JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CRIMINAL APPEAL No. 109 of 1972

BEFORE: The Hon. Mr. Justice Luckhoo, J.A.(Presiding).
The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Edun, J.A.

REGINA v. DUDLEY MAIS

Ian Ramsay for Appellant.

W.L. Morris for Crown.

13th February, 1973
13th April, 1973

EDUN, J.A.:

On February, 13, 1973, we allowed the appeal, quashed the convictions and set aside the sentences. We promised to put our reasons in writing. We do so now.

The appellant, a police constable, was charged in an indictment containing two counts; on the first count for maliciously wounding Terrelounge, and on the second count, for assaulting Terrelounge thereby occasioning him bodily harm.

Case for Prosecution

Selvin Terrelounge, managing director of Bailey's Petroleum Service Ltd., said that on June 9, 1971 about 1:30 p.m., he parked his car improperly on East Street, Kingston, but he claimed there was no obstruction of traffic. He then proceeded with Ainsley Soalas to the office of Herbert Strachan. Whilst there, Soalas spoke to him. He noticed the appellant in uniform, standing by his car. The appellant told him that his car was not properly parked and that he must move it. He said he removed it to a private parking lot and as he slammed the door to close the car the licence disc which was taped on to the windscreen fell off. He took it up and threw it into his glove compartment.

The appellant then asked him for his driver's licence. He complied and after the appellant examined two licences which were returned to him, the appellant indicated he was satisfied. Terrelounge returned to Strachan's office where he saw the appellant come in and ask to use the phone but it was

not then available for use. Terrelounge, Strachan and Soalas then left the office for a bar next door to have a drink. As the witness reached the bar, the appellant grabbed him in the waist and said: "You are driving an unlicensed car." He replied that his car was licensed. Strachan asked if Terrelounge was under arrest: if so, he would ask his son to take them to the police station. The appellant did not reply. Soalas suggested taking a cab. The appellant released his hold on Terrelounge, ran and stopped a cab and spoke to the driver. He returned to Terrelounge and said: "Come on and let's go."

Terrelounge said he was walking with the appellant in front when before getting off the sidewalk the appellant turned around and held him in front of his waist. Terrelounge stopped and said: "You can't do that," and whilst the appellant was pulling him, the cab drove off. He said the appellant spun around and began to push him. He was at the edge of the sidewalk, he slid, was going down when he felt a blow on his left temple by his left ear. He knew nothing more until he was on the Hope Ship and was later taken by an ambulance of that hospital ship to the Kingston Public Hospital. Because of lack of attention there, he was taken to Dr. Saunders and later to St. Joseph's hospital where he remained a patient and received treatment for ten days.

Doctor Saunders said he examined Terrelounge about 6 p.m., on that day. He was bleeding and his clothes were bloodstained. There was evidence of cerebral concussion. He found Terrelounge suffering from:

1, a 3" by ½" deep laceration wound on the left of the head. Scalp was exposed,
2, a 4" by ½" laceration at top of the head,
3, a 3" by ½" wound by the left top side of the scalp,
4, contusion of left side of face,
5, abrasion of right knee, and
6, abrasion by the left leg.

In his opinion, injuries 1, 2, 3, and 4 could have been caused by a police baton and 5 and 6 could have been caused by Terrelounge falling upon rough surface. A fair degree of force was required to inflict injuries to the head. X-ray disclosed a long fissured fracture of the left side of skull.

Dr. John McHardie, neuro-surgeon, said he would consider the injuries severe and serious particularly as to the risk of Terrelounge developing post-traumatic epilepsy.

Under cross-examination, Terrelounge denied telling anyone that the appellant could not arrest him like that or that he began to struggle after the appellant held him. He maintained that the appellant never arrested him. He denied ever hitting the appellant twice in the chest or that they both struggled and fell on the ground. It was not true the appellant was choking him on the ground and that the appellant hit him again. But very soon after saying those things he literally in the same breath, said:-

> "Accused released me, stopped a cab, returned grabbed me, pulled me towards the cab and we struggled again. Accused hit me with baton. I was resisting accused but not hitting. I wouldn't know how accused got injuries if found by doctor on him."

