IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 141/89

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

R. v. MICHAEL BAILEY

Carlton Williams for appellant

Brian Sykes for Crown

17th December, 1990 & 31st January, 1991

CAREY, J.A.

We treated the hearing of this application for leave to appeal on 17th December last as the hearing of the appeal which we allowed, quashed the conviction, set aside the sentence and directed that a verdict and judgment of acquittal be entered. We promised then to put our reasons in writing and we now do so.

In the Home Circuit Court, on 9th October, 1989 after a trial which had begun on the 4th, before Smith J. and a jury, the appellant who was charged with murder was convicted of manslaughter and sentenced to 5 years imprisonment at hard labour.

The ground of appeal on which submissions were made to us, was in the following form -

> "That the learned trial judge's withdrawal of the issue of self defence from the jury's consideration was a fatal error, for that on the evidence presented in court the issue of self defence clearly arose and if it were left for the jury's consideration there was adequate evidence upon which the jury could have found the applicant not guilty of manslaughter."

We can now detail the facts of the case: On the day before the fatal shooting of the victim Granville Angus by the appellant, an incident took place on the Shooters Hill road, Seven Miles in the parish of St. Andrew which involved the brother of the victim, Patrick Angus and the appellant. Angus had gone to a shop to make a purchase but found that he was short of cash and requested the other persons, apparently all youths, including the appellant, to make up the shortage. In the course of a deal of cross-talk, indecent language was used by Patrick Angus. The appellant who is a special constable warned that he would arrest Angus for the use of such language. This came as a complete surprise to Angus who enquired if that was so. On the intervention of other young men, the appellant was prevailed upon to release Angus. Thereafter, Angus threatened to report the appellant's conduct in assaulting him to his (?) parents. The appellant, who had walked off, returned to "drape up" Angus. The same youths called for peace and so it was. The appellant then went his way.

On the following day at about 9:00 a.m. Patrick Angus was riding his bicycle in the same area when he saw the appellant who came up to him. The appellant reminded him of the incident of the day before, and intimated that he was going to arrest him, and ordered him to park his bicycle. At this point Patrick Angus' brother, Granville (the victim) came from the Angus' house and sat on a pipe. The appellant then shoved Granville Angus, pointed a gun in his face and threatened to shoot him. When Granville Angus dared him to shoot, the appellant shot him. The medical evidence confirmed that the firearm was discharged in close proximity to the victim's chest, the bullet perforating the left lung, the heart and exiting through his back.

The appellant gave an unsworn statement. He recounted that on the day before the shooting, Patrick Angus had used indecent language and threatened to shoot him. On the day in question, he saw Patrick Angus who greeted him by demanding to know why he had reported him at the police station, and pointed a finger in his face with the warning that it would not go like that. The appellant said he held on to him, telling him to accompany him to the police station. The victim's brother now came on the scene and assaulted him by shoving him in his chest and warning him against arresting Patrick Angus. Granville Angus said he would take away the appellant's gun and grabbed at it but the appellant secured it, by removing it from his waist. Both brothers wrestled with him for the firearm, in the course of which, the gun went off accidentally. He had not intended to fire nor to shoot anyone.

The learned trial judge told the jury that the burden of the defence was accident and if the shooting took place accidentally, it was no offence at all. He ended by saying -

> "So if you accept the accused man's story that that is how it happened, there was this struggle and grabbing and pulling and the gun went off accidentally, then the act wouldn't be his at all; it wasn't a deliberate or voluntary or intentional act and you would have to acquit him."

Mr. Williams submitted that self defence plainly arose on the defence case. He pointed to the threats of the victim's brother to kill the appellant on the day before the shooting incident to the actual incident in which the appellant was assaulted by both brothers and their attempt to take away his firearm. Mr. Sykes on behalf of the Crown, acknowledged that self defence arose on the appellant's unsworn statement and the trial judge ought to have left that issue to the jury.

