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JAMAICA

IN THE COURT OF APPEAL
CIRCUIT COURT CR. APPEAL NO. 36/63

Before: The Hon. Mr. Justice Lewis - Presiding
The Hon. Mr. Justice Duffus
The Hon. Mr. Justice Henriques

REGINA vs. JOSCELYN SHAW

Mr. Geoffrey Ramsay for the Appellant

Mr. Lloyd Barnett for the Crown.

July, 18, 19, 22, Sept. 23 1963.

MR. JUSTICE LEWIS:

At the conclusion of the hearing of this appeal on the 22nd of July, 1963, the Court allowed the appeal, quashed the conviction and set aside the sentences. We now give our reasons for so doing.

The appellant was convicted in the Home Circuit Court on the 22nd of February, 1963, on two counts of an indictment charging him with shooting with intent to cause grievous bodily harm and wounding with intent to cause grievous bodily harm. He was sentenced to three years imprisonment with hard labour on each count, the sentences to run concurrently.

The case for the prosecution was that at about 1.30 p.m. on the 17th of May, 1962, one Nash, a Rastafarian, was standing on the Spanish Town Road in the area of Back-o-wall when the appellant came up, tried to pick a quarrel with him and took up a large stone and struck him with it; that Nash returned the blow with the same stone, striking the appellant what proved to be a serious blow and which according to the medical evidence fractured his left eleventh rib and ruptured his spleen. There were discrepancies in the evidence of the prosecution witnesses as to the immediate effect of the blow upon the appellant and the exact sequence of events after he received this blow. The sum of their evidence was that the appellant appeared to be in pain; that Nash went behind a truck where there was rubbish

and re-appeared with a stone and a coconut husk, and that the appellant then took a gun out of his pocket and fired it at him wounding him on the shin.

The appellant's story, which was denied by the prosecution witnesses, was that he had been attacked by a hostile crowd of about twenty persons who accused him of being a police informer and urged Nash to assault him, that Nash struck him with a stone causing him to bend over in severe pain; that on looking up he saw the crowd advancing upon him threatening to kill him; that when they were about five yards away from him, believing that they were about to kill or injure him further, he took out his gun and fired a shot downwards with the intention of scaring them. He denied having struck Nash with a stone or having wounded him with the intent charged in the indictment.

The defence was therefore one of self-defence and it is with respect to the Judge's summing-up on this part of the case that complaint is made in the grounds of appeal. The first ground is that the learned Trial Judge's directions were inadequate in that nowhere in his summing-up did he tell the jury that if on consideration of all the evidence in the case they were in doubt as to whether the appellant was acting in self-defence it was their duty to acquit him. It was urged that while at the commencement of his summing-up the learned trial judge gave the usual general directions as to burden of proof he did not either in relation to his directions on self-defence or when he came to deal with the appellant's evidence tell the jury that if they were left in doubt whether the appellant may not have acted in self-defence they should acquit him.

In his general directions, the learned judge told the jury that if they accepted the appellant's story they should acquit him, but if they rejected it they should then consider whether the prosecution had satisfied them of his guilt beyond reasonable doubt. He also told them that before they could convict the appellant on either count they must be sure of his guilt. Later, in dealing

with self-defence he said, -

> " If the evidence indicates that there was room for self-defence then that would render the act of the accused justifiable and you would therefore be entitled to give your verdict of not guilty."

and later -

> " I have told you if self-defence is established then the accused man is entitled to your verdict of not guilty. Bear this also in mind, that the burden of proving self-defence does not lie on the defence, it is for the prosecution to present to you a case in which there is no room for self-defence, that is to say, a case without self-defence."

Mr. Barnett for the Crown submitted that taking the summing-up as a whole the jury could not have failed to understand that the burden of negativing self-defence lay upon the prosecution and that if they were in doubt whether self-defence was established they should acquit the appellant. We have no doubt that this is what the learned judge intended to convey, although, as Mr. Barnett conceded, the phraseology which he used is open to some criticism in that it does not expressly cover the middle position of doubt.

