JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 84/89

COR: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

REGINA

VS.

LANCELOT WEBLEY

Frank Phipps, Q.C. & Delroy Chuck for Appellant

Miss Marcia Hughes for the Crown

October 24 and November 12, 1990

ROWE P.:

The appellant, a police constable, attended the Lady May Club in Spanish Town on the night of Sunday August 9, 1987, dressed in civilian clothes. He carried a firearm on his person. A dispute arose in the Club involving Derrick Bryan and a young woman who was alleged to have assaulted Bryan's father with a stone. Bryan, admittedly with a ratchet knife in his hand, sought an explanation from the girl on the upper floor of the Club. It was then that the appellant intervened, but the accounts of the prosecution and the defence vary as to the circumstances. Bryan said the knife was closed, that the appellant ordered him at gun-point to hand over the

knife to him, that he refused at first but relented and obeyed, that the appellant then struck him in his head with the firearm. Wayne Jones (the deceased) then approached and remonstrated with the appellant for so treating Bryan whereupon the appellant hit the deceased with the firearm and the parties retreated downstairs. The appellant's version was that he saw Bryan attempting to cut the young woman in her face with the knife, that he ordered Bryan who knew him to be a policeman to hand over the knife and Bryan refused saying that could only be achieved over his dead body. With that he held Bryan by the hand and wrestled the knife away from him. Wayne Jones commented that the appellant could not treat his friend like that, struck the appellant on his mouth and then the appellant retaliated. Bryan embraced the deceased and took him downstairs.

The scene shifted to the lower floor of the Club. Paul Blake who was called by the Crown to describe the immediate events downstairs had a complete lapse of memory and although treated as a hostile witness did not advance the prosecution's case in any way. Bryan admitted disarming Paul Blake of a bottle but could assist no further as he said he had gone in search of the proprietor after which he heard three gunshots downstairs. Barton Blake was at his home nearby the Club and attracted by the sound of gunfire went to Sheriya Lane in the near vicinity of Lady May Club. He observed a medium sized crowd of about 40-50 people come from Burke Road run into Bullock Lane and stop at the corner of Sheriya Lane. He saw the deceased

leaning on the gate of No. 6½ Sheriya Lane, holding "his belly" and crying for help. Blood was on his clothes. Then he saw the appellant emerge from No. 6 Sheriya Lane with a short gun in his hand and he was asking "where the bwoy run?" And another man, also armed with a gun, came up and answered the question saying: "See the bwoy here". Both armed men fired several shots at the deceased.

Blake described the crowd as noisy and angry but he did not observe anyone armed with a bottle. The crowd, he said, were calling out: "Is Major Worries, don't kill him". Blake identified the appellant as the man who emerged from 6 Sheriya Lane asking "where the bwoy run". At that time, said he, the appellant had some blood running down from the right side of his head.

Det. Sgt. Osmond Wright interviewed the appellant at his home on August 10, 1987 and the appellant said he was in the Lady May Club when a boy fling a bottle hitting him on the face. He fired some shots. He later saw the boy in a yard where he fired some more shots. Although the appellanc had a firearm he declined to hand it over as he needed it for personal protection. Later that day he did hand over a revolver described by Detective Inspector Grant as a Llama .38 revolver, serial number 743930. As it turned out this was not a police service revolver but it seems that the inescapable conclusion is that from this particular gun three bullets were fired into the body of the deceased. Dr. Clifford found that "Major Worries", the stage name for the deceased, was shot at least eight times. Ballistic evidence which is normally clear and helpful was rather confusing as the weapon taken from the appellant was sometimes described as a Smith and Wesson. In the end nothing turns on that evidence.

The appellant did not give sworn evidence. Instead he relied on an unsworn statement from the dock. First he spoke of the incident with Bryan, the young woman and the deceased. He added that as the deceased and Bryan were descending the stairs in each other's embrace, he heard them say:

> "We must kill you tonight police boy, we must kill you."

On advice from other patrons he waited some fifteen minutes before descending the stairs. He passed the deceased who had two bottles in his hands, but turned around just in time to see the deceased releasing one bottle towards him. He felt a hard hit on the right side of his face which caused a wound which bled profusely. He pulled his revolver and fired in the direction of his assailant. The appellant continued:

> "..... I felt several blows from behind hitting my head and back from patrons who were standing behind me. I somehow managed to run out into the street, that is Morrison Street. I ran down Morrison Street and a crowd of about a hundred people running after me, using threatening words. I was bleeding profusely and couldn't see from the right hand side of my face. I went on to Sheriya Lane. I ran into a yard there seeking refuge. There I re-loaded the firearm I had. ..... I was unfamiliar with that surrounding and while on the verandah I began to feel dizzy. So I decided to go back on the street bearing in mind the irate and angry crowd that was out there.

> "As I stepped out on to the street I was confronted with the said man that had hit me previously at the Club with objects in his hand and the angry crowd behind him also armed with bottles and other implements. ..... Immediately as I got out there I felt a blow to the left hand side of my chest. At this time I fired about three or four more shots in the direction of the said man who had hit me again. ....".