Ainsley Soalas, a travel agent and company director with offices at 200 Fifth Avenue, New York, U.S.A., gave evidence amply supporting the evidence of Terrelounge. As to the assault upon Terrelounge in his waist, he said both men were then on the sidewalk. Terrelounge told him to take his hand out of his waist as he was going along with him. He pushed Terrelounge off the sidewalk. Terrelounge slipped, but half way down he recovered his balance. Appellant took out his baton and hit Terrelounge on the left side of his head as Terrelounge was half-way down the sidewalk. It was a hard blow. Terrelounge was regaining his balance when accused hit him. When he was hit Terrelounge fell to the sidewalk; he appeared to be unconscious. Those blows were in quick succession. The appellant stepped back from Terrelounge and stood up. He came again and hit Terrelounge "brutally" on his head, blood began gushing (apparently the evidence supporting charge of malicious wounding).

Strachan spoke to him: He could not say where the appellant turned. He then stopped a jeep and with Strachan's assistance, put Terrelounge in the jeep and carried him to the Hope Ship. Under cross-examination, he said he heard the appellant arrest Terrelounge but never heard words of arrest but in his opinion appellant was taking Terrelounge to jail; he would infer Terrelounge had been arrested. Strachan and himself assisted Terrelounge escape; he did not ask appellant's permission to take Terrelounge to the

Hope Ship. His motive however was to get medical aid for Terrelounge. He saw nothing which caused appellant to seek medical aid.

Herbert Strachan, custom broker, also supported the case for the prosecution in that the appellant assaulted and wounded Terrelounge when there was no necessity to use any force to effect his arrest, if at all he had the right to arrest. He, too, did not hear Terrelounge use any indecent language thus: "Kiss my rass, you can't prevent me driving my blood cloth car, I am a big man in this country ...." He admitted, however, that Terrelounge was resisting the appellant but only by stopping and not in any other way.

There was evidence that Terrelounge was about 5 feet 5 or 6 inches tall, stout and stocky, and the appellant was short of stature and slim.

Case for the defence

The appellant on oath, said that about 2:30 p.m., on Wednesday, June 9, 1971, he was on duty in uniform when he noticed a motor car improperly parked in East Street, and which was constituting a hazard to traffic. Terrelounge came up to him and he asked him to park on the right side of the same street. Terrelounge did so but not in a private parking lot. He then observed that there was no licence disc affixed to the windscreen. He asked Terrelounge about licence for the car and the rough reply was that he had none. Terrelounge left. He went to the office to use the phone for the purpose of having car removed. He did not get the use of a phone. He then saw Terrelounge go out of the office with Strachan and Soalas and heard Terrelounge tell them "get in the car, let's go." He told Terrelounge he was not finished with his investigations. They were then in the street beside the car. Terrelounge said: "You are talking foolishness. Kiss my rass, you can't prevent me driving my blood cloth car, I am a big man in this country, what's your service?" He held on to Terrelounge and said: "I arrest you and charge you for using indecent language, driving unlicensed car," and cautioned him. Terrelounge grabbed him by his uniform shirt-front, tore it and hit him twice on his chest with his fists, punched him on right and left side of his neck. His helmet, pocket book, pen and whistle fell on the ground. Terrelounge reached for his trousers back pocket. He then drew his baton and hit him on the left side of his head. Terrelounge began struggling, they held on and both fell to the ground and wrestled and spun each other around when Terrelounge pinned him to the ground and was choking

him. He felt as if his breath was stopping. He hit again on the head with the baton. He was released and both of them got off the ground. They were there holding each other and struggling. He called for assistance but secured none; there was a crowd saying: "blood for Babylon boy, blood for Babylon boy," and there were members of the public with bits of sticks. None of them hit him but they took Terrelounge from him. An army landrover came up. The soldier-driver alighted, drew his gun and told the crowd to stop and that was how he got away. He had no gun with him. He did stop a taxi before to take Terrelounge after he made his arrest and charged him but Terrelounge struggled and refused to enter the cab. He went to the Central police station, made a report. He had not at that time discovered Terrelounge's name. The next day he felt pain in his chest and neck and he went to Dr. John Martin, a Government Medical officer, who examined him and treated him. He drew up seven warrants for traffic and various other offences but those were never executed. He was directed to withdraw them and issue summonses.

