NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 37 of 2003

BEFORE: THE HON. MR JUSTICE FORTE, P.
THE HON MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE HARRISON, J.A. (Ag.)

REGINA V DAMION COLEMAN

Delano Harrison, Q.C. and K. Churchill Neita Q.C., for the Appellant

Miss Paula Llewellyn, Senior Deputy Director of Public Prosecutions, for the Crown

December 7, 2004 and March 11, 2005

K. HARRISON J.A:

On February 10th 2003, after a trial in the St. Catherine Circuit Court before a judge and a jury, the appellant who was indicted for the offence of murder, was convicted of manslaughter and sentenced to a term of seven years imprisonment at hard labour.

The case for the prosecution

The charge of murder against the appellant arose from the fatal stabbing of Rason McKoy (the deceased) on the 17th August 2001. On that date, and at about 10:00 o'clock at night, Omar Mahoney and the deceased were riding their bicycles along the Barton's main road, St. Catherine. As they were riding along, a chair was flung in their path by one of five people playing dominoes under a

street light. The chair hit Mahoney's cycle so he stopped and asked who threw the chair at him. The appellant who is called "Lennie" got up off a chair, walked towards Mahoney and told him that he was going on as if he was a bad man and that he was going to "lick" him in his face. He then pushed Mahoney causing him to fall to the ground. He got up and as the deceased came off his cycle the appellant and his friends started to walk down towards them. Mahoney said the appellant and others surrounded them and he took up a stone. He flung it at the appellant and it caught him in the head. He came up to Mahoney, pushed him, took out a ratchet knife and said to him:

"You buss me face. You buss me face".

The appellant's brother then ran to his yard and returned with a baton. The appellant used the knife he had, and stabbed the deceased who was standing about six feet in front of Mahoney.

The appellant's brother hit Mahoney at the back of his head with the baton. He lost consciousness momentarily and was unable to say if it was at that moment his ice pick fell from his pocket. He said the deceased had nothing in his hands but at the time that he Mahoney was hit, he had a stone in his hand.

The defence

The appellant made a statement from the dock. He said he was 21 years old and was a professional footballer. On the 17th August 2001, he was at a street corner playing dominoes with two friends. He felt a bicycle hit him in his back. He turned around and saw the deceased and Omar Mahoney on their bicycles. An argument started and both deceased and Mahoney used expletives.

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They began to ride away when Ritchie, their area leader, came from a park and called them back.

Ritchie then chucked the appellant and he felt when a stone hit him in his face. He held on to his face and Ritchie and the deceased, both armed with knives came towards him. Mahoney was armed with an ice pick. On seeing them, he said he swung his hand because he was in fear of his life. It was in those circumstances, that the deceased received the fatal injury.

The defence was one of self defence but it is apparent from the facts outlined above, that legal provocation did arise, hence the learned trial judge correctly left this issue for the consideration of the jury.

The Grounds of Appeal

The original grounds of appeal were abandoned and leave was granted for Counsel to argue two supplementary grounds of appeal on behalf of the appellant. The grounds state:

> 1. That the learned trial judge's directions on the law relating to self defence were so tortuous and so lacking in clarity and simplicity that they could only have confused the jury as to how to properly approach the appellant's expressly stated defence (see pages 16-18).
>
> 2. That the learned trial judge erred in law in his failure to direct the jury that, if they were not sure, or were in doubt, whether the appellant acted in lawful self defence, they were bound to acquit the appellant.

The submissions

Counsel for the appellant submitted that the directions given to the jury at pages 16 -18 of the record, how they should consider the appellant's defence in relation to self defence, were extremely unclear. It was argued that the directions

were so confusing that they could have afforded the jury no guidance on the law relating to the issue of self defence. Counsel submitted in his skeleton arguments that the jury ought to have been instructed in simple, easily understood language that:

> (a) if the appellant was actually in imminent danger of his life or "the safety of his person from injury" or if he honestly believed he was, he was entitled in law to use such force as was reasonable in the circumstances to defend himself.
>
> (b) In defending himself, he was under no duty to retreat nor did he have to wait for his assailant (McKoy) to strike the first blow.
>
> (c) The prosecution bore the burden of proving beyond reasonable doubt (i.e to the extent that they felt sure) that the appellant was not acting in self defence when he struck McKoy.
>
> (d) If, therefore, they felt sure that appellant was not then acting in self defence, they were entitled to convict.
>
> (e) If, however, they believed the appellant was acting in self defence at the time or if they were not sure whether he was, they were duty bound to acquit him: see ***R. v. Lobell*** [1957] 1 QB 547, 548-549; ***Palmer v. R.*** [1971] AC 814, 831F – 832D; ***Beckford v. R.*** [1988] 1 AC 130, 131C –E.
>
> (f) Because the burden of proof lay on the prosecution even if the jury disbelieved the appellant's defence they would not merely on that account be entitled to convict him. They would have to consider the totality of the evidence including what the appellant told them.

