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JAMAICA

IN THE COURT OF APPEAL

CRIMINAL COURT APPEAL NO. 92/98

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

REGINA VS. CHRISTOPHER BRAHAM

Terrence Williams for Appellant

Anthony Armstrong for Crown

September 27 and December 6, 1999

LANGRIN, J.A.

The appellant was convicted in the Home Circuit Court before Panton J. and a jury on the 27th July, 1998 of the offence of murder of David Smikle and sentenced to imprisonment for life with the recommendation that he serve at least 30 years before becoming eligible for parole.

The circumstances of the killing may be stated in a summary form. Oral Williamson is the main witness in the case for the prosecution since he alone described how the deceased met his death. A student, aged 21, was visiting the deceased, his uncle, for about three days prior to the incident. While he was in the kitchen cooking, the accused came there and an argument developed between them. The accused assaulted Oral Williamson and advised him to go and tell his uncle so that his uncle would come and defend him. According to

his hand with the machete, Oral said "Stab up the boy noh". A wrestling took place when the machete fell out of Sheppie's hand. The accused got to the machete before Sheppie and Oral. On reaching the machete, the accused turned around with no intention of killing this man but because he held on to him he the accused swung his hand. When he found out that he was free he ran off. He acted in self-defence.

Mr. Terrence Williams argued a single ground of appeal in which he complained that the trial judge failed to completely direct the jury on how to consider the effect of the proportionality of the accused's defensive actions to the attack. He submitted that in directing the jury that excessive force in defence could negative self-defence, the learned trial judge ought to have added that it is often difficult in the heat of the moment to weigh precisely the degree of response to an attack. The appellant, he argued had claimed that in defending himself from an attack by two men he did one act of violence. As a result the deceased was decapitated. The question of excessive force, he maintained would be of importance. The jury could be misled to consider that the severity of the injury and the force of the blow would negative self-defence.

The trial judge directed the jury on the issue of self-defence (at pages 210-213) in these terms:

> "Now I turn to what I call the linchpin of the defence, self-defence, to tell you what in law is self-defence. Any individual who is attacked in circumstances where he believes his life to be in danger or that he is in danger of serious bodily

injury, such a person may use such force as is reasonable, in the circumstances, as he honestly believes them to be, so as to prevent or resist the attack. And if in using such force he kills or does injury to his attacker our law says that he is not guilty of any crime. Once self-defence is raised, it is not the accused man who must show that he was acting in self-defence. It is for the prosecution to show that he was not acting in self-defence. The prosecution has to satisfy you on the evidence that it has presented that the story told to you by the accused man is untrue. The burden remains on the prosecution, and if after you have considered all the evidence you are left in doubt whether the injury may not have been in self-defence, the proper verdict would be not guilty. If you find that the accused was indeed acting in self-defence, the accused would be not guilty. If you are sure, however, that he was not acting in self-defence, and you accept the story of the prosecution as it came from Oral Williamson, then it is open to you to find the accused man guilty as charged.

Mr. Foreman, members of the jury, you have to ask yourselves this, was the act, that is that chopping, was it done by the accused to protect himself from death or serious bodily injury? Or did he, the accused man, act as he did in order to protect himself from an attack that he apprehended as coming from the deceased, Oral Williamson? If your answer to either question is yes, then not guilty would be your verdict. If you are not sure what your answer should be, then your verdict is to be not guilty.

However, if you answer both questions no, that is, if you find that this chopping was not done to protect the accused, he did not do the chopping to protect himself from being chopped or serious injury, or if you find that he was not apprehensive of any attack coming from any quarter, then it would be open to you to say guilty as charged, if

> you accept the case for the prosecution. If you accept the case for the prosecution. If you accept the evidence of Oral Williamson.
>
> Now in deciding this question of self-defence, you have to consider the extent and the nature of the force that was used on the accused man and the nature and extent of force used by him to repel it. If excessive force was used by the accused man, then, the act would not have been done in necessary self-defence. I repeat, that if you find that the accused man used excessive force, then in law, the act would not have been done in self-defence, necessary self-defence. In deciding whether it was necessary for him to have used as much force as was in fact used, you have to have regard to all the circumstances which existed at the time. And of course, Mr. Foreman and members of the jury, at all times you must bear in mind that anyone who is under attack or who apprehends that he is about to be attacked, our law says that such a person is under no duty to run away and hide. And in all your deliberation on the question of self-defence, everything depends on what view you take of the facts and circumstances of the case."

In his final charge to the jury the trial judge had this to say:

> "The case although lasting over two days is a simple one. Do you believe Oral Williamson or not? If you believe Oral Williamson and you reject what the accused man has said, then it is open to you to find the accused man guilty. There would not have been any question of self-defence."

It was claimed that support for the contention of the appellant could be found in ***Palmer v. R.*** (1971) 1 All ER 1077 at 1088 where Lord Morris said inter alia:

> "....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. A jury will be told that the defence of self-defence where the evidence makes it raising possible, will only fail if the prosecution show beyond doubt that, that which the accused did was not by way of self-defence...."

Further, in ***Beckford v.R*** (1987) 3 All ER 425 it was clearly stated that the subjective element of the accused in relation to self-defence must be emphasized. However, Lord Griffiths went on to say at p. 433:

> " Now that it has been established that self-defence depends on a subjective test, their Lordships trust that those who are responsible for conducting the defence will bear in mind that there is an obvious danger that a jury may be unwilling to accept that an accused held an 'honest' belief if he is not prepared to assert it in the witness box and subject it to the test of cross-examination."

A consideration of these cited cases does not lead this court to conclude that in the present case there was any necessity to find that the trial judge had misdirected the jury on the question of excessive force. If the jury were satisfied by the prosecution beyond doubt that the accused did not act in self-defence, then there was no factual basis on which a direction on the proportionality of the accused defensive action could rest. The issue of self-defence arose only on the

defendant's case. It was the accused who swung his hand with the machete to ward off his attackers. The swing of the machete as described, in our view could not be equated with excessive force.

The real issue for the jury was whether in fact they accepted or rejected the account given by the appellant. This is a case in which self-defence does not arise on the Crown's case and therefore if the jury rejected the account of the attack upon the accused given by him in his unsworn statement it would not be necessary for the jury to consider the subjective element of the accused in response to an attack to necessitate its inclusion in the judge's direction on excessive force.

It follows from the above reasons that the appeal is dismissed and the conviction and sentence affirmed. The sentence commences on 28th October, 1998.