

K.M. case - Criminal case - unlawful wounding - defence of necessity - whether R.M. gain due consideration to evidence of appellant & witnesses - Sentence: whether manifestly excessive - JAMAICA (Appellant police officer - forensic used)
Appeal dismissed. No Cases referred to

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CRIMINAL APPEAL NO. 15/93

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

Evidence
Criminal Practice

REGINA vs. JOSEPH BOOTHE

Leonard Green for the appellant

Terrence Williams for the Crown

June 7 and October 19, 1993

WRIGHT, J.A.:

This is an appeal against conviction and sentence of eighteen months imprisonment at hard labour imposed in the Resident Magistrate's Court for the parish of Westmoreland on January 26, 1993, for the offence of unlawful wounding. On June 7, 1993, we dismissed the appeal and affirmed the conviction and sentence. These are the reasons for our decision which we promised to put in writing.

The charge arose out of an incident which need not have happened at all. Evon Brown, the virtual complainant, testified that at about 2:30 p.m. on February 7, 1990, he was in the Adrija Restaurant at Negril seated at a table awaiting lunch which he had ordered when in came three police officers one of whom, the appellant, actually ran into the restaurant and called to him. He went to the appellant who held on to him and "asked him for a search." He allowed himself to be searched. Although the search did not yield anything, the appellant next said to him, "Come on" to which he responded, "For what? Tell mi wha mi do noh." To the appellant's insistence that he "come on" he replied that he had ordered

his food and was waiting for it. The narrative continued:

"He push me on the door of the restaurant. Then he draw his Service Revolver from his side where the shield was. Then he point it at my chest and the shot just go off and go through my hands. I got a shot in my hand. I never do anything. It's just as I move when he point it at my chest. He held me here (indicates a holding in front of shirt)."

The record discloses that the witness indicated two points to the right arm just "below elbow" where he was injured by the bullet. However, the medical certificate in evidence reads:

"Gunshot wound right lower arm. Miraculously, no neurological, muscular or bony damage."

After an alarm was raised by persons present the appellant released his hold on the witness, and Michael Dawes who was seated at the same table with the witness having his lunch bandaged the witness' arm and after taking him to a Dr. Travis in Negril where he was given an injection, took him to the Savanna-la-mar Hospital where he was admitted and kept for two days.

The appellant's weapon, a .38 Special "Smith & Wesson" revolver was examined by the Ballistic Expert who certified that it was in proper working order. The amount of pressure required to fire this revolver was stated to be four and one half pounds on single action (that is, after the hammer had been pulled back fully by hand) and nine pounds on double action (pressing the trigger alone fully backward for mechanical cocking and firing).

The witness Evon Brown stated that he had known the appellant before the incident and that "we had a little argument before the incident like a week before." He further testified that when he asked "What mi do?" the appellant had replied that he should not ask him anything. The appellant had been followed into the restaurant by Constable Whyte while, the other, Constable Holder remained outside.

In a lengthy cross-examination Brown denied that on his way into the restaurant he had stopped and spoken to anyone. He denied, too, that the appellant had told him to move and keep on moving. He said he co-operated with the appellant when he requested the search and that nothing was found on him nor did he refuse to go along with the appellant. He said that the appellant chucked him into a corner when he held him and he, Brown, held onto the door. He denied being told he was going to be arrested for failing to move and keep on moving. It is a fact that he was not charged with any offence whatsoever. He demonstrated that it was his evasive action which prevented him from being shot in the chest. He countered the suggestion that he had kicked the door closed with the answer that the door is an automatic door.

Michael Dawes corroborated the testimony of the witness Brown and he added that when the shot was fired the glass door was broken. Cross-examination of this witness was, to say the least, unprofitable.

In his defence the appellant testified that he was on duty along with Constable Whyte when he saw Evon Brown seated on a garbage bin while another stood by. Both were talking to a white male visitor who more than once attempted to leave but was held back by the man who was standing. The visitor eventually went on his way and the two men entered the restaurant. He and Constable Whyte followed them into the restaurant where he told them he suspected a breach of the Tourist Board Act and ordered them to "move on and keep on moving." The other man left but Brown remained. Consequently, he told Brown he was going to arrest him for failing to obey the order to move on and keep on moving. He held Brown in his pants' waist but he put up resistance in the course of which the appellant received a bruise to his left arm and a blow by Brown's fist in his chest. He drew his revolver and pointed it at Brown with a view to restraining him. Brown held on to

the gun and then he heard an explosion from the firearm and he noticed that Brown was shot. He then said that he would take him to the doctor but no sooner had he opened the door than Brown ran away into bushes behind the premises.

In cross-examination, he admitted that he did not heard what passed between the men and the tourist nor did he speak to the tourist. Although he did not see Brown with any weapon in his hand he claimed he believed his life was in danger. He maintained that "Constable Whyte was then holding on to and pulling him with all his might, I presume." He could not say whether Michael Daves was there. Then this:

"Not true I fired the firearm that day.
The firearm was fired accidentally.
I pulled the trigger. During the
struggle I believe my finger contract
and the firearm went off accidentally."

He testified that after the incident he sought treatment from Dr. Ivan Rodrigues in respect of injuries he had sustained during the struggle.

Dr. Rodrigues confirmed that the appellant whom he had known from 1988 attended at his surgery on February 7, 1990, at about 5:10 p.m. The injuries seen were a bruise on the left arm and three scrapes to the anterior aspect of the left forearm. These injuries were not serious and could have been self-inflicted. These findings conflict rather sharply with the evidence of Constable Carl Whyte who, to some extent, supported the appellant's version. However, he said that after they had returned to the Police Station he saw the appellant with bruises and swellings to his left hand and chest. He also differed from the appellant in that he described a scenario in which the witness Brown was holding on to the appellant's hand which held the gun and during a "pulling and pushing" there were "various times when the muzzle of the firearm was pointed at Constable Boothe's direction."