The Senior Deputy Director of Public Prosecutions on the other hand, submitted that the directions on self defence were adequate as a matter of law. She argued that the learned trial judge had contextualized the directions on self defence squarely on the subjective basis and that the appellant's case was put in a balanced way before the jury.

Ground 1

Whether the directions on self defence were confusing

It will be convenient to quote the whole of the relevant part of the summing-up dealing with self-defence. At pages 16-17 of the transcript the learned trial judge stated:

> "Now, I am going to the accused man's unsworn statement and he is saying self defence. I will tell you what is self defence. A person who is attacked or believes he is about to be attacked may use such force as he thinks is reasonably necessary to defend himself.
>
> In fact, if you feel sure he was acting in self-defence he is entitled to be found not guilty, and it is for the prosecution to make you feel sure that the defendant was not acting in lawful self defence. It's not for him to prove he wasn't.
>
> A person is only acting in lawful self defence if in all the circumstances he believes it is necessary for him to defend himself and the amount of force being used in doing so is reasonable.
>
> So there are two questions for you to answer. Did he honestly believe that he needed to defend himself? If a person who is the aggressor acts unlawfully, this does not amount to lawful self defence. So if you are sure the defendant did not honestly believe it was necessary to defend himself, then self defence does not arise in this case and he would have been guilty of murder.
>
> But, if you find that he was acting in lawful self defence you must consider the second question, taking into consideration the circumstances and danger as to whether or not he honestly believed the amount of force used was reasonable, or the force used for self defence was unreasonable and unlawful in all the circumstances in the nature of the attack and the extent that was required of the defendant to defend himself, whether or not force was used by this defendant.
>
> Such questions on behalf of the nature of the attack in his unsworn statement, he said that three persons approached

> him, each with a knife, and "Dandoo", that's Mahoney, with an ice pick. Remember that a person who is defending himself cannot be expected in the heat of the moment to say the amount of force needed to defend himself or the amount of defensive action which is necessary".

At page 18 the learned judge concluded:

> "If you conclude that the defendant honestly believed the amount of force used was necessary to defend himself, you think there is strong evidence that the amount of force used by him was reasonable, then he is not guilty.
>
> If you are sure the force used by the defendant was unreasonable then he cannot be acting in lawful self defence and he can be convicted of murder, but if the force used you think is reasonable, then he is not guilty."

We find that the learned trial judge gave directions in faultless terms in the early stages of his summing up to the jury. The learned judge commenced his summing-up with the usual preliminary directions as to the respective functions of judge and jury, the burden and standard of proof. He then proceeded to direct the jury how to approach the evidence and how they should treat the addresses of each counsel. He next defined the offence of murder and the ingredients of the offence. He reviewed the evidence given by the prosecution showing the chronological sequence of events, and the inconsistencies and contradictions arising on the evidence. After this he dealt with the question of self defence. Next, he reviewed the unsworn statement given by the appellant and he quite properly left the issues of self defence and legal provocation for the consideration of the jury.

Unhappily, however, the learned trial judge's directions on self defence were somewhat confused at some points in the summing up. There were

obscure sentences in the directions and the language reproduced in the transcript, seems to be quite unlike that used in the learned judge's earlier directions. Whether this is the fault of the shorthand-writer or whether that is what the judge said is a matter that we shall never know. There is no magic formula in summing-up and provided that on a reading of the summing-up as a whole the jury are left in no doubt where the onus lies and how the defences are to be dealt with, no complaint can properly be made.

In ***Sophia Spencer v. R.*** (1985) 22 JLR 238 Carey J. A. stated:

> "A summing up, if it is to fulfill its true purpose, which is to assist the jury in discharging its responsibility, should coherently and correctly explain the relevant law, faithfully review the facts, accurately and fairly apply the law to those facts, leave for the jury the resolving of conflicts as well as the drawing of inferences from the facts which they find proved, identify the real issues for the jury's determination and indicate the verdicts open to them.
>
> If it is so couched in language neither patronizing nor technical, then it cannot fail but be helpful to a jury of reasonable men and women in this country".

Although we believe it is necessary that we take into account the pattern of the summing-up and its effects when taken as a whole, we cannot otherwise than regard the directions on self defence by the learned trial judge in the instant case as confusing and unfortunate.

Ground 2

Failure to direct the jury that if they were in doubt or were not sure as to self defence.

A further objection was taken by Counsel for the appellant. It was that the learned trial judge erred in law in his failure to direct the jury that if they were not sure, or were in doubt, whether the appellant acted in lawful self defence then they should acquit.

Early in his summing up the learned judge gave directions on the burden and standard of proof. He said:

> "As you have heard repeatedly, the burden of proof is on the Crown. There is no burden on the accused man to prove or disprove anything. Further, the standard of proof which must govern your decision making is that you can only return a verdict adverse to the accused man, if you are satisfied so that you feel sure."

We believe that a convenient way of directing the jury where self defence is raised is to tell them that the burden of establishing guilt is on the prosecution, but if, on consideration of the whole of the evidence, the jury are either convinced of the innocence of the prisoner or are left in doubt whether he was acting in necessary self-defence, they should acquit: see ***R. v. Lobell*** [1957] 1 Q.B. 547, 41 Cr. App. R. 100.

