fatal injuries were received otherwise than stated by the applicant, the verdict was manifestly unreasonable."

"(b) The learned trial judge misdirected the jury on the issue of self-defence."

Particular (b) to this ground is to this effect:

> "It is further submitted that the learned trial judge wrongly directed the jury as follows:
>
> ' ..... he must have believed on reasonable ground that he was in imminent danger of death or serious bodily harm." (p.146).
>
> "This objective test is inappropriate. The proper test is a subjective one, that is to say, that this defendant honestly believed the circumstances made it necessary for him to defend himself. The onus remained on the prosecution to disprove the court's belief."

Counsel did not pursue this second ground in the light of the decision reached by the court in the case of R. v. Arthur Barrett, S.C.C.A. 133/84, which had been heard and decided immediately before the instant appeal was called upon. We adhered to our view that the direction in law as to the definition of self-defence was fair and accurate.

On ground one I dissented from the views of my brethren and obtained the permission of the court under Rule 61 of the Court of Appeal Rules to write this dissenting opinion.

It will be observed from the portion of the appellant's unsworn statement extracted above, that the appellant was interrupted by the trial judge at the very time when he was speaking about the most critical part of his defence. The sentence was left unfinished and in answer to the judge's question he used other words than those he had uttered earlier to describe what happened. So what the appellant in fact said happened immediately before he fired the fatal shot is as set out below:

> "At that time I get up off the ground, the machete fell behind Biggs, Biggs turned his back to me, picked up the machete, straightened himself and turned to chop at me again, when I fired two more shots ..... Raised his hand to turn to chop at me again when I fired two more shots at him again."

The physical position of the deceased as described above could either be that he had turned facing the appellant when the appellant fired the two shots or that the deceased had picked up the machete and was about to turn towards him when the two shots were fired. If indeed the deceased had been facing the appellant at the time when the shots were fired it would have been impossible for those shots to have entered his body from the back. If on the other hand the deceased had picked up the machete, straightened himself and had made any motion indicating an intention to turn to face the appellant, his back could still be towards the appellant and if the appellant fired the shots at that time they could have entered the body of the deceased at right angles from behind. One must not lose sight of the fact that the appellant had said that the deceased had earlier run off and had stopped, turned and chopped at him a second time, after which the machete fell from his hands. So there was on the facts a reasonable basis for the appellant to believe that the deceased could make a third attempt to chop at him with the machete.

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On eight separate occasions the learned judge reminded the jury that the appellant had said that the deceased "picked up the machete, straightened and turned" and not once did he remind the jury that the appellant had said in continuation of his narrative and in direct answer to the court, that the deceased had "raised his hand to turn" when he fired the shots.

Two extracts from the summing-up at pp. 142-143 and at p. 147 of the Record show how the learned trial judge viewed the appellant's unsworn statement and how he directed the jury to approach it. He said at 142-143:

> "What he is saying is this, that he was under an attack and he fired in self-defence. A matter for you. The first two shots, he says, when the deceased man came over him with his right hand raised in a chopping position, 'I used my left hand and pulled my service revolver and fired two shots at him.' Well, the picture I get is a face to face position over him. I don't think the shots could have been, the injury could have been inflicted that way. He says 'he turned to run off and when he spun around suddenly he raised his hand, came chopping at me again when I fired one more shot;' got up off the ground; the machete fell. Biggs turned his back to him. Now, this is the position apparently when the injuries were inflicted. A matter for you.
>
> ""Biggs turned his back to me.' Try to form a mental picture of his being, his back to the man; picked up the machete; straightened himself and turned; well, we don't know whether he turned to right or left; 'raised hand to chop at me when I fired.' Well, when he raised his hand and turned, what position was the deceased facing the accused man; bearing in mind what the doctor says, if you accept his evidence, that the two wounds entered from the back and they went in a straight line, not at an angle, in a straight line ..... "

Then at page 147 he continued:

> "He says the deceased attacked him while he was on the ground, he fired two shots, and as the deceased turns to run off, he spun around, raised the machete, came chopping at him again, he fired a shot. The machete fell from him, he got up off the ground, the deceased man turned his back

> "to him, took up the machete, and according to him, turns, raises his hand to chop at him and then he fired. Well, the first thing, do you accept that story? That is the first thing. That is a matter for you. Do you accept it? Do you accept that the deceased behaved in that way? He was shot at, according to him, while he was over the accused man; he runs off, he spins around. Well, I don't know if that is the view you take of it, the deceased was inviting -- he attacks him, he was shot at, he runs off, he turns around and he comes back, he attacks him again with the machete. Matter entirely for you. Do you believe that story? Even if you do, what was his position when he got the fatal injury, the injury to the back? If he was running away from the deceased -- from the accused man, sorry -- if he was moving away from the accused, then there can be no self-defence, there can be no imminent danger, no impending danger. Matter for you."

What the jury were left to consider was that on the account given by the appellant it was quite impossible for the deceased to have been shot in the back and the only other reasonable explanation of how he got injured was that he was shot from behind while running away from the appellant. To put the case in that form ignored entirely a part of what the appellant had said, viz, that the deceased raised his hand to turn to chop at him again. If that alternative formulation which arose out of the applicant's unsworn statement had been put before the jury, can one say with any certainty that the jury would have rejected that explanation? I think not.

Mr. Gordon, the one prosecution eye-witness drove away in terror when he saw the attack which was made by the deceased upon the appellant. At one time the appellant was lying on his back in the roadway while the deceased stood above him attacking him with a machete. This is evidence coming from the prosecution. If the bullets had entered the body of the deceased from the front, I do not think that the Crown could possibly argue against self-defence. There is in my view such

a substantial difference between the expressions "turned" in the context of the case and the expression, "Raised the machete to turn to chop" that the omission by the learned trial judge to place this limb of the defence before the jury amounted to a serious misdirection which led to a miscarriage of justice. In my opinion, the appeal ought to have been allowed, the conviction quashed, the sentence set aside and a verdict of acquittal entered.