KMES

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No: 71/2000

BEFORE: **THE HON MR. JUSTICE DOWNER, J.A.**
THE HON MR. JUSTICE BINGHAM, J.A.
THE HON MR. JUSTICE SMITH, J.A. (Ag)

REGINA
V
EARL MURRAY

Ian Ramsay, Q.C., Patrick Atkinson and Oswest Senior-Smith, for the appellant

Evan Brown, Crown Counsel for the Crown

May 30, 31, June 1, 2001 and July 5 2002

BINGHAM, J.A:

Following a trial in the Home Circuit Court between March 22 and April 6, 2000, the appellant was convicted on an indictment for Non-Capital Murder and sentenced to the mandatory term of imprisonment for life. The learned trial judge made no recommendation as to the period of imprisonment to be served before parole could be considered.

His application for leave to appeal having been refused by the single judge, was reviewed before the Full Court. Having heard the submissions of counsel, at the end of the arguments we granted the application for leave to

appeal, treated the application as the hearing of the appeal, allowed the appeal, quashed the conviction, and set aside the sentence. A judgment and verdict of acquittal was entered. We promised at that time to reduce our reasons into writing at a later date. This we now do.

Before going any further into the merits of the application, it may be convenient at this stage to summarize the facts leading up to the proceedings below which resulted in this present appeal.

The Facts

On June 6 1996, several young men including the deceased Ian Bryan, his brother Shawn Bryan, one Damion Brown among others, left from Eleven Miles district, Bull Bay, St. Andrew, travelling in the back of a truck. Their destination was the Donald Quarrie Secondary School at Harbour View in Saint Andrew. Their pre-supposed intent was to enjoy themselves and to have a good time at a dance being held in the auditorium on the school premises. Unfortunately, as so frequently happens nowadays at these fetes, the occasion, for the deceased, was to end in tragedy. While in the auditorium and the dance in progress, a quarrel ensued between the deceased and another man. This quarrel was quelled and the man was seen to leave the dancehall. The deceased continued to dance with a young lady and while doing so he was suddenly and without any warning, stabbed from behind with a sharp weapon by the same man with whom he had earlier been engaged in the quarrel. The blade of the weapon penetrated the right lobe of his lung. The assailant then ran from the dancehall

followed by the deceased and some members of his party. The chase headed in the direction of the main gate, the assailant being hotly pursued by the deceased who was armed with an object and his followers. As they approached the gate, the appellant a police constable, who was in plain clothes and wearing a security vest which constables on special duty are accustomed to wear, along with two other constables similarly clad, all three being armed with revolvers, were unaware of the incident in the auditorium. They had been assigned on special duty at the school to offer security at the main gate and to maintain law and order at the dance in keeping with their sworn duty as peace officers.

As the chase neared the main gate, the appellant saw what appeared to him to be a hostile group of men headed by the deceased chasing a man (the assailant). The deceased was armed with what seemed to him to be a knife. The assailant who was now being chased by the deceased and others was represented to the appellant as the possible victim of what was in the nature of an imminent attack by his pursuers. In an attempt to ward off what he saw as the impending danger, the appellant shouted to the deceased to "stop! drop the knife!" This command was not heeded. As the deceased came closer to where the appellant was standing by the main gate now fearing possible serious bodily harm to himself, the appellant discharged a shot from his service revolver in the direction of the deceased in an attempt to halt his advance. His aim regrettably, was with deadly accuracy. The bullet pierced the deceased's chest and entered

the same lung which had been punctured moments earlier by the assailant's knife.

As the deceased lay fatally injured on the ground he was heard to remark to the appellant. "Officer why you shoot mi? Is a man stab mi and mi running him down".

On July 11 1996, Dr Ramesh Bhatt, a pathologist attached to the National Public Health Laboratory performed a post mortem examination on the body of the deceased. The body was identified by his father Devon Bryan. The significant findings were:

> (1) A stab wound one by half inch to the medial aspect of the scapular (shoulder blade). It was seen to pass through the upper lobe of the right lung.
>
> (2) A firearm entry wound half inch in diameter in the third right intercostal space and the lower lobe of the right lung. Death was due to hypervolemic shock as a result of the gunshot and stab wound.