There is no set formula for directing a jury on the onus of proof or the standard of proof and a trial judge, so long as he deals adequately with these matters and does not misdirect the jury in law or in fact must be left to sum up a case in his own way. We do not think that the jury were likely to be misled by the learned judge's directions on this point and we would not have interfered with the conviction on this ground alone. We think it desirable, however, to re-state the principle which has been laid down in a number of cases, notably in Woolmington v. D.P.P. (1935) A.C. 462, namely, that where an accused person gives an explanation consistent with innocence of how the act with which he is charged occurred, if the jury are either satisfied with his explanation or upon a review of all the evidence are left in reasonable doubt whether, even if, his explanation is not accepted, it may reasonably be true, the accused is entitled to be acquitted. In relation to the defence of self-defence, this means that if the jury on the whole of the

evidence, taking into account the explanation given by the accused, are left in reasonable doubt as to whether the act may not have been done in necessary self-defence, they should find the accused not guilty. A convenient method of directing the jury in cases of self-defence was given in R. v. Lobell 41 C.A.R. 100. Failure to give a clear direction to the jury to this effect may amount to a misdirection and result in the conviction being quashed.

The second ground of appeal was that the learned judge failed to direct the jury that if they found that a forcible felony was being committed on the appellant in or near a highway the appellant was not obliged to retreat as in other cases of self-defence but might even pursue his assailant until he found himself out of danger. It was submitted that if the appellant, having received grievous injury on the Spanish Town Road, on seeing the crowd advancing upon him and threatening to kill him, had reasonable ground for apprehending that he was in imminent danger of death or of further serious injury, he was under no duty to retreat but was entitled to use reasonable force repel the attack. Counsel relied upon the statement in Archbold, 35th edition, para, 2512 and the authorities there cited.

It is correct that in his directions on the law of self-defence, the learned judge in dealing with the duty to retreat, made no distinction between attacks involving forcible felonies and other attacks. In formulating his directions he appears to have had in mind the statement of the law as set out in Archbold 35th edition para. 2496. There, the learned author refers to the cases of an assailant being killed where "two men fight upon a sudden quarrel" and "where one man attacks another", and states:-

> " But, in either of these cases, to shew that it was homicide in self-defence, it must appear that the party killing had retreated either as far as he could, by reason of some wall, ditch or other impediment, or as far as the fierceness of the assault would permit him. (1 Hale 481, 483)".

But in para. 2512 Archbold deals specifically with defence of person or property against felonious attacks and states the law thus:

> " If any person attempts to rob or murder another in or near the highway (R. v. Hall, 9 C. & P. 22) or in a dwelling-house, or attempts burglariously to break into a dwelling-house in the night-time, and is killed in the attempt, the slayer is entitled to acquittal, for the homicide is justifiable, and the killing is without felony."

The authorities cited for this proposition are The Offences against the Person Act, 1861, s. 7 and 1 Hale 481, 482. The learned author continues:

> " The same rules applies where a man is killed in attempting ..... (arson, rape, housebreaking) ..... or to commit any other forcible and atrocious crime: Bracton, Fl. Cor. 155; Fost. 273; 1 Hale 484; Fost. 274;
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> " The above rule, however, does not extend to felonies without force, such as picking pockets, 1 Hale 488, nor to misdemeanors of any kind; and even in cases within the rule it must be proved that the intent to commit such forcible and atrocious crime was clearly manifested by the felon, 1 Hale 484, otherwise the homicide will be manslaughter at least, if not murder ..... in cases within the rule, it may be necessary to observe that the party whose person or property is attacked is not obliged to retreat, as in other cases of self-defence, but may even pursue the assailant until he finds himself or his property out of danger: 1 East P.C. 27: Fost. 273."

Archbold also refers to an American authority, Aldrich v. Wright 53 New Hampshire 398, but unfortunately the Court has been unable to obtain a report of this case.

Mr. Barnett submitted that the distinction thus made by Archbold between felonious attacks with force and other attacks with respect to the duty to retreat was not supported by the authorities cited. There was, he said, no case in which the decision that use of a deadly weapon was justified had been based upon this ground. The rules as to self-defence, whether against forcible felonies or otherwise were, he submitted, based upon the principle of necessity to protect oneself by reasonable methods and the use of force was lawful if necessary but its

justification was limited by the necessities of the occasion: If either retreat or resort to a weapon lesser than/deadly weapon was practicable then resort to a deadly weapon was unlawful since the circumstances would not give rise to a compelling necessity to act in that way. The only case, he submitted, in which the probabilities of retreat were not to be taken into account in assessing the reasonableness of resort to a deadly weapon was where a person was attacked in his own house. (See R. v. Mancey 18 Cr. App. R. 160.) Otherwise, there was in all cases a duty to retreat before resorting to the use of a deadly weapon where this was practicable.

