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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 219/88

COR: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

R. V. CECIL PALMER

Delroy Chuck and Miss Helen Birch for Applicant

Miss Paula Llewellyn for Crown

14th January & 31st January 1991

FORTE, J.A.:

On the 14th January, 1991, we heard an application for leave to appeal in respect of count II of the indictment upon which the applicant had been charged for shooting with intent. The application was treated as the hearing of the appeal. The appeal was allowed, the conviction quashed, the sentence set aside and a verdict of acquittal entered.

An application for leave to appeal in respect of the applicant's conviction on count I for illegal possession of a firearm, was not pursued and accordingly that application was refused.

In respect of the appeal on count II, we now, as promised, give our reasons for allowing same.

The allegation was that the complainant was shot at a district called Welcome in the parish of Hanover. The complainant testified that on the morning of the 18th July, 1988 he was at the gate of a Mr. Victor Robinson and in the company of Wesley Hayles when the applicant came along walking on the roadway. He asked the applicant about an incident that occurred

between his mother and the applicant on the previous evening; the applicant's reply was "look like you wan dead'. The applicant who it is alleged had a machete in his right hand, turned back towards the complainant, placed the machete in his left hand, and with his right hand pulled a gun from his waist, dropped the machete to the ground and then using both hands fired a shot at the complainant, who ducked. He (complainant) took up two stones, flung one at the applicant, hitting him on his right hand, after which the applicant fired two more shots, while he took refuge in the house on the premises.

In his defence, the applicant maintained that he had no gun, that he had been accused by the complainant of having harrassed his mother on the previous evening, and that in "revenge" the complainant flung two stones at him, one hitting him on his right wrist, and the other on the back of his neck. As a result he ran away to the safety of his home and his mother, who sent him off to the hospital where he had his hand bandaged. On his way to the police station, he was accosted by the police and taken into custody.

Subsequently, Cpl. Clinton Russell visited the scene where he observed three impressions, one on a tree on the premises and two on the house, which he testified in his experience were made from bullets. He also recovered two pieces of lead which he described as pieces of bullets.

Mr. Chuck for the applicant argued one ground of appeal i.e.

> "That the learned trial judge fell into error by repudiating the defence of self-defence to the second count which defence should have been considered in the circumstances of the case."

The learned trial judge in his judgment identified what in his opinion was the "root" of the case in the following words:

> "..... Clarke says that he threw stones at the accused. He threw one stone at him, but that one stone was thrown after a first shot had been fired at him by the accused. .... Hayles said, no, the stones were flung by Clarke before shots were fired; it was after the stones had been flung that the shots were fired. The accused man himself is saying that stones were flung at him that morning but there is no doubt in my mind that stones were thrown by Clarke at the accused man that morning. .... That is not the crux of the matter. Let us go to the root of the case. The live issue is whether or not the accused man had in his possession a firearm and whether or not he used that firearm to shoot at Ainsley Clarke with intent to do him grevious bodily harm. ....".

The learned trial judge, was obviously not concerned with the effect of the discrepancy he pointed out as to the precise time in which the stones were thrown by the complainant, in that dependent upon his finding as to where the truth lay in that regard, the question of self-defence could arise in the case.

In dealing with self-defence he stated:

> "The question of self-defence which seems to have been suggested, in my view, doesn't arise at all, no question of self-defence, he wasn't acting in any self-defence, he wasn't under any attack at the time that these shots were fired."

In this one statement, he removed any consideration of self-defence from his mind. It is fair to say that the issue of self-defence was not raised in the defence, and the success of this appeal rested on whether that issue arose on the case for the prosecution. As it clearly did not arise in the

evidence of the complainant, an examination of the testimony of the other witness Hayles is necessary for a determination of that question. Here is what he said:

> "Defence Counsel: Did you hear Dalton say to the accused man, 'what mi old lady do you mek you have fi push her down last night; you waan go on like you a bad man, you soon dead'.
>
> A. Yes."

Earlier in Examination-in-chief:

> "Q. Palmer do anything?
>
> A. Him turn back face Clarke and Clarke take up two stones.
>
> Q. When you say he turn back facing Clarke, did he stand up or was he walking?
>
> A. Turn back to Clarke, so Clarke fling back the first stone. It never catch him.
>
> Q. Clarke fling the stone at who?
>
> A. Palmer. Him fling a next one on his right hand."

He then testified that it was at this point that the applicant took the gun from his waist and fired at the complainant. This testimony in our view was open to the conclusion that the applicant, being under attack by the complainant, who had uttered threatening words, could have honestly believed that the attack was continuing and consequently could have taken action to defend himself.

Regrettably, the learned trial judge did not address his mind to that question, and so denied the applicant of the determination of that issue, though he had not raised it in his defence. For those reasons, the appeal was allowed.