JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 78/96

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

R. V. PETER SIMPSON

Dennis Morrison, Q.C. for the Appellant

Carrington Mahoney & Mrs. Sharon George for the Crown

17th, 18th March and 5th May, 1997

FORTE, J.A.

The Appellant was tried and convicted for the offence of non-capital murder in the Home Circuit Court on the 14th June, 1996. As is mandated by law, he was sentenced to life imprisonment. The learned trial judge however ordered that he serves fifteen years imprisonment before becoming eligible for parole. This appeal comes to us by way of leave granted by a single judge. We heard arguments on the 17th and 18th March, 1997, after which the appeal was allowed, the conviction quashed and the sentence set aside. In the interests of justice, we ordered that a new trial take place in the following session of the Home Circuit Court. We now deliver the reasons for our decision, which we promised at the time.

In view of our decision, it is only necessary to set out the facts in summary form. The incident occurred on the early morning of the 1st December, 1994, when the deceased and the appellant along with the main prosecution witness Mr. Ancelle Shooter and others were at the corner of Pembroke Road and Windward Road gambling at a table. The card game was "rummy". Mr. Shooter described the manner in which the deceased came to his death. The appellant won the last game, as the game broke up immediately thereafter as a result of a quarrel between the deceased and the appellant. It appears that the quarrel was as a result of the appellant's claim that the deceased did not pay over to him $10.00 which he had won. In order to pacify things, the witness paid over $20.00 to the appellant, as payment for the deceased and himself. Nevertheless, the appellant jumped over the table to the side where the deceased was sitting, and continued to quarrel. The deceased then stood up and said "Mek sure that when we gambling again and I win that oonu have money to pay me." The witness understood this to mean that the deceased had no money to pay the gambling debt, and though the appellant knew that, he was still quarelling. In response the appellant came from behind and chucked the deceased saying "Eh bwoy, a threaten yuh a threaten me or you a bad boy." Thereafter, continuing the quarrel, the appellant was seen to "draw a long thing like a knife what fisherman use, from his waist and then stabbed 'Rommell' (the deceased) in his left chest, then Rommell ran off towards Mountain View and Peter (the appellant) ran behind him." The witness and two other men ran behind them "shouting to Peter." Both men stopped. Asked if he was stabbed, the deceased did not reply but soon collapsed on the roadway, from where he was taken to the hospital. He succumbed to his injury soon thereafter.

Later, the witness returned to the scene of the stabbing, where he retrieved the knife, which he testified was the knife which the appellant had used and which he had

seen him throw away. He took the knife to the Rockfort Police Station, where he handed it over to the police in the presence of the appellant. The appellant made no response when he (the witness) told the police "This is the knife that Peter used to stab Rommell (the deceased).

Dr. Codrington testified as to the results of the postmortem examination done on the body of the deceased. She found a stab wound to the left side of the chest, measuring two centimetres in length and which was located nine centimetres from the midline of the body and eight centimetres above the left breast. Internally, the left lung was partially collapsed and showed a wound 1.2 centimetres long on the anterior aspect of the upper lobe, close to the midline. There was also a wound to the right ventricle of the heart. The stab wound which was downwards and towards the midline was the cause of the internal injuries. Death was due to "haemorrhage, shock or blood loss complicating a stab wound to the chest injury to the left lung and heart". A sharp instrument, such as the knife exhibited could with moderate degree of force cause the injury to the deceased.

The appellant in his defence, gave sworn testimony in which, he related that he was playing the card game with the deceased and the witness Shooter. He was winning and started taking up the money "in front of me." The deceased asked "if is done me done". He then stated that Shooter (the prosecution witness) took out a knife from his waist, and both he and the deceased were coming towards him. He then heard someone say, "A idiot thing that. Leave the man alone. You cant want to rob the man. A unnoo invite the man to the game." Both men were still advancing on him. He struck a blow with his fist to the face of the deceased and shove him away and then ran down Windward Road. On seeing a police jeep, he stopped it and made a report to the

police, and asked for assistance. He then looked towards where the incident occurred, and saw the deceased lying on the ground.

The appellant's defence, though denying that he had the knife and that he deliberately stabbed the deceased, amounted inter alia to one of self defence, because his actions were the result of the imminent and dangerous attack being made upon him by the deceased and Shooter.