In the doctor's opinion the gunshot wound was the more serious of the two wounds, but death could have resulted from either, depending on what sort of treatment the deceased got.

In his statement from the dock the appellant told of being dispatched along with two other police officers to the Donald Quarrie Comprehensive High School on July 6 1996, around 12:30 a.m. They were all dressed in plain clothes wearing marked police vests and armed with service revolvers.

About 3:30 a.m. while standing at the gate which was the main entrance to the school, the appellant heard a commotion coming from the area where the

dance was taking place. He looked in that direction and saw a group of persons running from that direction coming towards the gate where he was standing. They came up to the gate and rushed pass the police. He then saw a man behind this group with a knife in an upraised position and running in the same direction. He called out to this man (the deceased) saying "Police! stop". The man did not stop but continued running and coming straight at him. The knife was still in an upraised position. He fired one shot from his service revolver as he was fearful for his own life. The deceased fell to the ground as also the knife. He later took the knife and his service revolver to the Harbour View Police Station where he made a report and handed over both the knife and his service revolver.

The evidence indicates (and as the appellant was deployed on special duty at the school), that the manner of the shooting of the deceased gave rise to the defence of self defence involving the following issues of law viz:

(1) The conduct of a police officer where he acts in defence of preventing possible injury or harm to himself.

(2) He acts to prevent a crime being committed by someone else on a third person and the alleged perpetrator is killed in the process.

On the evidence it was clear that the appellant had no knowledge of the circumstances which led to the stabbing of the deceased at the dance. The absence of this knowledge would have tended to provide reasonable grounds for his belief that during the chase the deceased, (given his course of conduct i.e.

armed with an object) would have been cast in the role of an assailant rather than the victim which in fact he was. Such a situation would have given rise to a possible defence of self defence based on a mistake of fact as well as the appellant acting in the execution of his duty to prevent the commission of a crime. In this regard the manner in which self defence was left to the jury would therefore be a matter of crucial importance in the light of the second ground of complaint which reads:

> "Ground (2) Mistake of Fact while in the Execution of Duty - No direction
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> That the learned trial judge unduly narrowed and/or over simplified the factual issues before the jury; thus he made the issues of innocence or guilt depend upon whether the deceased had a knife or an adjustable metal walking stick.
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> Whereas it is submitted that where a possible case of self defence arises within the context of a police officer acting in execution of duty, further directions ought to have been given albeit the defence relied on personal self defence only; namely:
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> (a) That a police officer has a duty to prevent the commission of a crime and preserve peace and good order. Therefore where the circumstances could give rise to the view that there was a threat of violence and/or breach of the peace, he has a duty to intervene using no more force than was reasonably necessary.
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> (b) That if the intervention of the police invoking the use of force was based upon a mistake of fact or a genuine misapprehension of the circumstances, the appellant/appellant was not thereby deprived of a defence.

> Wherefore it is submitted that even if the deceased did not have a knife but was running after someone with a metal object in his hand thus triggering police intervention to preserve the peace, then the issues of mistake of fact while in the execution of duty should have been left to the jury. And it is contended that the failure of the trial judge to so direct herein amounted to misdirection thus vitiating the conviction".

In leaving self defence to the jury the learned trial judge commenced his directions in the following manner:

> "Now the accused man has raised the issue called self defence. Now the law provides that every person, you, the police, everybody, myself, may use such force as is reasonable to prevent the commission of a crime, that is the law. And where the defence commonly called self defence prevails that person who raises it succeeds no offence is committed. So it means that if you believe that the accused man honestly believed that he was under an attack and shot and killed him, you would have to acquit him. Because you see, it is not every killing not every time a person is killed a crime is committed.
>
> Now, real force depends on the circumstances as they prevail at the time that is, you look at the nature of the attack, what weapon was used. But you must also remember that a person defending himself doesn't have the time to weigh the issues. You know to say this man has a knife, I should have a knife or a machete it does not work like that, because all you have to think about is whether the accused honestly believed that he was under attack, in other words that he was threatened. Because it is the prosecution that must satisfy you so that you feel sure that there was no need for this accused to shot (sic) and kill Ian Bryan. The fact that he has raised self-defence has no burden on him to prove that he was so acting".