The learned Resident Magistrate in his findings of fact stated, inter alia, that he accepted the prosecution version and rejected the defence holding that "the accused and his

witness Whyte are not witnesses of truth." He found as a fact, too:

"That the appellant while holding the complainant deliberately pointed his loaded firearm at him and pulled the trigger; that the complainant was deliberately shot by Boothe and was injured; that the accused Boothe's act was unlawful and without any legal justification and further, the act was not an accident."

Three grounds of appeal were filed which complain as follows:

- "1. That the Learned Resident Magistrate erred in finding that the evidence adduced by the prosecution adequately establish a case against the accused/appellant in that the witnesses for the prosecution failed in their testament to give any evidence capable of negating the defence of accident.
2. That the Learned Resident Magistrate failed to give any or any adequate consideration to the evidence of the accused/appellant or his witnesses Dr. Ivan Rodriguez regarding the injuries which the accused/appellant suffered during the incident with the complainant.
3. That the sentence of the Learned Resident Magistrate was manifestly excessive having regards (sic) to the injury sustained by the complainant and the special circumstances of this case."

However, save for the submissions regarding sentence, counsel made his submissions in a rather omnibus manner. The centre-piece of the defence was that the appellant was acting in the lawful execution of his duty by ordering the complainant Brown to move on and keep on moving and that such force as was employed arose in the context of securing compliance with that order.

The power to issue such an order is conferred by section 20 of the Constabulary Force Act which reads:

"It shall be lawful for any constable to order any person or persons in any public place or thoroughfare to 'move on' and 'keep on moving' and any person failing to obey such order shall

"on summary conviction be liable to a penalty not exceeding four dollars and in default of payment thereof to imprisonment for any term not exceeding one month."

If this section could legitimately be construed to arrive at the meaning contended for by the appellant, viz, to enable him to enter a restaurant and order a person sitting at a table and not offending in any way, to "move on" and "keep on moving", then the legislature could be condemned for investing a constable with rather draconian powers which would enable him to harrass unoffending citizens. But we are satisfied that such is not the case.

Although "marginal notes" are not a part of the statute and as such are not legitimate aids to construing the statute the marginal notes to the section in question do seem to state what must be the obvious meaning of the section, that is:

"Power to prevent congestion in thoroughfare."

Of course, the section speaks to the clearing of a public place or thoroughfare. By no stretch of the imagination can the act of the appellant be brought within the provisions of this section. It was all the more strange, therefore, to hear his counsel submit that the appellant was justified in pointing his loaded firearm at the complainant's chest in order to secure compliance with the order given. We are clearly of the view that the arrest of the complainant in those circumstances was unlawful and that the complainant was within his legal rights to refuse compliance and to resist the resultant arrest using no more force than was necessary. This would be legitimate self-defence. On the evidence he did just that. There could, therefore, be no justification for the pointing of the loaded firearm at the complainant and it is otiose to talk about accident where the appellant himself testified that he pointed the firearm at the complainant and pulled the trigger. The first ground of the appeal is, therefore, without merit.

The second ground is similarly unmeritorious since such injuries of which the appellant complained and sought to support by the evidence of Dr. Rodriques were brought upon himself by his own unlawful act which was legitimately resisted. But evenso the injuries of which Dr. Rodriques spoke (with the aid of his notes) were:

"A bruise to the left arm and three scrapes to the interior aspect of the left forearm about 2½" in length and not very deep."

These were the injuries he saw at 5:10 p.m. and in his evidence-in-chief he said they could have been sustained in a struggle. In cross-examination he said they could have been self-inflicted. The appellant was no stranger to Dr. Rodriques who testified that:

"I knew Boothe in a professional capacity.
He used to be my patient."

The appellant had testified of a bruise to his left arm and fist blows to his chest and neck. His witness, Constable Whyte, had testified to observing "bruises and swellings to his left hand and his chest."

Although no burden was sought to be placed on the appellant, it is our view that the recorded evidence plus the opportunity which the learned Resident Magistrate had of seeing and assessing all the witnesses amply justified the rejection of the defence witness as untruthful and the acceptance of the prosecution witnesses.

In passing sentence the learned Resident Magistrate commented:

"This court considers the sentence as most lenient. The accused should have been tried for shooting with intent and wounding with intent at least. His act was that of a trigger-happy gun man, totally unprovoked and without rhyme or reason. Guns are not toys. They are lethal weapons and persons entrusted with the awesome responsibility of carrying guns must be aware of their responsibility and use them lawfully."

In the light of the concession and observations made by the

learned Resident Magistrate, it is unrealistic to complain that the sentence is excessive let alone being manifestly so. The appeal was accordingly dismissed.

However, before parting with the case we cannot withhold a comment on what to us seemed quite alarming. The evidence of the two constables was that they had taken action in pursuance of the provisions of the Tourist Board Act, that is, with a view to prevent harrassment of tourists. There was neither evidence nor complaint of harrassment. All they observed was that the complainant and his friend, against neither of whom they had ever had any complaint of harrassment, had spoken to a white man who had gone his way.

Laudable as it undoubtedly is to protect visitors to our shores from harrassment, the authorities must ensure that that objective is achieved without so infringing the rights of Jamaican citizens that they are regarded as aliens in their own country. This cannot be countenanced. The court found the attitude of the constables in the purported exercise of their duty rather reprehensible in this regard and this calls for a re-orientation of the Police who are so employed, if indeed these constables were in any way reflecting what obtains in giving effect to the Tourist Board Act. Then, too, it is a chilling fact that for such an assignment the constables were armed with firearms!