It is on that background that the ground of appeal which in our view, was unanswerable, had to be determined. It reads:

> "That the learned trial judge erred in his directions to the jury on the question of self-defence, with regard in particular to the burden of proof on a plea of self-defence."

After directing the jury that the prosecution must prove "that the killing was unprovoked, and must prove also that the killing was not done in self-defence," the learned trial judge proceeded to define self-defence, in a manner which was not totally accurate, but which does not call for our comments, as the complaint by Mr. Morrison in his ground of appeal was sufficient to dispose of the appeal. The passage complained of reads:

> "... and the Prosecution must prove - not the Prosecution - the accused man must satisfy you that he honestly believed that the force used by him was necessary to prevent or resist this attack when he says it was imminent on him."

These directions are patently incorrect, and clearly indicated to the jury that the defence had a burden of proving some element of self-defence. It was argued for the appellant that the general directions given by the learned trial judge in respect to the burden of proof on self-defence would have cured the earlier misdirection given by the learned trial judge. He relied not only on the passage earlier cited but also on the following:

> "We ask you to consider all the evidence, and if you are left in doubt as to whether the killing may have been done in self defence, the proper verdict would be one of not guilty."

While these general directions are correct they do not speak to the specific element of self-defence which the incorrect passage addresses i.e. the appellant's honest belief that the force used by him was necessary to prevent or resist the attack.

In addition, the learned trial judge did not at any time in his summing-up withdraw that statement from the jury by indicating that it was incorrect and that they should disabuse their minds of it. In those circumstances the jury would have relied upon this incorrect statement of the law in their deliberation as to guilt.

We found support for this view in the following passage in the 2nd Edition of "Criminal Evidence" by Richard May at para. 3 - 04 which was cited by Mr. Morrison and which reads as follows:

> "Every jury must be directed upon the burden of proof. Nothing should be said which detracts from the principle that the burden of proof rests with the prosecution. Any misdirection by the judge in the course of his summing-up to the effect that the defendant bears an onus when he does not, must be put right in the plainest possible terms."

For this statement, the author correctly relies on the following dicta of Salmon, L.J. in **R. v. Moon** [1969] 1 WLR 1705 at 1707:

> "It would be necessary ... to repeat the direction which he had given, to acknowledge that that direction was quite wrong, to tell the jury to put out of their minds all that they had heard from him relating to self defence up to that moment about the burden of proof and then in clear terms, which would be incapable of being misunderstood, tell them very plainly and simply what the law is."

In the instant case, the learned trial judge was about to tell them that the burden was on the "prosecution" but "corrected" himself and was thereafter quite definite in

telling the jury that the burden of proof was on the defence. That, in our opinion aggravated the error which he made. The error was never withdrawn from the jury and consequently, we cannot conclude that they did not rely upon that incorrect principle in arriving at their conclusion. For these reasons the conviction could not stand, and consequently we made the order to which we have already referred.

Mr. Mahoney in seeking to have the Court apply the proviso to Section 14(1) of the Judicature (Appellate Jurisdiction) Act, relied on the decision of this Court in **R. v. Cyril Barton and Winston Barton** SCCA 97 and 98/95 delivered on the 20th December, 1996 (unreported) in which the proviso was invoked in a case where there was a misdirection on the burden of proof in self-defence. In that case, the ratio decidendi for applying the proviso appears at page 13 of the judgment where Gordon, J.A. delivering the majority verdict stated:

> "... when the prosecution case is overwhelming there should be no new trial but an application of the proviso dismissing the appeal.
> The injuries inflicted on the deceased in this case are 'far greater than could conceivably have been necessary.' Self-defence cannot avail the appellants. A misdirection on self-defence cannot affect the justice of the case."

The instant case is quite different. The appellant alleged that the deceased and another was advancing upon him. The question then of his honest belief as to the force he had to use in the circumstances was a matter of utmost relevance to the issues that the jury would have to determine. There was only one stab-wound and consequently it could not be said that his actions went beyond what could be determined as self-defence. In our view the misdirection was a vital issue in the case and consequently, we could not say that the jury properly directed, would nevertheless

have convicted. The result must be therefore, that a new trial be ordered. And so we did.