JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No.154/68

BEFORE: The Hon. Mr. Justice Waddington, President (Ag.)
The Hon. Mr. Justice Luckhoo
The Hon. Mr. Justice Edun

R. v. MELBOURNE GARDNER

Mr. W. Spaulding appeared for the appellant
Miss J. V. Bennett appeared for the Crown

24th July, 1969

LUCKHOO, J.A. :

The applicant Melbourne Gardner was convicted in the Circuit Coutt at Portland on the 18th of November, 1968, for wounding Abendana Cockburn with intent to do him grievous bodily harm. He was sentenced to seven years' imprisonment at hard labour. He now seeks leave to appeal against his conviction and sentence.

The case for the prosecution was to the following effect. The complainant Cockburn, a cultivator, said that at about 6.30 a.m. on Saturday, the 9th of March, 1968, accompanied by his 8-year old daughter Adina, he was on his way to his field at Silver Hill when he met the applicant andone Herman Thompson on Avocat Road. Adina had shortly before gone into a shop nearby to make some purchases. He told Thompson in the hearing of the applicant,"Good morning. Imagine I had my goats at Level Grove and Burnie" (meaning the appliaant),"killed one of my goats and I see no reason why he should kill it. He has no field there but guinea grass. But Burnie said the reason why he killed the goat is that I carry;man in the area and take away his ganja".

The applicant then said,"you are lucky, I heard that you went

to the police station and they ran you. You f.... lucky, is your f.... head I want".

According to Cockburn, his daughter returned with some things. He took his hamper off his back and was bending down in the course of placing those things in the hamper when the applicant chopped him on the left hand with a machete; his hand hung down and was bleeding. The applicant threw away his (Cockburn's) bucket and struck him in the chest with a rock stone. Thompson advised him to go and see a doctor and told the applicant,"Burnie, Jesus Christ, look I told you to go on your way and leave the man and look what you have done". Thompson had also earlier reminded them that this was the Lenten season and advised them to go their way, to which the applicant replied "F...a Lent". Cockburn admitted that he had a machete with him but denied that he had chopped at the applicant with it.

Thompson testified as to what Cockburn had told him about the applicant and the reply the applicant had made. He said he advised Cockburn and the applicant to go their way because it was the Lenten season. After so advising them they walked ahead. Cockburn was carrying a hamper on his back at that point of time; he (Thompson) was working on the road. He then heard a sound and on looking in the direction whence the sound came he saw Cockburn's machete, bucket and hamper on the ground, and he saw Cockburn's left hand hanging and 'chinning blood'. He said that Cockburn's daughter was present. This witness also stated during the course of his testimony that he saw when the applicant raised his machete in making the blow at Cockburn.

Evidence was led to the effect that Cockburn was later that day examined by Dr. Samuel Williams who found a large laceration of the left forearm some four inches long and about one-quarter to one-half inch deep. The wound involved the skin, muscle, nerve and bone. The bone was cut through and fractured at several places. Cockburn was admitted into hospital where he remained a patient from the 9th of March to the 2nd of May, 1968, when he was discharged. The fracture

had not healed when he was discharged, Paralysis of the back of the forearm had set in and this was likely to be permanent. The wound was consistent with being inflicted by a sharp instrument like the machete which the applicant had handed to the District Constable later on the 9th of March, 1968. A severe degree of force would have been necessary to produce the wound. In answer to counsel for the applicant, Dr. Williams agreed that if a person were cutting at another without severe force behind the cutting motion and that other person were coming into the former with considerable force, there could result an injury such as would result from the application of a severe degree of force because of the two movements of the persons towards each other.

About an hour after the occurrence of the incident the applicant made a report to District Constable Alden Foster at his home and handed him a machete; thereupon the District Constable Foster arrested the applicant and charged him with felonious wounding. The applicant was cautioned and thereafter told District Constable Foster, "This cause through provocation".

The applicant testified to the existence of prior bad feeling existing betwwen himself and Cockburn over his killing of one of Cockburn's goats which he had found trespassing in his field. He said that on the 9th of March, 1968, he was on his way to his field carrying a bucket and cutlass when he met Linton Bennett and Herman Thompson. They walked along Avocat Road. When they reached the point where Thompson was working Cockburn came with a cow and spoke to the other men and then said "Foster paid you to kill my goat and I will chop your r..." Cockburn then chopped at him with his machete; he slipped the blow. Cockburn raised his machete again to chop him and he (the applicant) defended himself with his cutlass. When cross-examined, the applicant said that it was at the time Cockburn chopped the second time that he came into collision with his (the applicant's)

cutlass. He denied that he wilfully cut Cockburn and said he tried to defend himself.

