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JAMAICA

IN THE CT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 112/87

BEFORE: THE HON. MR. JUSTICE ROWE, P.
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE FORTE, J.A.

REGINA

VS.

GEORGE BURKE

Dalton Chuck for Appellant

Mrs. Joan Joyner for Crown

March 15, 16; April 18, 1988

ROWE, P.:

At the invitation of the Court, Mr. Chuck accepted an assignment to represent this appellant and at the end of a week, filed and argued eight interesting Grounds of Appeal which eventually led the Court to allow the appeal, quash the conviction, set aside the sentence and order that a verdict of acquittal be entered. The appellant had been convicted of murder in the St. Mary Circuit Court and had been sentenced to death. Self-defence was the only live issue in the case and most of the appellant's complaints centred around the directions to the jury on this issue.

Hampstead is a village in St. Mary. It is served by two intersecting roads and where they cross there are some shops. At 4 p.m. on August 26, 1986 a number of persons were in the vicinity of the cross-road and of the shops. The appellant and Denzil Clarke (the deceased), approached

the square, walking and talking. The deceased was asking the appellant for money and the appellant was denying that he had any money for the deceased. One witness for the crown heard the deceased say: "Give me my things, man," which drew the reply from the appellant: "It in my pocket, take it out." Whereupon the deceased said: "No, I am not going in your pocket because the last thing I go in your pocket you going said I rape you off." The other crown witness gave more details of the talk between the two men. She described it thus:

> "A: I saw George and Shorty arguing from the other shop coming towards over the other shop about some money.
>
> .....
>
> I hear Shorty say to George 'pay me me money, pay the I I money man.'
>
> .....
>
> George say 'I don't have any money' ..... and Shorty say to him, 'me just a come from bush and I hungry now and the I want something to cook some food and you must pay me me money mek me go cook.' "

Then followed the invitation from the appellant that the deceased should search his pockets, which drew the quaint reply about rape.

The three eye-witnesses called by the prosecution had no connection with the appellant or the deceased or with each other. Their evidence varied in some of the details and so it is necessary to set out the accounts. The first witness saw the two men start to "shuffle" as if they wanted to fight. Then she saw the appellant reach for his pocket, take out something resembling a knife and make a stab at the deceased. At the prodding of counsel for the prosecution, the witness said that she saw the deceased reach for his pocket at the said time that the appellant reached for his pocket.

This series of questions and answers show how that evidence was elicited.

" Q: Was George the only one that draw from his pocket and make the stab?

A: Shortie.

Q: When you saw Shortie get stabbed was there anything in Shortie's hand?

A: No.

Q: You said you saw like two of them going to fight?

A: Yes.

Q: Did you see who reached what, what happened, who reached what first?

A: I say I see George.

HIS LORDSHIP: What did you see George do?

A: Pulled from his pocket.

Q: You said that you also saw Shortie like him reach?

A: Trying to ..... (witness demonstrates).

Q: When was this, was it after George reached for his pocket. Before or when?

A: At the said time.

.....

Q: You said that when the deceased got stabbed Shortie did not have anything in his hand?

A: I never see it.

Q: You said also that you saw something, that you saw an old file?

A: Where the accident happened I saw an old file at the ground. When everything over everybody where the accident happened I saw an old file on the ground."

These questions are more typical of cross-examination than of examination-in-chief, but obviously crown counsel was leading from the deposition. Cross-examination did not advance the defence except that the witness admitted that the appellant crossed the road during the talk with

the deceased and that the deceased followed him and went and stood in front of the appellant.

Now for the other crown witness. To crown counsel she said that the first physical act between the parties was committed by the deceased, who when the appellant was about to turn away, pushed him back around and said: "The man no decide fe pay me me money man? The appellant told the deceased to move away from in front of him and was about to turn away, when again the deceased spun around the appellant and said: "The I noh decide fe pay the I me money mek me go cook some food?" The appellant then gestured with both hands as if to push away the deceased but did not in fact touch him. Then followed these important responses:

"	A	And same time I saw George feel his back-pocket and Shorty feel his.
HIS LORDSHIP:		Who felt his back-pocket?
	A:	George.
HIS LORDSHIP:		George then felt his back-pocket and then what?
	A:	And then Shorty felt his own and come up with an old file.
	Q:	Now let's get this straight now. It was George who felt his back-pocket first and then ....
	A:	Shorty pull up.
	Q:	Shorty felt his back-pocket. What you say George do now?
	A:	Then after him, Shorty, come up with the file, him come up with the knife and stab it like this and drag it down and I see the blood come and I say 'Jesus Christ him dead in a him heart him get it.' "

She described the struggle that followed, how the deceased was attempting to disarm the appellant, how the appellant cut the deceased on his hand and ran away, chased by the deceased. The file which the deceased drew from his pocket was an old file with a stick at one end.

