JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 139 of 1991

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (Ag.)

REGINA
vs.
ALVA NUGENT

Earl Witter for the applicant

Miss Cheryl Richards for the Crown

July 27, 28 and September 29, 1992

MORGAN, J.A.:

This is an application by Alva Nugent for leave to appeal his conviction and sentence for the offence of wounding one Clive Nelson with intent to do him grievous bodily harm. The matter was heard at the St. Mary Circuit Court on the 20th May, 1991, before Panton, J. and a jury and the applicant was sentenced to seven years imprisonment at hard labour. The application was heard on the 27th and 28th July when the application against conviction was refused and leave to appeal against sentence was granted. Sentence imposed was set aside and a sentence of five years substituted. We promised to put our reasons for so doing in writing, and this we now do.

The facts can be simply set out. Mr. Nelson and the applicant are cousins and both cultivate farms but the applicant also rear goats. For some time Mr. Nelson had been bothered by the presence of the applicant's goats trespassing on his farm, eating and destroying his crops. Unable to control this nuisance, he cut the throat of one of the goats and on his way home informed the applicant of this act. The applicant showed disinterest so Mr. Nelson continued to his home. While Mr. Nelson stood in

his yard, however, the applicant came and suddenly dealt him four chops with his machete repeating, "This for the goat, this for the farm." He also said that he was going to leave Mr. Nelson for "John Crow to eat him." Mr. Nelson was unarmed and received severe injuries to both hands.

The applicant in an unsworn statement said that he saw Mr. Nelson pulling his dead goat and that Nelson threatened to "kill him like the goat" anywhere he caught him. The applicant further said that he was on his way to the Police Station and because of the threats he had received he took his machete with him. On reaching Mr. Nelson's yard, Mr. Nelson ran out with a machete and a knife to injure him and he had to chop Mr. Nelson to protect himself.

His primary defence was that of self-defence.

Mr. Witter filed four grounds of appeal. In Ground 1 he complained that the directions on self-defence were inadequate, his thrust being the directions the learned trial judge gave on the use of "excessive force" and further or alternatively that the judge's concentration on the rival versions of the parties obscured the question of the use of excessive force.

Grounds 2 and 3 can be conveniently taken together as they attacked the learned trial judge's analysis of the evidence as misleading, in particular that he failed to direct the minds of the jurors to the individual injuries and/or any reasonable inferences that could be drawn from the manner of their inflictions e.g. that the applicant's response to perceived danger was not excessive.

As to the first complaint, Mr. Witter points to the fact that the following directions were omitted:

> "...a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. ...in a moment of unexpected anguish (the Applicant) had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken."

These views of the defence of self-defence were expressed by Lord Morris of Borth-Y-Gest in R. v. Palmer (1971) C.A.R. pp. 223, 242.

The learned trial judge, in dealing with the question of excessive force, had this to say at page 7 of the transcript:

> "At the same time, Mr. Foreman and Members of the jury, I should tell you that where excessive force is used, the act would not have been done in self-defence. In deciding this question of self-defence, you have to consider the extent and the nature of the force used on the accused and the force used by him to repel it. As I say, if excessive force was used, that would not be self-defence. In deciding whether it was necessary to have used as much force as in fact was used, regard has to be had to all the circumstances that existed at the time."

Again at page 12 in his directions as to the verdicts open to them he reminded them of the applicant's statement that he was attacked and said:

> "...if you have any doubt about this little area of the case, not guilty would be the verdict, because if Mr. Nelson is on his way out of his yard to attack or to even give Mr. Nugent the impression that he was going to attack him, Mr. Nugent would be well within his rights to use his one machete and inflict whatever injury necessary to protect himself, even kill him, and he told you that in his defence, he had to chop him and after he chopped him he just left and went to the station."

In this case self-defence was raised by the defence. It was art of the defence case that both parties had a machete, albeit the injured man was, in audition, armed with a knife. The applicant said that he was under attack and they were equally armed.

Mr. Witter relied on Regina vs. Clovis Burton (1987) S.C.C.A. 33/86 dated 18th February, 1987 (unreported) to support his point, as in that case Carey, J.A. recommended the use by judges of the directions in Palmer's case (supra) and relied on by counsel. In Burton's case, however, the parties were unequally though lethally armed and on the facts of that case,

unlike this, both admitted being armed thus the crux of the case for the defence was whether excessive force was used in the circumstances. Again in **Regina vs. Shannon** (1980) 71 Cr. App. R. 192, referred to by Mr. Witter, the applicant was armed with a pair of scissors whereas the deceased was a powerful man but unarmed. Again, the matter was decided solely on whether more force was used than was reasonably necessary in the circumstances. In this matter the case for the Crown is that Mr. Nelson was unarmed.