Learned counsel for the appellant has in the light of the above passages under emphasis, submitted that these directions sought to reverse the burden of proof resting on the Crown where self defence arises on the evidence as it does not have to be raised by the accused: Nor for that matter does the defence 'commonly called self defence' have to prevail. This is so it is further submitted as it is the Crown's burden to prove affirmatively that self defence does not arise or is negatived: Nor for that matter does a jury have to believe that the accused man honestly believed he was under attack in order to gain an acquittal. It is sufficient if they have a doubt as to whether he honestly believed this to be so or not.

There is much force in this submission as it is the accused's subjective belief and not whether, faced with a similar situation a reasonable man would have honestly believed that his life was in danger from a possible attack by the deceased, that was important.

Having carefully examined the directions given by the learned trial judge on the crucial issue of self defence, the facts in this case called for a direction focussed along the guidelines laid down by the Board of the Privy Council in ***Palmer v the Queen*** [1971] A.C. 814 as reviewed in ***Solomon Beckford v the Queen*** [[1987] 24 J.L.R. 242.

In this regard although there was an attempt by the learned judge to advert to the ***Palmer*** guidelines as developed in ***Beckford v the Queen*** (supra) here the correct focus called for a clear exposition of the law on self

defence based on honest belief founded on a mistaken view of the facts. Regrettably, the jury was left to wrestle with resolving an issue of fact as to whether the object in the hand of the deceased was a knife or a walking stick. This would not have materially affected the appellant's state of mind in relation to the manner in which he reacted having regard to the circumstances which confronted him in the early hours of that morning. The acid test by which the appellant was to be judged was, his state of mind based on what he conceived the object in the deceased's hand to be. If he honestly but mistakenly believed it to be a knife, then the reasonableness or unreasonableness of that belief was irrelevant. He had to be judged against the background of his honest but mistaken view of the facts. Added to this was the unfortunate comment made by the learned judge in treating with the role of the policemen (including the appellant) at the fete. He remarked that (p. 275 of the Record):

> "... they said out there they were on general police duties which includes protection of life and property and all that sort of thing and here a man was shot and he left on the ground by the police. I don't know, that is how they say it happened, because when Shawn gave evidence he also said that the brother Ian said to the policeman, "Officer why yuh shoot me? Is a man stab mi, and mi running him down". So Mr. foreman and members of the jury, was the deceased running with a knife as he proceeded towards the gate that caused the accused man to honestly believe that he was going to attack him?"

The manner in which this direction was structured would have tended to cast doubt on the genuineness of the belief held by the appellant. What is clear

and beyond question was that it is highly unlikely that the deceased having been seriously injured at the dance, he would have resorted to giving chase after his assailant without any means of defending himself from further harm or injury. Moreover, there is not one scintilla of evidence indicating that during the chase leading up to the firing of the fatal shot by the appellant any attempt was made by the deceased and the other persons giving chase after the assailant to alert the appellant and the other policemen at the gate as to the stabbing that had taken place in the dance. For example by shouting to them, "stop that man!" (pointing to the fleeing assailant). "He just stabbed a man". It was, therefore, left to the appellant in the brief moments he had available to him, given the particular circumstances as he conceived them to be, to weigh and assess the situation and to deal with it in the manner he thought fit in keeping with his sworn duty to keep the peace.

