JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 36 of 1970

BEFORE: The Hon. Mr. Justice Shelley, Presiding
The Hon. Mr. Justice Luckhoo J.A.
The Hon. Mr. Justice Smith J.A. (ag.).

REGINA v. SIMEON ARCHER

Mr. V.O. Blake Q.C. and Mr. Eric Chambers for applicant

Mr. C.B. Orr and Mr. Courtney Orr for Crown

24th and 25th June, 1970
31st July, 1970
25th September, 1970

SHELLEY J.A.

The applicant was indicted for the murder of Clyde Sealy on the 25th day of May or on the 26th day of May, 1969 in the parish of St. Ann. He was tried in the St. Mary Circuit Court and was convicted on the 20th March, 1970, of Manslaughter.

Clyde Sealy was a seaman. The applicant was the proprietor of Alcazar Club at Discovery Bay in St. Ann. On the night of the 25th May 1969 the applicant shot Clyde Sealy with a revolver at the Club. Sealy died subsequently in the St. Ann's Bay Hospital.

Sealy together with Delroy Anderson and Evan Allen had gone to the bar of the club and had drinks. Sealy tendered a United States bill to the barmaid in payment for the drinks. She brought him change. He claimed he had given her a $10 bill whereas she had brought him change from $1 and she insisted that the money he had tendered was a $1 bill. The cashier became involved in this dispute; she eventually left the bar and the applicant himself entered the bar and went in front of the cash register on the private side of the counter. The cashier made a report to him and Sealy insisted that he had tendered a $10 bill. The applicant checked the cash register and informed Sealy that there was no cash over. Sealy insisted on having change from $10 and the applicant insisted there was no excess cash in the register and then the trouble really began.

Around the cash register was a metal grill. Overhead a lamp

cord was suspended from the ceiling. At the end of the events that night the cash register, the lamp cord and the grill were on the floor of the club. Various accounts were given of how they got there. One witness said the applicant backed into the cash register and shoved it off its stand. Another witness said Sealy shoved it off in lunging forward immediately he was shot. For present purposes however, this is not important. The evidence that Sealy caused the cash register to fall on the floor would have been very relevant to the defence of provocation. That, however, no longer arises as provocation was withdrawn from the jury and the verdict of manslaughter must undoubtedly have been found on the use of excessive force in self defence. It is the evidence as to what, if anything, Sealy did with the grill which is of paramount importance; it is what attack, if any, did Sealy make upon the applicant that is really important in the case.

According to Anderson, Sealy was doing nothing when the applicant shot him. Allen said much the same thing, and he thought that the applicant showed signs of acute displeasure before he drew his revolver and shot Sealy. Two other eye witnesses testified. One, Jack Sutherland, said that he saw Sealy pat the applicant twice on his shoulder whilst he was repeating his request for change and thereafter the applicant drew his revolver and shot him. In cross examination he admitted that Sealy shook the metal grill but denied that he did anything more with it. Leonard Bailey, the other eye witness, said that the deceased demanded and was refused his change some six or seven times and nearly every time that it was refused he shook the metal grill; that he was leaning forward with his hands resting on the cash register stand and the grill, and was shot in that position. Police Constable Roy Williams was on the premises; he was in the dance hall adjoining the bar. He heard the gun shot and went to the bar. He saw the applicant standing behind the stand on which the cash register had rested, a gun in his hand, and Sealy standing on the other side of the stand facing the applicant. He asked the applicant what had happened. He replied "This man had a dispute with the barmaid over some change, started to mash up my place and attacked me with a bottle and I shot him." This is the first bit of evidence which introduced an allegation of an attack upon the applicant. Williams denied

that the applicant told him that Sealy had attacked him with the grill. In his unsworn statement from the dock the applicant said what he told Williams was that Sealy and the barmaid had a dispute over change, and that Sealy had started mashing up his place and attacked him with the iron grill. The Crown also introduced evidence of another statement made by the applicant to Detective Joscelyn Bailey at Brown's Town Police Station some time after 6.30 in the morning of the 26th of May. Detective Bailey told the applicant that he was investigating a case of fatal shooting at the Alcazar Club and the applicant made the following statement -

> "At about 11.00 p.m. I was at the club and my niece was the cashier. Lorna Allen came and told me that she and a sailor had a dispute over change. I went with her to the club and I saw the deceased who told me that he tendered a $10 bill for drinks and he want his change and cannot get it. I went to where the cash register was, checked the money in the cash register, checked the slip of the cash register and I found them to be correct. The deceased held on to the grill around the cash register and shook it and said he want his change. Deceased then broke down the light, bounced off the cash register, broke off the mesh wire, hit at me with the mesh wire. I slipped it. He held it to hit at me again and I fired a shot from my revolver. He dropped the mesh wire and ran outside. The police came and I handed over my revolver to Constable Roy Williams. After the police left they started throwing stones, broke up my place and mashed my car. I called the police and on their arrival the stone and the bottle throwing ceased. I went in my car and left Runaway Bay for Brown's Town."

Detective Bailey and the applicant then proceeded to the club. They went to the bar. The applicant said:-

> "See where the cash register was and see where me was standing. Me never have anywhere to go."

At the trial the applicant said from the dock -

> "I have nothing to add to the statement which I gave to Detective Bailey on the morning of the 26th of May 1969. I told Constable Williams when he came to the bar that night that Sealy and the barmaid had a dispute over change and that Sealy start mashing up my place and attack me with the iron grill. When I said this to the Constable I pointed out the grill to him."

He went on to show that Leonard Bailey had malice for him, he spoke of the slip which was taken from the cash register and then made this statement:-

> "If I wasn't attacked by Sealy that night and my life was in danger, I would not have fired."