If Foster's Crown Cases, after drawing a distinction between justifiable self-defence and excusable self-defence, the learned author states:-

> " In the case of justifiable self-defence the injured party may repel force by force in defence of his person, habitation, or property, against one who manifestly intendeth and endeavoureth by violence or surprise to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if in a conflict between them he happeneth to kill, such killing is justifiable."

For this proposition, Foster cites as his authority, Mawgridge's case (1706) Kel (J) 119 at page 128, 129 (84 E.R. 1107) and 1 Hale at. sec. Mawgridge, on words of anger, threw a bottle with great force at Cope's head and immediately drew his sword, upon which Cope returned the bottle with equal violence. It was held that this was lawful and justifiable on the part of Cope, for, said Lord Holt, 'he that hath manifested that he hath malice against another is not fit to be trusted with a dangerous weapon in his hand.' At page 247, Foster gives a number of illustrations of this rule and states, inter alia:-

> " Where a known felony is attempted upon the person, be it to rob or murder, here the party assaulted may repel force by force; and even his servant then attendant on him, or any other person present may interpose for preventing mischief; and if death ensueth, the party so interposing will be justified."

The law is stated to the same effect in Coke 3rd Inst. 56 1 Hale P.C. 486- 7 and 1 East P.C. 271-274.

Turning to more modern authors the learned author of Russell on Crime, eleventh edition, discusses the statements of the law in the older authorities and points out that the true historical basis for the distinction between justifiable homicide in self-defence and excusable homicide (by misadventure or in self-defence) was that in the latter cases the homicide had to be compensated; over the centuries the harshness of this strict liability for compensation was alleviated by the expedient of the royal pardon. He then states, at page 492:-

> " There is however, still a substantial difference in cases where death has been inflicted in self-defence; for if the attack resisted is a felonious one then the victim of it may stand his ground and kill with impunity, so long as the means of resistance which he employs are held to be reasonable in the circumstances. If, however, the attack is not felonious then the victim must if possible retreat, and can only be excused for a death caused by resistance if it was no longer possible for him to withdraw in safety."

In Stephen's Digest of the Criminal Law, 9th edition, articles 304-305, the same distinction is recognised.See also per Lord Goddard in R.v. Semini (1949) 1 All E.R. 233 at p. 234 discussing "chance medley".

The Court sees no reason to doubt the accuracy of the statements of the law on this point as expounded in Foster and summarised in Archbold. In our opinion the authorities referred to above 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 as to give him reasonable ground to believe 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 that he in good faith might in the circumstances reasonably believe to be necessary for his protection; and that in such case he is under no duty to retreat but may stand his ground and repel force by force. Put shortly, a person thus attacked may justify the use of necessary force, if unavoidable, in self-defence, but he is under no obligation to retreat.

In the instant case, the appellant said that he fired the shot at a moment when a crowd of about twenty persons, one of whom had already inflicted a serious unprovoked injury upon him, was advancing upon him uttering threats to kill him. If the jury accepted that there was in these circumstances a manifest intention to commit a forcible felony upon the appellant there would be in law no duty to retreat. It is true that the learned judge told the jury that if they accepted the appellant's story he was entitled to be acquitted, but he at the same time told them that the law of self-defence as he had earlier stated it applied to that story; and in that statement he had stressed that there was a duty to retreat unless the appellant was prevented by the severity of the attack or by any ditch or wall. The minds of the jury were therefore never directed to this aspect of the law as it related to the appellant's defence.

Further, the learned judge unfortunately failed to tell the jury that the law of self-defence would apply equally, whether they found that the appellant was in fact in danger of serious injury or that he honestly believed and had reasonable grounds for believing that he was in danger of such injury and that his act was necessary for his defence. Learned Counsel for the Crown conceded that this direction should have been given. The cases of R.v. Weston 14 Cox 346 and R. V. Rose 17 Cox 540 are authority for this proposition. This very point was taken on behalf of the appellant on appeal against his conviction on the first trial of the same indictment. See R. v. Shaw (1963) 3 W.L.R. 212. Duffus JA, delivering the judgment of the Court said, at p. 214:

> " It seems to us in the circumstances of this case that the learned judge should have assisted the jury by informing them that if there was reasonable apprehension of violence that the appellant might very well have been justified in using a firearm even though there was no evidence that any member of the hostile crowd was armed with an offensive weapon."

In our judgment the omissions referred to above amounted to serious misdirections. We are unable to say that the jury, if properly directed, must have come to the same conclusion. For these reasons, we allowed the appeal, quashed the conviction and set aside the sentences. This conviction followed a retrial of the appellant on the same indictment and we were of opinion that the interests of justice did not require us to order a third trial.

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