Thomas Levene, detective corporal of police, was directed to interview Terrelounge. He did so at the St. Joseph's Hospital. Terrelounge told him that there was a struggle between appellant and himself. He was arrested for breach of traffic law. He told the constable that he was talking foolishness and that the constable could not arrest him. He started to walk off from the constable. The constable held him and the struggle started: "I began to struggle with him," Terrelounge said. In the course of his duties, the detective submitted the statement to the prosecutor. In cross-examination, the only questions asked evoked the answers that Terrelounge had a bandage on his head and was in bed when the witness saw him.

Harl Atkinson, Army Lance corporal, soldier, said that the appellant ran towards his jeep and asked his assistance. His buttons were torn off, his clothes crumpled and in disarray. The appellant said he wanted to take a man to the hospital as he had hit him. A menacing crowd gathered about him. He had a compression top which resembled a revolver and he pointed it at them and told them to get back and allow the law to take its course. He took the appellant and upon his directions drove on East Street but he saw no one there. He then took the appellant to the Central Police Station. Good character evidence on behalf of appellant was led by Inspector of Police, Egbert Smith.

Dr. John Martin said that upon examining the appellant on June 10, 1971, he found him suffering from contusions from his chest and neck; in his opinion they were consistent with his being struck. The appellant spat blood which indicated a squeezing of the throat. Though the injuries were not serious, they were not trivial as spitting of blood indicated also that some force was used to the neck.

The learned Resident Magistrate found the appellant guilty on both counts and the only benefit we have of his reasons for judgment was that he said: ".... I believe there was a struggle but I feel and very strongly that you used excessive force." We do not know what findings of fact he made concerning the appellant's right to arrest. In the appeal, learned attorney for the appellant submitted that:-

1, as the learned Resident Magistrate found there was struggle between the appellant and Terrelounge,
2, the undisputed evidence of Thomas Levene that Terrelounge admitted he was arrested by the appellant for breach of the traffic law,
3, Terrelounge was in effect resisting arrest,
4, the undisputed evidence of Dr. John Martin established that the appellant was hit in the chest and choked in the throat,

the verdict was not only wrong but was unreasonable and could not be supported having regard to the evidence. On the other hand, learned attorney for the Crown submitted that the appellant had no right of arrest and should have proceeded to summon Terrelounge or, in the alternative, if he had the right to arrest he used excessive force in exercising that right and so was rightly convicted. In resolving the problems in this case, we have had to consider the facts on two aspects because of the lack of helpful reasons for judgment by the learned Resident Magistrate.

1. <u>No right of arrest by the appellant</u>

The whole basis of the case for the prosecution was that the appellant had no right to arrest Terrelounge. The law has been correctly stated by Lord Goddard, C.J. in <u>R</u>. v. <u>Wilson</u> (1955) 1 W.L.R. p.493, thus: ".... if a person is purporting to arrest another without lawful warrant the person arrested may use force to avoid being arrested but he must not use more force than necessary. If more force than necessary is used it is not justified." In that case, the appellant was charged with assault on

a game keeper with intent to evade lawful arrest. Under the Game Act 1831, a game keeper was entitled to arrest a person he found in pursuit of conies but he must first ask the person's name and address. The game keeper had only asked the person's name. The deputy chairman quite properly ruled that the appellant could not be charged with assaulting the game keeper with intent to evade arrest because the apprehension was by a technicality, not lawful. He, however, directed that they could find the appellant guilty of common assault if they were of the opinion that the appellant used more force than was necessary. The appellant had threatened to get out knives and called out "get out knives" and in addition kicked the game keeper. It would appear that the game keeper did no more than lay his hands upon the appellant in exercising his right of arrest.