It is, therefore, our view that in the particular circumstances of this case the directions given by the learned trial judge were both appropriate and adequate.

Mr. Witter sought to reinforce his point by submitting that the learned trial judge's concentration of the rival versions would tend to encourage the jurors to take the view that once they made a choice their task would be completed.

This is what the learned trial judge said at page 8:

> "You bear in mind that you can only convict the accused man if you believe Nelson and if you reject Nugent's statement."

Also at page 12:

> "If you believe Nelson, and disbelieve the accused, the verdict, guilty. If you have doubts about the credibility of Nelson, not guilty. If you believe the accused, not guilty. You remember the case rests on the creadibility of Nelson. If you believe him, guilty. If you don't believe him, not guilty, in doubt about him, not guilty."

It needs no reiteration that it is the duty of the Crown to prove its case and in any case where self-defence arises it is the duty of the Crown to disprove it. In this case the issue of self-defence rested on Nelson, as he was the only Crown witness as to facts, whether he had satisfied the jurors so that they felt sure that he was speaking the truth thereby disproving the fact that he was the attacker and the applicant the defender. Once they believed Nelson then self-defence became a non-issue and the element of "use of excessive force" would be irrelevant.

That was the thrust of the directions of the learned trial judge and it cannot be faulted.

Counsel's next complaint was that the learned trial judge failed to remind the jurors of the injuries, their severity and alert them to possible inferences to be drawn. Counsel cited as an example:

> "...that if the most severe of the injuries was to the right hand and/or was the last to be inflicted, the circumstances would support the inferences, variously that the Complainant was armed and/or that the Applicant's response to perceived dangers was not excessive."

The learned trial judge spoke of "inference" thus (p.3):

> "Now, under our system of law, I have to tell you that having ascertained those facts which have been proved to your satisfaction, you as jurors, are entitled to draw reasonable inference from those facts, to assist you in arriving at a decision."

This was sufficient, in our view, for the jurors to find that the only reasonable inference was that the severity of the injuries to the right hand was consistent with an unarmed man holding up his hand in a position to catch the instrument or thwart a blow.

The learned trial judge explained that he did not intend to repeat the evidence in detail, the case was simple, short, having one only witness on each side as to facts, and the hearing completed by 3:00 p.m. of the same day. There was one live issue which was that of self-defence and the facts, he noted, were fresh in their minds. Mr. Witter conceded it was a short case and it was unnecessary for the learned trial judge to recount all the evidence save the injuries.

We are of the view that, in the circumstances of this case, there was no necessity to recount the injuries in detail. The jurors were present, they saw and heard the evidence of the injuries and listened to addresses from both Counsel. We are, therefore, unable to see how a failure in this regard becomes misleading.

There is no merit in any of the grounds. It was a straightforward and simple case where the sole issue was that of self-defence. The learned trial judge carefully and adequately explained the law to the jurors in his directions and left all the available verdicts open to them in an equally simple manner. It was a question of who they believed having seen and heard both witnesses. There is nothing to be disturbed and we refused the application.

Finally, Counsel complained that the sentence was manifestly excessive. The evidence of character in respect of the applicant was very good and the learned trial judge indicated he accepted it. The evidence showed that he was a young man of twenty-two years with no previous conviction. He was industrious, illiterate, and, as the evidence showed, unlike the young men of today he farmed and reared goats. His cultivation was chopped down and his goat killed by the victim - his own cousin - and he was thus deprived of his livelihood. He was hardworking, quiet, and as the judge accepted, a simpleton. The clear inference on the facts is that he was seriously provoked and he reacted.

The learned trial judge, in sentencing him, took note of the prevalence of the offence and said that the sentence was one that would be a warning to other young men who would want to "flash machetes". He then referred to the applicant as of a "violent nature" - slightly in contrast to his acceptance of the applicant as "quiet" and a "simpleton".

In all the circumstances of the case, it was not a matter, in our view, in which the sentence need be punitive, and, taking everything into consideration, the applicant could be unfairly regarded as of a general violent nature.

It is our opinion, based on these factors and the character evidence, that the applicant is a person capable of rehabilitation and accordingly the sentence was set aside and instead a sentence of five years imprisonment at hard labour substituted to commence on 20th February, 1992.