There was evidence from Detective Joscelyn Bailey that the grill weighed 7½ lbs. The grill itself was exhibited in evidence, so the jury could judge for themselves just how lethal it could be. Dr. Noel Black expressed the opinion that a blow to the head with that grill could have caused serious injury.

The jury retired for two hours and fifteen minutes, then delivered a verdict of not guilty of murder and told the court that they were divided 7 to 5 on the issue of manslaughter. The learned judge asked the foreman whether the jury needed any further assistance on any particular point. He said "Yes, self defence and provocation." The judge gave further directions on self defence and provocation. Crown Counsel raised the question whether the issue of provocation was still alive having regard to the verdict of not guilty of murder. The judge considered this and withdrew provocation from the jury, leaving to them only the issue of self defence. After retiring for a further thirteen minutes the jury returned a unanimous verdict of guilty of manslaughter.

Learned counsel for the applicant contended that

> "The learned trial judge both before the retirement of the jury and after they returned and asked for further directions, so confused the issue of self defence and provocation and the evidence relevant thereto as to render it impossible for the jury to appreciate that if they accepted the case for the defence in its entirety, it was not open to them to find the appellant guilty of manslaughter on the ground of provocation."

With the greatest respect, we do not think that this contention is tenable because provocation was unequivocally withdrawn from the jury.

Two other grounds were taken together in support of the application, namely:-

> (1) there was no evidence in the case that the appellant had used excessive force in the defence of himself and this issue should not have been left to the jury; and

(2) the verdict of the jury is explicable only on the hypothesis that the appellant was guilty of manslaughter on his defence. Such a finding is unreasonable having regard to all the relevant evidence.

We do not agree that the question whether excessive force had been used by the applicant in defence of himself should not have been left to the jury; but what we are gravely concerned about is whether it was brought home to the jury that depending upon what facts they found, the question of excessive force might be irrelevant. In Reg. v. Lloyd Clive Bartley, Supreme Court Criminal Appeal No. 59 of 1969, judgment delivered on the 14th November, 1969, Waddington, J.A. said:-

> "In our view there are important distinctions between cases of killing in self defence in circumstances where, if established, the homicide would be excusable, and cases of killing in the course of defending one's person or property from the commission of a forcible and atrocious crime in which if the defence is established the homicide would be justifiable. One distinction is that there is generally a duty to retreat in the former case, but in the latter case, there is no such duty. Another distinction is that in the former case the degree of force used in repelling the attack must be proportionate to the seriousness of the attack and the danger to the person attacked. In the latter case, if the intent to commit the forcible and atrocious crime is clearly manifested and there is an honest belief based on reasonable grounds that the commission of the crime can only be prevented by killing the assailant the degree of force used in repelling the attack is generally irrelevant (1 Hale 484)"

The jury were clearly told that they had to decide whether Sealy attacked the applicant. Next they ought to have been told that if they found there was such an attack they had to decide the nature and extent of it. Was it, either because of its ferocity, or the nature of the instrument used, or both, such an attack as could be and was reasonably regarded by the applicant as an attempt to commit a forcible and atrocious crime? Next they ought to have been told that if they found that there was an attack of that degree then both the questions of retreat and of the degree of force used to repel the attack were irrelevant if the applicant had an honest belief that the commission of the crime could only have been

prevented by shooting Sealy. If they so found or were left in reasonable doubt then the defendant was entitled to be acquitted.

The learned trial judge was careful to repeat his directions on self-defence. On each occasion it was, if not in exact words certainly in effect, the same as the following which he gave in the earlier stages of his summing up:-

> "I now deal with the defence of self-defence. If a man attacks another that other is entitled to defend himself. The authorities establish that for the prevention of, or the defence of himself or any other person against the commission of a felony, where the felon so acts to give him reasonable grounds that he intends to accomplish his purpose by open force, a person may justify the infliction of death or bodily harm provided that he inflicts no greater injury than he in good faith might in the circumstances reasonably believe to be necessary for his protection, and that in such cases he is under no duty to retreat but may stand his ground and repel force by force. That is to say in those circumstances there is no obligation to retreat.
>
> In passing, members of the jury, I must also tell you that the party whose person or property is attacked is not obliged to retreat but may even pursue the assailant until he finds himself or his property out of danger. If, however, the attack is not felonious a person must, if possible, retreat and can only be excused for wounding or injuring the assailant by resistance if it were no longer possible for him to withdraw in safety.
>
> If you accept, members of the jury, that there was in the circumstances of this case a manifest intention in the deceased man to commit a forcible felony upon the accused there would be no duty to retreat, but the accused may stand his ground, provided he inflicts no greater injury than he in good faith might in the circumstances reasonably believe to be necessary for his protection. So, members of the jury, when you examine the evidence and see what you find, you ask yourselves the question, was there an attack on the accused man by the deceased man, and in all the circumstances was it such as to cause the accused to fear serious bodily injury, or for his safety, and so to act in the manner he did with the revolver? "

This direction in some places undoubtedly suggested that whatever the nature of the attack may have been the question of the use of excessive

force to repel it was a relevant consideration.

This was a case which called for a clear direction on the distinctions between killing by use of excessive force in self defence attracting a verdict of manslaughter and justifiable homicide resulting in acquittal. The jury did not have the benefit of such a clear direction. They were clearly directed that in some circumstances there may be no duty to retreat but were not clearly told that if they found that Sealy attacked the applicant with the grill and caused him reasonably to fear that a forcible and atrocious crime was about to be committed upon him and that he shot to prevent the commission of such a crime he would not be guilty of any offence.

We regret that we are unable to say that as things went in this case had they been properly directed the jury must inevitably have come to the same conclusion.

For these reasons we allowed the appeal and quashed the conviction.