There can be no doubt that a duty which is placed on a trial judge is to leave any issue, i.e. defence which fairly

arises on the facts of a case to the jury irrespective of such issue being raised by the defence: R. v. Porritt 45 Cr. App. R.; R. v. Albert Thorpe S.C.C.A. 7/84 (unreported) dated 4th June, 1987. It is also very necessary for a trial judge to lay before a jury the defence in a form they can appreciate: R. v. Badjan 50 Cr. App. R. 141.

In this case we do not have before us the addresses of counsel but we note from the transcript that Crown Counsel had timeously suggested to the learned trial judge at the completion of the summing up that he should leave self defence to the jury but he declined to do so, saying it did not arise. Indeed, at the very outset of the summing up, he told the jury in quite definite terms - "let me tell you here and now that self defence does not arise." It was quite clear that the trial judge had formed the view that the label to be attached to what the appellant related in his statement, was accident. He did not shrink from identifying this as the crucial issue. He expressed himself in these terms at p. 5 -

> ".....An accidental killing is no offence at all and this, Mr. Foreman and your members, I would make bold to say is the crucial issue, whether or not the killing was accidental, was it deliberate, was it intentional as the Crown is saying or was it accidental as the Defence is saying."

But with all respect to the trial judge, it is too clear for words that self defence arose on the appellant's unsworn statement. But having identified the defence as accident, he was in our judgment, bound to explain the meaning of accident. No directions in this regard were given to the jury. He would have had to tell the jury that a killing which occurs in the course of a lawful act without negligence is, accident which they had to have in mind. It plainly was not the jury's laymen's view of accident which mattered. In

applying this principle to the appellant's statement, he would be obliged to explain that the appellant was obliged and entitled - (i) to protect his firearm (he was a police officer) and (ii) to protect himself from any intended or actual attack on him by the two brothers. He was entitled therefore to remove his gun from his waist and as he had previously been threatened, he could take all reasonable steps to protect his person. Those acts would be justified in defence of his person and his official weapon. Having mentioned self defence, he might well have appreciated, that accident was a wholly unnecesary refinement.

Indeed, we venture to think that self defence as a concept embraces not only aggressive action such as a pre emptive strike or aggressive reaction but equally to a wholly defensive posture which results in the death of an attacker. What the person attacked intends is not to kill but to defend himself. His action whether aggressive or defensive may result in death. The law as stated by Foster [C.C. & C.L. 273]-

> "was that a man is justified in resisting by force anyone who manifestly intends and endeavours by violence or surprise to commit a known felony against either his person, habitation, or property. In these cases he is not obliged to retreat, and may not merely resist the attack where he stands but may indeed pursue his adversary until the danger is ended, and if in conflict between them he happens to kill his attacker, such killing is justifiable."

We would emphasize the words "resist the attack where he stands." We also note that the trial judge left the issue of provocation and he did so on the basis of the appellant's statement. At p. 6, he said -

> "The accused says that fingers were pointed in his face, somebody grabbed his gun at one time, chucked him. These and other circumstances, you can look at them and see whether you find that the accused was provoked in the manner I have just defined to you, provoked so as to lose his self-control, and would a reasonable man having lost his self-control, would that man do what the accused did? That is what you have to consider."

It seems to us absolutely illogical that the judge left to the jury the issue of provocation which has all the ingredients of self defence in a murder case, but omitted to mention self defence. The actus remains the same in both situations.

In our view, what occurred here, was a misdirection by omission as occurred in **R. v. Badjan** 50 Cr. App. R. 141. Although we were invited by counsel for the Crown to apply the proviso to Section 14 (2) of the Judicature (Appellate Jurisdiction) Act. We declined to do so for the reason stated by Edmund Davies J, (as he then was). In that case, the learned judge at p. 144 observed as follows -

> "Where a cardinal line of defence is placed before the jury and that finds no reflection at any stage in the summing-up, it is in general impossible, in the view of this court, to say that the proviso can properly be applied so as to say that the conviction is secure in those circumstances."

We think that in the circumstances of this case this Court finds itself quite incapable of saying that this conviction ought to stand notwithstanding the misdirection by omission which we have identified. For these reasons, we had no alternative but to allow the appeal in the terms stated at the outset of this judgment.