In convicting the appellant of common assault, the jury had obviously concluded that the appellant used more force than was necessary for repelling the unlawful arrest. In the judgment at p. 495, Lord Goddard said:-

> "So here, we are clearly of opinion that a verdict of common assault was justified in this case. We cannot measure the amount or weigh the actual violence; it was a common assault. An assault was necessary to prove the offence laid in the indictment, but the intent laid in the indictment failed. For these reasons the conviction is upheld."

In the instant case, when the appellant held Terrelounge in his waist and assuming that he had no right to arrest, he was technically assaulting Terrelounge who then was obviously not entitled to use more force than was necessary to repel the unlawful arrest. When, therefore, Terrelounge proceeded to strike the appellant in the chest and squeeze him by the throat - such evidence being established by the undisputed testimony of Dr. John Martin - in our view, the appellant was entitled to defend himself. Not because the appellant had committed a technical trespass upon the person of Terrelounge, must he be denied the right as a citizen to defend himself, so as to be killed or be allowed to suffer serious bodily harm.

In Palmer v. The Queen (1971) A.C. 814 Lord Morris of Borth-y-Gest expressed their Lordships' view in the Privy Council of the defence of self-defence at p. 831, thus:-

> "..... It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only commonsense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances ...."

at p. 832 "..... If there be no attack then clearly there will have been no need for self-defence. 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 ....."

When the learned Resident Magistrate in the instant case, gave as his reasons for convicting the appellant: "I believe there was a struggle but I feel and very strongly, that you used excessive force ...." he must have:-

(a) accepted the evidence of the appellant that he was attacked,

(b) believed the appellant was entitled to use some force in necessary defensive action, and by using the words "excessive force" as his reason for convicting the appellant,

(c) incorrectly applied the law as to self-defence as he was basing the conviction not upon the appellant taking unnecessary defensive action but upon his measuring or weighing to a nicety the actual violence suffered by both parties.

If the appellant had taken necessary defensive action, he could not be found guilty: see also R. v. McInnes (1971) 55 C.A.R. p.551.

2. Right to arrest by the appellant

The whole basis of the defence was that the appellant had a right to arrest Terrelounge. Let us assume that the learned Resident Magistrate did believe that Terrelounge did not utter indecent language. The position is that Terrelounge admitted he had improperly parked his car, an offence, contrary to section 46(1) of the Road Traffic Law Ch.346 as his car was not parked with its nearside as close as possible to the left side of East Street. As Terrelounge removed the car upon the appellant's directions, the appellant

noticed there was no licence affixed to the windscreen. Terrelounge also admitted that his licence disc fell down and instead of re-affixing it he threw it into his glove compartment. If the learned Resident Magistrate believed that the appellant saw no licence disc affixed to the windscreen that he asked Terrelounge about the licence for the car and his rough reply was that he had none, then Terrelounge had committed another offence, contrary to Section 10(3) of the Road Traffic Law, Ch. 346.

In R. v. Waterfield and Lyn (1964) 1 Q.B. 165, two constables were informed that a car was involved in a serious offence and they kept watch on the appellant's car without charging or arresting W or L, they were preventing W and L from taking the car away. One constable held up his hand in a signal to stop it and L., reversed the car which came into slight contact with one of the constables. W. was encouraging L. to drive the car at the constable. W. and L. were charged and convicted for assaulting the constable when acting in the due execution of his duty. On appeal, the question arose whether the constable was acting in the execution of his duty. It was held that although the constables were acting in the execution of a duty to preserve for use in Court evidence of a crime, the execution of that duty did not authorise them to prevent removal of the car and consequently when they detained the car they were not acting in due execution of their duty at common law. Further section 223 of the Road Traffic Act, (U.K.) 1960 merely provided a power to stop a car as opposed to laying down a duty; and the exercise of such power to detain the car was invalid because the object of its exercise was to do something which the constable had no right to do; therefore, the constable was not acting in due execution of his duty.