Defence counsel went directly to the crucial point in the case as the following questions and answers show:

" Q: In terms of sequence, could you see if any, listen carefully. Did any of the two men come up first. Answer that question first?

A: Sir, I saw Shortie come up first with the file and hold it like this (indicating). The two of them come up first but him stab first and I see when the file drop from Shortie.

Q: Just a while ago you said that Shortie came up with the file.

A: The two of them go to them back-pocket same time but Shortie come up first."

The cross-examination having been completed, the learned trial judge put a question to clear up what he perceived to be a contradiction.

"HIS LORDSHIP: Can you explain to us Miss S. which is true because at first you said George was the first person to reach for his pocket and then Shortie followed suit? ..... But then you told Mr. Malcolm that the both of them went to their pockets at the same time. I do not want to put words in your mouth, but do you mean that George went first and then Shortie, but it happened so quickly that it looks like it is the same time, or are you saying that they both went at the same time, to Mr. Malcolm. But to Crown Counsel you said George. Who went first?

A: George went first.

Q: Therefore when you told Mr. Malcolm that both went to their back-pockets at the same time that was a mistake?

A: Sir, I don't know how Shortie get to come up so fast. I don't know how Shortie get to draw his own so quick but I know George first, and Shortie come up sharp behind."

A third prosecution witness said the appellant made two stabbing motions, the second of which caught the deceased. She did not see the old file at all and she did not see the deceased attack the appellant at any time that day.

In his unsworn statement, the appellant said that the deceased demanded money from him but he did not owe the deceased any money. He said the deceased grabbed him up, and "said time me see him dip in a fe him pocket and come up with something. ..... Said time me see him a come up back, but me don't know what him come up wid. Said time me did have my knife into my back pocket. ... And me stab at him." Later he said he did not stab the deceased to kill him.

The appellant complained in Ground 2 that the learned trial judge misdirected the jury on the meaning of intention. In explaining the meaning of intention to the jury, the learned trial judge told them at pp. 76-77 that:

> "Nobody can cut open the head of a man and look into his mind to see what he intended, but the law says, all natural and reasonable men and women intend the natural and probable consequences of their behaviour."

He gave an example at p. 77 of the Record that:

> "So if you take up a knife and you stab at somebody the law says that you either intend to do serious injury or to kill him."

and at p. 78 he continued in this vein:

> "Assuming that my pen was a revolver, loaded, and I pointed it at crown counsel and wounded her. The law says that since I am not a mad man then I intended the natural consequences of my behaviour and if I fire a loaded gun at another human being then I either intend to kill that person or to do serious injury."

Mr. Chuck said that in these passages the trial judge was putting forward an objective test, that is, the test of the ordinary reasonable man, rather than the subjective test, which is, what did this individual before the Court intend, and he submitted that the appropriate test in Jamaica is the

subjective test. In R. v. Roy Thomas S.C.C.A. 105/86 (unreported) this Court expressly approved of the earlier case of R. v. Loxley Griffiths S.C.C.A. 31/80 (unreported) which decided that the test of intention is always a subjective one. The jury can draw an inference from what an accused person has said and done or said or done, that he intended a particular result, but that is not the same thing as saying that as a matter of law, a reasonable man always intends the natural and probable consequences of his acts. In R. v. Moloney (1985) 1 All E.R. 1025, the House of Lords re-considered the whole question of specific intent in the crime of murder. The House was of the view that it is not at all necessary in every case where the crown has to prove a specific intention as an essential ingredient of a crime for a trial judge to embark upon a definition or an explanation of intention. Rather, that issue should be left to the good sense of a jury. The House held too that when there is a prosecution for murder or any crime of specific intent, it is not sufficient to prove intention merely by showing either (i) that the accused desired a certain consequence to happen whether or not he foresaw that it would probably happen or (ii) that he foresaw that it would probably happen, whether he desired it or not.

We quote and adopt the portion of the headnote in Moloney's case which says:

> "Knowledge or foresight of consequences is at best material from which the jury, properly directed, may infer intention when considering a crime of specific intent. The trial judge should normally avoid any elaboration or paraphrase of what is meant by intent (except where he considers it necessary to explain that it is quite distinct from motive or desire) and should leave to the jury's good sense the question whether the accused acted with the necessary intent. In the few cases where it is necessary to direct the jury by reference to the foresight of consequences, the judge should do no more than invite the jury to consider (i) whether the relevant consequence which must be proved (eg death or really serious injury in murder) was a natural consequence of the accused's voluntary act and (ii) whether the accused foresaw that it would be a natural consequence of his act, and then direct the jury that, if so, it is proper for them to draw the inference that the accused intended that consequence." [Emphasis added]

We agree with the submissions of Mr. Chuck that the learned trial judge misdirected the jury when he told them that the law says that all natural and reasonable men intend the natural and probable consequences of their behaviour.