In ***R v Williams*** [1987] 3 All ER 411 on facts not too dissimilar to this case M saw a youth attempting to rob a woman in the street. He gave chase, knocked the youth to the ground and attempted to immobilize him. The appellant who had not witnessed the attempted robbery, then came on the scene. M told the appellant that he was a police officer, which was untrue, and that he was arresting the youth. When M failed to produce a warrant card a struggle ensued in which the appellant punched M. in the face. The appellant was charged with assault causing actual bodily harm. At his trial his defence was that he honestly believed that the youth was being assaulted by M and that it

was irrelevant whether his mistake was reasonable or unreasonable. The judge directed the jury that the appellant had to have an honest belief based on reasonable grounds that M was acting lawfully. The appellant was convicted. He appealed on the ground that the judge had misdirected the jury. It was held that:

> "If a defendant was labouring under a mistake of fact as to the circumstances when he committed an alleged offence he was to be judged according to his mistaken view of the facts regardless of whether his mistake was reasonable or unreasonable. The reasonableness or otherwise of the defendant's belief was only material to the question as to whether the belief was in fact held by the defendant at all. It followed that there had been a material misdirection. The appeal would therefore be allowed and the conviction quashed". (Emphasis added)

The direction complained of was one in which the learned recorder had said (p. 413(B-C):

> "If you come to the conclusion that the defendant ... had a belief, had the honest belief, had the true belief, and the reasonable belief, that is to say the belief based on reasonable grounds that Mason was acting unlawfully, then his use of force would be excused provided again that it was in all the circumstances reasonable and directed to no more than that in the way that I have explained".

Of this direction the Court said (per Lord Lane CT.):

> "It is plain to this Court that those directions failed to make it clear to the jury that it is for the prosecution to eliminate the possibility that the appellant was acting under genuine mistake of fact. The nearest that the recorder ever got to such a direction is to be found at the stage when the jury returned with a

> question to ask of the recorder and in the course of answering the question the recorder said:
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> 'If you think the position is, or the position may be, that the defendant Mr. Williams had such a honest and genuine belief based on reasonable grounds that he was acting unlawfully then you go on to ask yourselves; was Mr. Williams' use of force to be excused because again in all the circumstances, it was a reasonable use of force and directed to no more than preventing the commission of a crime'?"

This later direction was not accepted by the Court as a correct statement of the law on self defence.

This decision of the English Court of Appeal was approved and followed by the Board of the Privy Council in ***Solomon Beckford v the Queen*** [1988] A.C. 130 to which reference will be made later on in the judgment. Of material significance in ***Williams*** (supra) was the circumstances which presented itself to the mind of the appellant and which led him to honestly believe that the youth (the miscreant) was the victim and that M (the good Samaritan) was the villain. This situation was not so different from the circumstances with which the appellant in the instant case was confronted.

It was also similar circumstances that prompted the Board in ***Solomon Beckford v the Queen*** (supra) in their advice to Her Majesty to say:

> "(1) In all crimes of violence the prosecution must prove the unlawfulness of the defendant's actions. A genuine belief in facts which if true would justify self defence was a defence to a crime of personal violence because the belief negatived the intent to act unlawfully. If the belief was in fact held, its unreasonableness was irrelevant. The proper test to

> apply in a case raising the issue of self defence was whether the accused had used such force as would have been reasonable in the circumstances which he honestly believed to exist in defence of himself or another. Whether the plea is self defence or defence of another, if the defendant may have been labouring under a mistake as to the facts, he must be judged accordingly to his mistaken belief of the facts; that is so whether the mistake was on an objective view, a reasonable mistake or not". (Emphasis supplied)

In light of the above and given the facts in this case, the directions by the learned trial judge on the law relating to self defence, meant that any directions of a general nature as was given would have been faulty as not going far enough. There was the need for specific directions focussing on a situation in which the appellant purported to act:

(1) In defence of himself.

(2) In defence of another and added to this, the further need for a particular direction based on the appellant's honest belief founded on a mistaken view of the facts in the case.

Such directions as was given therefore fell far short of what was required in this case and amounted to a mis-direction of a material nature thereby vitiating the conviction. In the light of the above the conviction cannot stand.

It was for the above reasons that we came to the conclusion and made the orders that are set out at the commencement of this judgment.