The Court, however, certified that a point of law of general public importance was involved that is:-

> "whether at common law a constable, without making a prior charge or arrest, has the duty to detain as prospective evidence any property found in a public place and which he has reasonable grounds to believe to be material evidence to prove the commission of a crime."

Leave to appeal to the House of Lords was not pursued. Lord Denning M.R. in his judgment in Ghani v. Jones (1969) 3 A.E.R. 1700 was prepared to hold that the constables in R. v. Waterfield and Lyn (supra) were under a duty to prevent the removal of the car in the circumstances. However, the dicta of

Ashworth J., in R. v. Waterfield and Lyn were applied in Donelly v Jackman (1970) 1 AER 987.

But no such problems arise in this case, because section 10(3) of the Road Traffic Law, Ch. 346 provides:-

> "If a motor vehicle ..... is used on a road without being licensed ... or if any ... licence to be affixed and kept affixed in accordance with regulations made under this Law is not so affixed and kept affixed ... the person driving or using the motor vehicle ... shall be guilty of an offence and the motor vehicle shall be liable to be seized and kept in possession of the Police until the requirements of the Law and regulations thereunder have been complied with."

The duty of a constable to seize, remove and detain a car in those circumstances, is statutory.

In the instant case, the defence further disclosed that Terrelounge told the appellant that he had no licence, he walked off and soon after told his friends "get in the car, let's go." In those circumstances, the appellant was acting in the due execution of his duty in restraining Terrelounge from removing his car. When therefore, the appellant held Terrelounge by the waist, he was taking an integral step in the process of arresting him. There was abundant evidence establishing beyond a reasonable doubt that Terrelounge was assaulting and resisting the appellant in the due execution of his duties. Terrelounge tried to make out that his resistance was not accompanied by any use of force. However, the appellant's evidence as supported by Dr. John Martin made out that he was struck twice in the chest and squeezed by the throat, by a stouter and stockier opponent. By the use of the words "you used excessive force" the learned Resident Magistrate had decided that the appellant was justified in the use of force but the degree of that force disentitled the appellant to an acquittal.

What then is the position of the appellant who was acting in the due execution of his duties and was by the use of force being resisted when promoting the interest of the law. In R. v. Fennell (1970) 3 A.E.R. 215, a police officer tried to arrest the appellant's son. The appellant asked a police sergeant to release him as he had done no wrong. The sergeant replied that the son was arrested and he would have to be taken to a police station; whereas according to the appellant the sergeant told him to take

his son home. The appellant also said that the officers were using excessive force on his son. He told one of the officers that he would hit him if the son was not released and, as the officer did not respond, the appellant hit him a deliberate blow on the jaw. The jury were directed that the appellant's defence that even if the officers had not, in fact, exceeded their powers, the appellant genuinely believed on reasonable grounds that the restraint of his son was unlawful and that he was thus justified in using reasonable force to free him, could not in law amount to a defence to the charge of assaulting a police constable in the execution of his duty. The appellant was convicted and on appeal against his conviction, the Court of Appeal dismissed the appeal because the son's arrest was lawful, the appellant's use of force could not be justified. At p. 217, Widgery, L.J. (as he then was) said:-

> "The law jealously scrutinises all claims to justify the use of force and will not readily recognise new ones. Where a person honestly and reasonably believes that he or his child is in imminent danger of injury, it would be unjust if he were deprived of the right to use reasonable force by way of defence merely because he had made some genuine mistake of facts. On the other hand, if the child is in police custody and not in imminent danger of injury, there is no urgency of the kind which requires an immediate decision, and a father who forcibly releases the child does so at his peril. If in fact the arrest proves to be lawful, the father's use of force cannot be justified." (underlining mine).

In the instant case, if the learned Resident Magistrate believed the appellant, the arrest of Terrelounge was lawful. The appellant held Terrelounge by the waist as he was entitled to do. Terrelounge's use of force to resist the appellant and to obstruct the fulfilment of the law was unjustified. Instead of viewing the evidence reasonably and applying the law correctly, the learned Resident Magistrate convicted the appellant because in his lawful use of force Terrelounge got the worse of it.

The foregoing are our reasons for allowing the appeal.