In ***R. v. Abraham*** 57 Cr. App. R. 799, the English Court of Appeal suggested (at p. 803) that a judge should deal with such issues as follows:

> "(G)ive a clear ... general direction as to onus and standard of proof; then immediately follow it with a direction that in the circumstances of the particular case there is a special reason for having in mind how the onus

> and standard of proof applies and go on to deal ... for example ... with the issue of self-defence by telling the jury something on these lines: 'Members of the jury, the general direction which I have just given to you in relation to onus and standard of proof has a particularly important operation in the circumstances of the present case. Here the accused has raised the issue that he acted in self-defence. A person who acts reasonably in his self-defence commits no unlawful act. By his plea of self-defence the accused is raising in a special form the plea of Not Guilty. Since it is for the Crown to show that the plea of Not Guilty is unacceptable, so the Crown must convince you beyond reasonable doubt that self-defence has no basis in the present case.' Having done that the trial judge can then proceed to deal with the facts of the particular case ..."

What the abovementioned cases demonstrate, is that, if in the result the jury are left in doubt where the truth lies the verdict should be not guilty, and this is true of an issue of self defence as it is to one of provocation though of course the latter plea goes only to a mitigation of the offence. Had the learned judge in the instant case said either in his early directions on the burden of proof or in his final charge to the jury, that if the jury were in doubt then they should acquit, there would be no room for argument in the present appeal. We are of the view that his failure to direct the jury on the question of doubt regarding whether or not the appellant was acting in lawful self-defence was a non-direction amounting to a misdirection in law.

We must now ask the question whether in light of our conclusions thus far, it is proper to invoke the proviso and uphold the conviction on the ground that "no miscarriage of justice has actually occurred" or should we order a re-trial.

In ***Reid v Regina*** (1978) 27 WIR 254 the Judicial Committee of the Privy Council provided guidance as to the approach to be utilized in circumstances

where because of error by the trial judge in the summation (as in this case) the verdict cannot be allowed to stand. Lord Diplock who delivered the advice categorized two positions. The first relates to that category of case where the prosecution has adduced insufficient evidence to discharge the burden which it is obliged to discharge. In such a situation a verdict of acquittal is the correct conclusion. The second is where it would be proper to apply the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act. This is where on the state of the evidence any reasonable jury if properly directed would have convicted the accused. In the latter situation the conviction would stand. If, it is such, that the case does not come within either of these two categories then the question of whether there should be a new trial falls to be considered.

In respect of the first position (supra), it cannot be said that there was insufficiency of evidence. In respect of the second position (supra), it is our view that it would not be proper to apply the proviso to section 14(1). This is so, because the jury were not directed how to treat the self-defence issue if they were in doubt. This would certainly be an issue for the jury to resolve after having been adequately directed.

We now turn our attention to the question whether we should order a re-trial. In ***Reid*** (supra) Lord Diplock stated at page 258:

> "Their Lordships would be very loth to embark upon a catalogue of factors which may be present in particular cases and, where they are, will call for consideration in determining whether upon the quashing of a conviction the interests of justice do require that a new trial be held. The danger of such a catalogue is that, despite all warnings, it may come to be treated as exhaustive or the order in which the various factors are listed may

> come to be regarded as indicative of the comparative weight to be attached to them; whereas there may be factors which in the particular circumstances of some future case might be decisive but which their Lordships have not now the prescience to foresee, while the relative weight to be attached to each one of the several factors which are likely to be relevant in the common run of cases may vary widely from case to case according to its particular circumstances. The recognition of the factors relevant to the particular case and the assessment of their relative importance are matters which call for the exercise of the collective sense of justice and common sense of the members of the Court of Appeal of Jamaica who are familiar, as their Lordships are not, with local conditions".

His Lordship continued by suggesting certain factors that would determine whether or not to order a re-trial. He said:

> "Their Lordships have already indicated in disposing of the instant appeal that the interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing-up to the jury. Save in circumstances so exceptional that their Lordships cannot readily envisage them it ought not to be exercised where, as in the instant case, a reason for setting aside the verdict is that the evidence adduced at the trial was insufficient to justify a conviction by a reasonable jury even if properly directed. It is not in the interests of justice as administered under the common law system of criminal procedure that the prosecution should be given another chance to cure evidential deficiencies in its case against the accused".

There can be no doubt about the seriousness of the offence for which the appellant in the instant case was charged. The case was not one of any complexity. It narrowed to a straight issue as to whether the stabbing of the deceased occurred in circumstances related by the Crown witness or in

circumstances related by the appellant. In the circumstances of this case it cannot be said that because with the passage of time there is the danger that the evidence of the witness could become ossified. The possibility of the prosecution filling any evidential gaps or providing a remedy for any deficiency will not arise in this case. The prosecution will have to stand or fall on the evidence on which it now relies.

For the foregoing reasons the appeal is therefore allowed, the conviction is quashed and the sentence set aside. In the interest of justice a new trial is thereby ordered.