JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 33/86

BEFORE: The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.

R E G I N A

v.

CLOVIS BURTON

W.B. Frankson, Q.C., & A.B. Stewart Stephenson for applicant

Miss Heather Dawn Hylton for Crown

2nd & 18th February, 1987

CAREY, J.A.:

In the St. Thomas Circuit Court at Morant Bay on 21st March, 1986 before Morgan, J., and a jury, the applicant was convicted on an indictment charging him with wounding one William Murphy with intent and sentenced to pay a fine of $5,000.00 in default, 2 years imprisonment at hard labour. He now applies for leave to appeal against his conviction.

The facts may be shortly stated:
The victim, William Murphy, is a labourer who works on the Eastern Banana Estate, a farming property situated at Winchester in the parish of St. Thomas. In evidence he said that on the 10th September, 1985 at about 11:45 a.m. while walking along a road in the vicinity of the

property, with his nephew, he paused by a stream to get a drink. While he was so engaged, he heard the voice of the applicant ordering him not to move. He was armed with a shot-gun and standing some 2½ to 3 chains away from him. After some conversation between the men, Murphy heard a shot which caught him on his buttocks and legs. Another shot was fired which caught no one. He was taken up in a car and taken to the police station and the work-yard of the estate where the supervisor showed a bag with bananas to the crowd which had gathered. At the police station, it was reported by the applicant that he had caught Murphy stealing bananas.

The defence account of these events was altogether dissimilar. According to the applicant, who is a ranger on the property, while he was on patrol, he heard voices in the banana field. On investigation, he saw Murphy and a lad. The former had a bag on his head and a machete in his hand. The applicant demanded to know what the bag contained and got the reply - "bananas". He ordered Murphy to put the bag down but that he refused to do because, said he, he had been working on the property for a long time, and no one could prevent him taking bananas. When the applicant finally examined the bag, he confirmed that it contained bananas. He made a report to his supervisor one Donaldson who issued him with a shot-gun. He subsequently caught up with Murphy in a short-cut on the property. He called to Murphy who stopped, and put down the bag which he had on his head. As he raised up, he swung around at the applicant with the cutlass, whereupon the applicant fired a shot. The distance at which the gun was fired at Murphy was not stated. The applicant said that when he accosted Murphy he was 5 yards away. These were, therefore, two diametrically opposed versions before the jury. On the Crown's case, there was no room for self defence: on the defence, this was a case of self defence.

The ground of appeal which was allowed to be argued before us, was in the following form:

"That the learned Trial Judge failed to direct the Jury sufficiently or at all on the law relating to self defence and in particular:-

(a) that the onus is on the prosecution to show that the retaliatory act was not done in defence of the person of the Appellant using no more force than was necessary; and

(b) the test to be applied as to the reasonableness of the force must be measured objectively and in this connection it was of paramount importance to alert the jury's attention as to whether or not the apprehension of injury to himself was present in the Appellant's mind."

This ground was provoked by the following question put by the learned trial judge to the jury after the verdict had been returned: it appears at page 21 of the Record:

"HER LADYSHIP: May I ask you one thing, Mr. Foreman? Is it guilty on the basis of excessive force or guilty on the basis of the complainant's story?

FOREMAN: Excessive force."

It was submitted by Mr. Frankson that the two accounts of the incident were irreconcileable and accordingly, excessive force could only apply if the defence story was substantially accepted as true. In the circumstances, the directions were deficient as particularised and inadequate.

We must now examine the directions of the learned trial judge in this regard. She began by giving some general directions at page 17:

"So what he is saying, Mr. Foreman and Members of the Jury, is that he was acting in self-defence. Now let me tell you what the law is with respect to self-defence. If a person is attacked in circumstances where the person reasonably believes that his life is in danger, or that he is in danger of seriously bodily injury, he may use such force as on reasonable grounds he believes is necessary to prevent the attack or to stop the attack, or to resist it; and if in using such force he causes grievous bodily harm or injury, or even kills the assailant he is not guilty of any offence, even if he did it intentionally."

She then relates her directions to the circumstances the jury are being invited to consider and says this:

> "But, Mr. Foreman and Members of the Jury, in this case you have to decide whether it was reasonably necessary; if it was necessary within reason. You have to decide whether it was reasonably necessary in all the circumstances to have used as much force as you find was used, because if you use more force than you should use, then self-defence is no defence, self-defence goes. What this accused man is saying is that he is five yards away from the complainant - and you can measure five yards when you go to the jury-room - and a machete is swung at you, even if you believe that your life is in danger, is it reasonably necessary, Mr. Foreman and Members of the Jury, at that stage, to fire a firearm? That is a matter that you have to decide.
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> When they speak of using as much force as was necessary, I will give you an illustration to make you better understand. If somebody comes and points a finger in your face do you expect a man to retaliate with a knife and cut the other person? That is what one means when one says if excessive force is used self-defence is of no avail. That is a matter entirely for you, Mr. Foreman and Members of the Jury."