A number of grounds of appeal have been argued on behalf of the applicant. It was firstly submitted under grounds one, two and three, which were argued together, that the learned trial judge wrongly restricted the cross-examination of the witnesses Dr. Williams and District Constable Foster by connsel for the defence. Dr.Williams had testified in examination-in-chief that it would require a severe degree of force to inflict the injury to the complainant's forearm with the machete shown him. Counsel for the defence endeavoured to elicit that such an injury could have resulted not only by way of a deliberate blow given by the machete but also by way of the victim rushing with great force against the machete held passively or nearly so. The learned trial judge at this stage pointed out that the doctor had already given as his opinion in answer to defence counsel that such an injury could have resulted by a person cutting at another with a machete without using a severe degree of force if the victim was coming towards the machete with considerable force.

We do not think the learned trial judge erred in this regard and in any event it was never suggested to the complainant when he was cross-examined that the injury was inflicted in the way indicated by the question put to the doctor. Indeed on page 21 of the transcript there appears the following question. later disallowed by the trial judge, put by defence counsel to the complainant :

> "From the machete that Gardner had in his hand, did you know - now if you don't know from your own knowledge you cannot answer the question - but did you know that Melbourne Gardner went to D/C Alden Foster, gave up himself, told him that he had chopped you because you attacked him?"

This question clearly shows that it was not part of the defence that the injury was inflicted by reason of the complainant rushing against a machete passively held or nearly so. This was made crystal clear

when the applicant himself testified in examination-in-chief.

We find that the complaint made of Dr.Williams' testimony is without substance.

It was also submitted that the learned trial judge was in error when he ruled that the report District Constable Foster said the applicant made to him before arrest was hearsay. It is clear from the question put by defence counsel to the complainant in this regard that he wished to elicit from District Constable Foster that the applicant told him before arrest that he had chopped the complainant because the complainant had attacked him. Counsel for the applicant contends that although the contents of this report would not be admissible to prove the truth of what was said, it is advissible to prove consistency of the story told by the applicant at that point of time with the story told to the jury. Further, that it would show the words uttered after arrest and caution,"this cause through provocation", was not to be taken as giving an explanation of the incident inconsistent with what was given to the jury. In England, the contents of a report made by an accused person to the witness before arrest have at times been admitted in cross-examination of that witness, sometimes not. In the latter case the reason usually given for rejection is that the evidence is self-serving; in the former case it is usually admitted sub silentio. In the instant case the exclusion of such evidence could not have had the effect of rendering the story told by the applicant any less capable of belief, and we do not share counsel's view that the exclusion of such evidence could in the circumstances of this case have resulted in the jury forming the view that the words uttered by the applicant after arrest and caution indicated the setting up of an explanation of the incident inconsistent with that given at the trial. Indeed the learned trial judge at pages 22 and 23 of the summing-up was at pains to place before the jury as a reasonable interpretation of those words the interpretation urged by counsel for the defence.

We are of the view that grounds one, two and three are without

substance.

With respect to grounds four, five and six, which were argued together, it was submitted that crucial aspects of the case were not referred to by the trial judge in the summing-up. Examination of the complaints made in this regard during the course of the argument showed clearly that the learned trial judge attracted the attention of the jury to the discrepancies and contradictions real and apparent in the evidence of the witnesses and gave full and accurate directions as to how discrepancies or contradictions should be regarded in relation to the credit-worthiness of the witnesses. We are unable to agree that there is any merit in the contentions put forward by counsel for the applicant in support of these grounds.

It was also submitted by counsel for the applicant that the learned trial judge erred in his exposition to the jury as to what constituted self-defence. Counsel contended that no where in the summing-up did the learned trial judge explain to the jury that self-defence was based not only on an actual attack but also on an imminent attack or reasonable apprehension of an attack. Counsel referred us to certain portions of the summing-up dealing with self-defence and contended that even if the jury were disposed to reject the testimony of the applicant that there was in fact an actual attack upon his person during the incident, the jury could still from the other evidence in the case come to a conclusion that there was imminent attack upon the person of the applicant or that the applicant in the circumstances had reasonable apprehension of such an attack.

In this regard it is necessary to bear in mind that the summing-up is not to be a treatise on the law relating to self-defence. The directions in law to be given must be related to the facts which are adduced in evidence. We are unable to see that there was any evidence upon which the jury could infer that there was an imminent attack as distinct from an actual attack upon the person of the applicant, or that the applicant had reasonable apprehension of an attack as distinct

from actual attack upon his person.

