JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 15/90

COR: THE HON. MR. JUSTICE CAREY - PRESIDENT (AG.)
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

R. v. BRIAN SCOTT

Ronald Parris for Applicant

Miss Cheryl Richards for Crown

10th & 18th June, 1991

CAREY P. (AG.)

On 10th June last, we heard submissions in this application for leave to appeal a conviction for manslaughter in the Circuit Court for St. James before Gordon J, and a jury and a sentence of 18 years imprisonment. At that time we refused the application in relation to conviction but varied the sentence to 15 years at hard labour. We now give our reasons.

The facts need only be stated in outline as the point submitted for our consideration related to the trial judge's directions on the issue of self-defence. On Sunday 26th March, 1989, Mr. Forbes drove his taxi-cab in which were his wife and another lady on their way to a Church function but Mr. Forbes stopped at the cross-roads at Top Road Granville in St. James. He explained to prospective passengers that he was not able to ply because of his previous engagement. Everyone was disappointed. Among these persons were the applicant and his brother who were very much upset because they were minded to get to Montego Bay. The applicant vented his spleen, first by striking Mrs. Forbes the cab-owner's

wife, a blow in her eye which obliged her to seek medical attention at hospital. She had refused his demand that she get out the car so he could enter. Then using a stone he hit Mr. Forbes who had left the car and upbraided him. When Mr. Forbes stooped to pick up a stone, the applicant dared him on pain of death to do so. Mr. Forbes was taken to hospital. Lastly, he cut one Ruthlyn Reid who came by and spoke to him. Mr. Theophilus Forbes, the victim and a brother of the taxi-cab owner came up enquiring for his brother. Mrs. Forbes said he had gone to the police station. At this stage, the applicant rushed upon Mr. Theophilus Forbes and stabbed him in his chest. He fell. Both the applicant and his brother made off.

The defence was self-defence. In an unsworn statement the applicant expressed himself laconically in these terms -

> "I am not guilty. After the car came, the family rush us. Mr. Forbes had a knife in his hand. I ask my brother for the knife. Mr. Forbes rush on me and I rush at him and he got stabbed to save my life. That's all."

It appears that the applicant was saying that the Forbes' family, one member of whom was armed, came at him. He armed himself and rushed to do battle with that armed person. In the duel, Theophilus Forbes was stabbed.

In the course of his summing-up at pages 18-19 the trial judge began by giving the jury correct directions as to self-defence. We set them out:

> "It is both good law and good sense that a man who is attacked may defend himself. It is also good law and good sense that he may do, may only do what is necessary in defence. Everything depends on the particular facts and circumstances and of these you can decide. In some cases the only sensible and clear possible course to be taken is some simple avoiding action. Some cases simple avoiding action may be taken. Some actions 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 is wholly out of proportion to the necessities of the situation. If the attack is serious so that it puts someone in immediate perils, then immediate defensive action may be necessary. If in a moment one is in crisis and imminent danger he may have to avert the danger by some instant reaction. If there has been no attack then there is no need for defence. If there has been attack so that defence is necessary, it will be recognized that a person defending himself cannot weigh to a nicety the exact measure of the necessary defensive action.
> Where the defence of self-defence arises on the evidence, this defence can only fail if the prosecution proves that what the accused did was not done in self-defence. If you think that in a moment of unexpected anguish the accused had only done what he honestly and instinctively thought was necessary, that would be the most potent evidence that only reasonable defensive action has been taken.
> If you find that the accused was acting in self-defence your verdict must be one of not guilty. If you are in doubt whether he was acting in self-defence or not, your verdict would still be one of not guilty, because the prosecution would not have satisfied you in discharging the burden of proof."

About these, no complaint is made. The trial judge however ended his directions in this regard thus at page 20:

> "Where a person says he was acting in self-defence in answer to a charge, it must be shown he did not want to fight. He must have demonstrated by his actions that he was prepared to temporize, to disengage and perhaps to make some physical withdrawal. He need not have gone as far as to take to his heels and run away. You see, a man defending himself does not want to fight, but defends himself solely to avoid fighting."

Mr. Parris challenged the correctness of these last directions which suggested that in self-defence there was a requirement for the subject of the attack to disengage or withdraw or perhaps stand his ground. We do not suppose that his quarrel

related to the suggestion of that person standing his ground. He interpreted these directions as asserting to the jury the idea that a strategic withdrawal was obligatory.

We do not think that interpretation is valid. The trial judge had already told the jury that a man who is attacked is not obliged to retreat. The sting of that final direction is in the tail, in the words:

> "...He need not have gone as far as to take to his heels and run away. You see, a man defending himself does not want to fight, but defends himself solely to avoid fighting."

No duty or obligation to retreat was being put forward as the sine qua non for the plea of self-defence to succeed. There is, of course, no duty to retreat but the question whether the accused retreated is an element which the jury may consider in deciding whether the force was reasonably necessary.

We think however that the impugned directions are not lacking in pedigree. In **R. v. Knock** 14 Cox 1 at page 2 Lindley J, said this:

> "If a man attacks me, I am entitled to defend myself and the difficulty arises in drawing the line between mere self-defence and fighting. The test is this: a man defending himself does not want to fight, and defends himself solely to avoid fighting."

This dictum still retains its vigour: it is still good law. In our view, the challenged directions were appropriate in the circumstances and context of the present case. The applicant did not challenge or refute the fact of his prefatory onslaught upon members of the Forbes' family and also upon Ruthlyn Reid. According to his statement, the family rushed down on him and he in turn rushed down upon them. One pictures immediately in the mind's eye, a clash of armed foes. Plainly, it seems to us, if the directions were to

be custom-built for these facts, then the trial judge was obliged to give these directions. In our judgment, the learned trial judge was perfectly correct and we are not persuaded that counsel's criticism is well-founded.

We desire to make it clear that there is no duty cast upon any person on whom a felonious attack is made, to retreat. But it will depend on the particular facts of the case. In some cases, the attack may not call for a pre-emptive strike: it may call for defensive action. If attack can be avoided without danger then that course is preferable. A person is entitled to take reasonable steps in his defence. See **Palmer v. R** [1971] 55 Cr. App. R. 223. **R. v. Beckford** 36 W.I.R. 300 has not in any way altered that situation: it is concerned with the mistaken belief of the person who is asserting that he honestly believed an attack was imminent.

Mr. Parris next complained that the trial judge did not adequately nor fairly assist the jury in the manner of their treatment of inconsistent statements made by the prosecution witnesses. We can dispose of the submissions in this regard quite shortly.

He conceded that the trial judge had in fact given correct directions regarding inconsistencies. He agreed that the trial judge isolated the inconsistencies in the evidence and reminded the jury as to these directions. Although counsel was invited to do so, he was quite unable to suggest to us what further assistance he thought the trial judge should have proffered. That being so, we could find no merit in the grounds relating to this aspect of the appeal.

With respect to sentence, the trial judge imposed a term of 18 years imprisonment at hard labour. The jury by their verdict had found that the applicant was provoked. We are not in

the least doubt that this was a pious verdict. Nevertheless the trial judge could not ignore the jury's findings. The circumstances suggest a person with a violent temper and quite indisciplined. His antecedent history indicates that he is considered a bully in his community. Having said all this, we are of the view that justice will be served by substituting a sentence of 15 years imprisonment at hard labour for that imposed at his trial.