There are two observations we desire to make at this point. Firstly, the learned trial judge focuses on her interpretation of the statement of the applicant, that at the time he fired, he was 5 yards away. The significance plainly lies in the distance and the suggestion being made is that at such a great distance, discharging a firearm was not on, for no reasonable person could reasonably apprehend injury or danger to himself to justify defence in this manner. It was not suggested by her that 5 yards could only have been at best an approximation. Certainly the judge did not say that the distance was pointed out in court so that the jury could assess for themselves the accuracy of the distance. Secondly, the remote analogy with a situation where one person pointed a finger and another retaliates with a knife, was hardly comparable or helpful in circumstances where the parties as in the instant case, are both armed with lethal weapons. Having said this, it is right to point out that the response of the foreman of the jury makes it abundantly clear, that the jury must have rejected the

Crown's case. Learned Counsel for the Crown did endeavour to argue that this was not an inevitable conclusion. We think, however, that Mr. Frankson's contention in that respect is plainly supportable on the facts. The Crown's case shows the applicant as taking a pot-shot at a man innocently slaking his thirst at a stream by a road: self defence plainly cannot arise in those circumstances.

We think that the summing-up was neither adequate nor fair, in that, it did not clearly bring to the jury's mind the necessity to consider (i) the fact that both men were armed with lethal weapons; and (ii) in those circumstances, the apprehension of danger might require the use of force to repel the imminent danger. A machete is as dangerous whether used as a sword or hurled as a spear. The situation presented to the applicant was a thief unrepentant, insisting that he had a right to the bananas he had stolen and refusing either to surrender himself or the result of his thievery, and pressing an attack. He was not to know whether the swing of the machete was not to be followed by another swing or its being hurled at him. It is not to be supposed that there was any obligation on the part of the applicant, lawfully performing his functions as a ranger endeavouring to apprehend a thief, to retreat. The distance of 5 yards, even assuming that to be a precise estimation, did not, we think, take the applicant out of the ambit of danger. Although we are mindful of the admonition of Lord Morris in Palmer v. Reginam [1971] 1 All E.R. 1077 that no prescribed words are necessary, nevertheless, we are of the view that his observations at page 1088 are apposite, and we strongly recommend them to trial judges as a useful guideline in their summation where self defence is an issue:

> "In their Lordships' view the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is

> "needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend on the particular facts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence. Of all these matters the good sense of a jury will be the arbiter. There are no prescribed words which must be employed in or adopted in a summing-up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self-defence. If there has been no attack then clearly there will have been no need for defence. If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked 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. A jury will be told that the defence of self-defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence. But their Lordships consider in agreement with the approach in De Freitas v. R. [1960] 2 WIR 523 that if the prosecution have shown that what was done was not done in self-defence then that issue is eliminated from the case. If the jury consider that an accused acted in self-defence or if the jury are in doubt as to this then they will acquit. The defence of self-defence either succeeds so as to result in an acquittal or it is disproved in which case as a defence it is rejected."

It is clear from the citation and indeed it is trite that in considering self defence all the circumstances must be considered. It cannot, therefore, be fair to invite the jury to confine their attention to the distance separating two armed men and ignore altogether the nature and character of the arms they bear. Had the jury been alerted, as we think they should have, that this was a factor that the

accused as a reasonable man, was entitled to consider, the probabilities are that the verdict might have been otherwise. At all events, this non-direction on the part of the learned trial judge amounted to a misdirection. In our judgment it effectively deprived the applicant of a chance of acquittal.

We would add also that the summing-up was inadequate in that it failed to bring home to the jury that a man who is attacked as in the circumstances of this case with a lethal weapon, cannot be expected to judge to a nicety the exact measure of his necessary defensive action. This direction was profoundly essential seeing that the learned trial judge had directed the jury in effect that self defence was necessary, but the applicant had gone too far. She said this at page 17 which bears repetition:

> "What this accused man is saying is that he is five yards away from the complainant - and you can measure five yards when you go to the jury-room - and a machete is swung at you, even if you believe that your life is in danger, is it reasonably necessary, Mr. Foreman and Members of the Jury, at that stage, to fire a firearm? That is a matter that you have to decide."

The issue for the jury was thus restricted in a manner not warranted by the circumstances of the case.

Further, the jury having obviously rejected the Crown's case, the account left was that of the applicant. If his story was believed, as was implicit in the answers of the jury to the judge's enquiry then, it could only mean that the applicant honestly believed that he was in imminent danger from the attack made on him by the intruder armed with a machete, and that caused him to react so as to repel force by force. The facts objectively viewed are in his favour. The result would be that the verdict cannot be supported by the evidence, or was unreasonable, having regard to the evidence.

In the event, we have come to the clear conclusion that

there is much merit in the ground of appeal canvassed before us by Mr. Frankson. We propose to treat the hearing of the application as the hearing of the appeal. The appeal is allowed, the conviction quashed and the sentence set aside. We direct that a verdict and judgment of acquittal be entered.