We therefore, are of the view that there was no error made by the learned trial judge in dealing with the question of self-defence.

It was further submitted that the learned trial judge erred in his direction relating to the burden of proof. Counsel for the applicant contended that the trial judge ought to have directed the jury that the burden of proof was two-fold; firstly, to establish that serious harm was sustained by the complainant, and secondly, to establish that there was an intention on the part of the applicant to cause serious harm to the complainant, and that the fact that there was an absence of need for self-defence even though serious bodily harm to the complainant was established, did not automatically mean that the Crown had discharged the burden of establishing that there was intent to cause grievous bodily harm.

During the course of the argument Counsel's attention was directed to to pages 1 and 2 of the summing-up where the question of intent was very carefully and clearly dealt with by the learned trial judge. Counsel conceded that what appears on pages 1 and 2 of the summing-up does in fact constitute a proper direction in relation to the question of intent; but, counsel urged that the learned trial judge in his last words to the jury should have again mentioned the question of intent to cause serious bodily harm. When the direction at page 28 of the summing-up is looked at however, it does appear that in fact the learned trial judge did specifically refer to his earlier directions on the question of intent. He reminded the jury that he had already given them directions in this regard and that in considering whether the lesser charge of unlawful wounding was proved the question of the absence of intent was material. Having regard to the directions given, not only on page 27 but also on page 28 of the summing-up, we are of the view that there was full and adequate direction on the burden of proof.

Counsel during the course of his argument of this ground attracted

our attention to the passage appearing on page 28 of the summing-up where the judge in dealing with the question of unlawful wounding said -

> "or you are not in any state of doubt that it was necessary for him to defend himself, it would be open to you to convict him of unlawful wounding, that is to say that he inflicted the wound maliciously."

That is how the judge is recorded as having expressed himself. Such a direction would have been perfectly good had the word 'unnecessary' appeared where the word 'necessary' appears. Be that as it may, we are of the view that what appears on the record to be a mis-statement by the learned trial judge could not affect the issues in this matter. The applicant was not convicted of unlawful wounding; he was convicted of wounding with intent, and the learned trial judge on page 27, as has already been pointed out, gave a clear and full direction in relation to the elements necessary to be proved to sustain a conviction of wounding with intent.

It was further submitted that the verdict was unreasonable and could not be supported having regard to the evidence. In this regard counsel referred to the inconsistencies, discrepancies and contradictions, real or apparent, in the evidence of the complainant and of the supporting witness for the prosecution, Thompson. We are of the view that this was essentially a matter for the jury. The learned trial judge very carefully and very fully brought to the attention of the jury all of the matters in respect of which complaint was made by counsel for the applicant.

Counsel also urged that this court ought to say that having regard to the circumstances it would be unsafe to uphold the conviction. In support of that contention he cited the case of R. v. Sean Cooper (1968) 3 W.L.R. 1225, a decision of the Court of Appeal in England, where that Court considered that in the state of the evidence in that case it was unsafe to uphold the conviction. In

that case the question of identification of the accused person was in issue. There was only one witness on the part of the prosecution and there were certain features which were brought out at the hearing of the appeal which caused that Court to have a lurking doubt as to whether or not the appellant in that case did the act at all. The position is somewhat different in the instant case. We cannot say, giving our best consideration to the various aspects of the matter brought to our attention by counsel for the applicant, that there is any lurking doubt in our minds as to whether this conviction is right.

Lastly, counsel for the applicant submitted that a sentence of 7 years' imprisonment at hard labour inflicted on the applicant was unduly severe. He brought to our attention the fact that the applicant has no previous conviction; he is 38 years old, a cultivator, a simple sort of country man; that this is not the case of a man seeking out his victim to inflict injury upon him; it is not a case where the the applicant deliberately armed himself for the purpose of inflicting injury upon the complainant; it was a chance meeting on the part of the complainant and the applicant and the applicant had his machete in his hand on his lawful occasions. Counsel also referred to the fact that the applicant is a member of the Adventist Church and he attends church regularly. In the circumstances counsel urged the Court to reduce the sentence imposed on the applicant.

We have taken all of these matters into consideration and we do feel that in the circumstances of the case the sentence of 7 years' imprisonment at hard labour is unduly severe and we therefore substitute a sentence of five years' imprisonment at hard labour in its place.

The application in so far as it relates to the conviction of the accused is refused. The application so far as it relates

to the question of sentence is granted and the sentence will be reduced to 5 years imprisonment at hard labour.