JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 96/87

BEFORE: The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Forte, J.A.

R. v. OWEN VIRGO

Anthony Pearson for Appellant

Ms. Y. Sibble for Crown

March 2 & 23, 1988

CAMPBELL, J.A.

Owen Virgo was found guilty by a jury in the Hanover Circuit Court and sentenced by Reckord J., (Ag.) to concurrent terms of imprisonment of five years and ten years at hard labour for the offences of Larceny of Cattle in count 1 and Wounding with intent in count 11 of the indictment.

Leave to appeal was refused by a single judge in respect of count 1 but granted in respect of count 11.

The facts of the case are brief and straight-forward. On May 29, 1986, Venries Williams aged 57 tied his three goats by the side of his kitchen and went to bed. About 1.00 a.m., he was aroused by the barking of dogs. He was called outside by one of his sons. On going outside, he saw that two of his goats were missing. He proceeded down a certain road and was just in time to see Owen Virgo and another man named Timothy McIntosh turn into a pass leading to their homes. They were leading his two goats into this pass. Williams raised a hue and cry calling out the names of Owen Virgo and Timothy McIntosh as persons who had stolen his goats. He raised a hue and cry for about three hours. Nobody then responded. There

was a respite, then he resumed his hue and cry for about two hours. Still no one responded.

Undaunted, he resumed his hue and cry at day break. On this occasion he saw Virgo running down a hill towards him, armed with a machete. Williams ran towards the home of one Mr. King. He tripped and fell. Virgo caught up with him and as he lay prostrate on the ground, Virgo chopped him with the machete severing the right index finger, permanently incapacitating him in the use of his right hand.

The defence of Virgo was that he heard Williams making noise and calling on Daisy Brown, mother of Virgo and telling her to ask Timothy McIntosh to bring back the two goats. Virgo said he went out to Williams, there was some talking and matters subsided. Later, he was going to his bush when he was surrounded and attacked by Williams and his family. He Virgo had a machete which he was constrained to flash about to prevent serious injury being inflicted on him. He was hit in the eye with a stone and chopped in the head with a machete by Williams.

No complaint has been made against the learned trial judge's directions to the jury in respect of the count for Larceny of Cattle and as we ourselves found that there was ample evidence to support the count, and there was no misdirection we refused the application for leave to appeal.

With regard to count 11 for wounding with intent the ground of appeal argued before us was that:

> "The learned trial judge misdirected himself and the jury on the law applicable in respect of the issue of self defence raised by the appellant."

The learned trial judge's general direction on self defence is stated thus:

> "The law says that a man who is attacked in circumstances where he reasonably believes his life to be in danger, or that he is in danger of serious bodily injury, may use such force as on reasonable grounds he believes is necessary to prevent and resist the attack."

Relating this general direction to the particular facts of the case before him the learned trial judge said:

> "Now, there are certain elements that must be supplied in this defence of self defence. You must be satisfied of one, that there was an attack upon the accused. I just say at this stage on the prosecution's case this matter of self defence does not arise because the prosecution says, 'I was out there just bawling and making noise and this man run me down and chop me.' So on the prosecution's case no self defence arises. On the defence's case, however, he is walking to his bush; the complainant and his family, wife, two sons, attack him. So on the Defence's case this defence of self defence arises. So, as I said a while ago, first of all you must be satisfied that there was an attack upon the accused."

Later he said:

> "Remember he said that the complainant called his two sons and said 'see him here; mek we chop him up.' This is his statement, and whereupon they attacked him, chased him."

And again he said:

> "Here the evidence is that four persons are down on him with a machete. So if he uses a machete ..... he would be justified, because four persons are over him with machetes or around him. So he would be quite justified in using his machete if his story is true."

Mr. Pearson for the appellant submitted that the learned trial judge misdirected himself in his general direction on self defence because he used therein the expressly forbidden test namely 'belief on reasonable grounds' instead of 'honest belief' mandated by R. v. Solomon Beckford Privy Council, No. 9 of 1986. He submitted further

that even though the learned trial judge thereafter related the issue of self defence to the actual facts before him, this did not cure the defect in the general direction. Such defect could only be cured by a specific direction in which the learned trial judge tells the jury that the issue of self defence was to be considered not only on whether there were circumstances on which the appellant's defence of self defence could rest but additionally whether in those circumstances he could have honestly believed that he was justified in acting as he did.

R. v. Solomon Beckford (supra) has laid down a general principle that in every case of self defence the direction to the jury must be in terms of whether the accused, "honestly believed" that the circumstances were such as to make self defence lawful. It laid down that a direction in terms of whether the accused "believed on reasonable ground" that self defence was lawful is a misdirection.

We do not interpret the restatement of the concept of self defence in R. v. Solomon Beckford as rendering "reasonable grounds for belief" as irrelevant but that although it is no longer an essential element in the concept it remains an evidential factor for the jury's consideration. We are led to this view by the following statement in R. v. Solomon Beckford wherein their Lordships themselves said:

> "... where there are no reasonable grounds to hold a belief, it will surely only be in exceptional circumstances that a jury will conclude that such a belief was or might have been held."

Based on this statement, it seems to us that only in cases of mistake of fact, or where the circumstances constituting the threat of attack are such that "there was a further possibility" namely that the accused mistakenly believed that he was under attack, would a direction not emphasising "honest belief" be so defective as to be fatal to a conviction.

Thus in the normal circumstance where the facts constituting self defence are patent, a direction in terms of "belief on reasonable grounds" albeit a misdirection under R. v. Solomon Beckford (supra) will not be fatal if in fact the learned trial judge in his summation thereafter directs the jury that firstly, there are only two versions of the facts which have to be considered and that these are diametrically opposed, namely the prosecution's version on which no issue of self defence arises, and the defence version which if accepted by them would support the claim express or implied of the accused that he acted in lawful self defence; and secondly that it was for them to choose between the two versions. This view finds support from their Lordships of the Privy Council in R. v. Solomon Beckford (supra) where they said:

> "If on the facts as they appear from the summing up, the judge had left the matter to the jury on the basis of a choice between the two accounts (prosecution account and defence account), then any misdirection as to the reasonableness or otherwise of the appellant's belief would have been of only academic interest."

In the present case the learned trial judge albeit misdirecting the jury in his general direction on self defence, proceeded thereafter to put to the jury the two versions of the facts given by the crown and the defence respectively. They were told expressly that the appellant would be justified in using his machete if his story is true.

The misdirection in the general direction did not therefore result in any miscarriage of justice much less a substantial miscarriage. It was for this reason that we dismissed the appeal on March 2, 1988.