Mr. Chuck directed the burden of his submissions to the trial judge's directions on self-defence, in support of his complaint that the jury were misdirected in a multiplicity of ways. The learned trial judge gave some directions on the necessity to retreat before one could act in self-defence. He said:

> "The duty to retreat does not apply where you are involved in what you could call an imminent violent attack. If a man has a big stick and he is about to hit you with it, you may not have time to retreat. Maybe if you turn around to retreat you going to expose yourself more to him. In those circumstances the law says there is no need for him to retreat. You can stand right where you are and defend yourself. You must be, first of all, certain that he is intending to kill you, before it is self-defence."

In the first place if there is an attack on the highway there is no obligation on the victim to retreat. In any event, the cases show that there is now no rule that a man who is attacked must retreat as far as he can. In a given case, whether or not the accused retreated, is only one element for the jury to consider on the question of whether the force used was reasonably necessary. Palmer v. R. (1971) 55 Cr. App. R. 551; R. v. Shaw (1963) 6 W.I.R. 17; R. v. Belnavis (1964) 8 W.I.R. 128.

At best, the direction to the jury that the accused must first be certain that the deceased intended to kill him before he can act in self-defence, is absolutely misleading and when read in context with the direction in relation to retreating, is likely to convey the meaning that unless a person under attack is certain that the attacker meant nothing less than to take his life, the person under attack must retreat. This would be setting the applicable rule of law as to retreat upon its head.

At page 83 of the Record the learned trial judge directed the jury that:

> "You must be satisfied of the following things where the question of self-defence arises. There must be an attack upon the accused. That is the first thing. As a result the accused must have believed that he was in imminent danger of death or serious bodily injury."

He gave an even more explicit direction at page 88 of the Record when he said:

> "Because you only kill in self-defence if you are being attacked. The two things must go together. It must be an attack from Shorty to the accused and then the accused killed him."

The issue for the jury in the instant case was not one of attack or no attack. It was plain that the real issue was whether the appellant honestly believed that he was under an attack and that is the issue which ought to have been left for the jury's consideration. To have channelled the jury's minds towards the existence of an actual attack by the deceased and that nothing short of that would do, to let in self-defence, was a misdirection. R. v. Solomon Beckford (1987) P.C.A. 9/86.

Comments made by the learned trial judge in the course of the summing-up were criticized by counsel for the appellant, on the grounds that they were either confusing, misleading or highly prejudicial to the appellant's case and deprived him of a fair trial. One such comment was made upon evidence that the appellant had left the Hampstead area after the stabbing incident and when apprehended by the police officer explained that he had not come forward as he did not know of the death of the deceased. The trial judge commented that there was Biblical authority for the statement that "the wicked fleeth where no man pursueth."

Another comment at page 84 of the Record was directed to the whole defence. The learned trial judge said:

> "So honesty is the key when it comes to deciding whether this man killed in self-defence or not. In other words when he implies or ask you to infer that he killed the deceased because he himself was in fear of his own life, whether when he said that he is speaking the truth because that is the test. Is it an honest belief or is he just making it up to save his neck because he is now on trial for murder..." [Emphasis mine]

This particularly poignant comment coming from the trial judge could be interpreted as an invitation to the jury to reject the account given by the appellant because it was a recent invention. That comment was made in the teeth of the evidence from one prosecution witness who had always been saying that the deceased was the aggressor and that the deceased drew an old file from his pocket and held it in a threatening position. In our view, this comment from the trial judge, based on a mis-interpretation of the evidence, was highly prejudicial to the interests of the appellant.

Ground 6 complained that the learned trial judge gave a wrong interpretation of the confrontation between the deceased and the appellant which resulted in a misdirection. The defence had submitted that the deceased had been the aggressor and in commenting upon that submission, the learned trial judge at p. 92 told the jury that:

> "If you believe this evidence, if the accused is trying to avoid a physical attack, why is he turning back? Why is he turning back and telling the deceased, move from here. She said George turned back, he turns first and the deceased said: 'Stop, hold on man,' spin him back around, 'You don't decide to pay me mi money?' She said George turned again and said: 'Move from me mi don't have any money'. He had moved his hand in a flourish towards Shortie and pushed him, that is pushing him away."

All the evidence was, that each time the appellant tried to continue on his journey, the deceased turned him around or went and stood in front of him. The prosecution witnesses said that the appellant gestured with his hands towards the deceased, indicating that the deceased should leave him alone, but that the gesture did not result in George's hand coming into physical contact with the deceased. There was therefore no pushing by the appellant and the comment from the trial judge which called into question the appellant's desire to avoid a confrontation were indeed a mis-interpretation of the facts.

We were of the view that the learned trial judge fell into error in his directions on intention and on self-defence; that there were other unsatisfactory facets of the summing-up as adumbrated herein and we therefore treated the hearing of the application as the hearing of the appeal. In allowing the appeal in the manner set out at the beginning of this judgment we promised to put our reasons in writing, a promise we now keep.