He said another policeman came to his assistance and when the crowd became angrier, that policeman shouted to them to back off.

Five grounds of appeal were filed four of which complained of the learned trial judge's treatment of the issue of self-defence and the fifth with his directions on common design. In amplification of these grounds on self-defence Mr. Phipps submitted that the directions on self-defence were inappropriate in the sense that they seemed to have cast an onus on the appellant and inadequate in that they made no reference to the salient facts in the defence, for example, the injury to the appellant. He submitted further that since the decision in Beckford v. R. [1987] 3 All E.R. 425 the subjective test ought to be applied both in relation to whether or not the prisoner found it necessary to defend himself and also to the nature of the response to the attack. The importation of the objective test of reasonableness in the retaliation, which is statutorily provided for in provocation cases, is in his submission, impermissible and wrong.

Ellis J. directed the jury on self-defence in a number of passages in the summing-up which we re-produce below. At pages 166-169 of the Record he said:

" ..... You heard about the accused defending himself. The law on that, Mr. Foreman and members of the jury is that when it is necessary to defend one's self, when it is necessary for a person to defend himself, the use of such force as is reasonable is not unlawful. Because if a man is attacked in circumstances in which he honestly believes that his life is in danger or he honestly believes that he is in jeopardy of bodily harm, he is entitled to defend himself by using such force as is reasonable in the circumstances to repel that attack. And, if in doing so death results to his assailant, he does not commit any crime. ..... I want to give you the law on it before I move on you see and this is how we are to look at it, Mr. Foreman and members of the jury: That it is both good law and commonsense that if a person is attacked he may defend himself and it is also law and commonsense that he may do but only do what is reasonably necessary to repel that attack. But when you consider self-defence, everything, all your consideration depends on all the circumstances. You have to consider all the circumstances and the particular facts. That is a matter for you. The circumstances and the particular facts are a matter for you. In some cases the only reasonable, possible and sane thing to do if you are attacked is to take a simple avoiding action; run away, move away - though no obligation - but in some cases you can move away. In other cases an attack may be serious, demanding immediate action on the part of a person. If, Mr. Foreman and members of the jury, an attack is of some minor, simple nature it would not be commonsense to permit some act of retaliation far in excess of the action from which you say you are defending yourself. Wouldn't be commonsense to allow that. For example, if a man boxes you it wouldn't be commonsense to say you take up your machete and chop off his neck, wouldn't be. And it

"comes back to what I said up at the top there, that it has to be reasonable. Again I repeat that some actions may demand immediate action on the part of a person to avert an attack.

On the other hand, Mr. Foreman and members of the jury, if an attack is over, even if you were attacked and an attack is over, it is finished and no sort of peril or danger remains, you were attacked, you know, but it's finished, not that you are in imminent attack, anybody attack you, it finish, you may consider that the employment of force in those circumstances is only by way of revenge or retaliation and if it is so then it can't be self-defence either. It wouldn't be reasonable or commonsense to allow that. You can't say because you were attacked up at Parade you come down to King Street bottom and see your assailant and you chop off his head and say you were attacked. No, can't go so. If the peril is passed it doesn't afford you to say that you were acting in self-defence.

Again, when you are considering all these circumstances and the factual situation you have to be reminded that if a person is attacked to the extent that he honestly believes that his life or body is in danger then you can't expect him to weigh up to a fine point the quantum or the amount of force he is going to use but remember that in all the circumstances it's for you to consider whether the supposed or alleged attack was such to merit that type of retaliation. If you, Mr. Foreman and members of the jury, think that in a moment of anguish a person did only what is reasonably necessary, did only what he honestly thought was necessary, that would be some evidence, strong evidence that he was acting in self-defence.

"Mr. Foreman and members of the jury, if when you consider this concept of self-defence, if the prosecution has shown that what was done was not done in self-defence, you have to remove it from your mind, it does not avail. If you think the prosecution has satisfied you so that you feel sure, considering all the circumstances, that what was done was not done in self-defence, you eliminate it from your consideration. It's not of any avail.

If you find that it was self-defence or that any reasonable doubt exists in your mind that there was this self-defence, he was acting in self-defence, it's your duty to acquit because the prosecution on whom the burden rests in negativing self-defence would not have discharged that burden to your satisfaction. So, I repeat: If you think and find that he acted in self-defence you acquit him. If you are in any reasonable doubt as to whether or not he was acting in self-defence equally you have to acquit him.

The defence of self-defence either succeeds or it doesn't succeed. If it doesn't succeed it is not of any moment. ..... This concept that I have given you direction thereon, self-defence, is of added importance in the light of this case because the accused man in this case has pleaded not guilty and the issue of self-defence has been raised and if a man is acting in self-defence, honestly believing that an attack endangers his life and body, he commits no offence so in that sense he is saying 'I acted in self-defence and I am not guilty.' And the burden of proving the case against him rests on the prosecution, so it's the prosecution that must negative this act of self-defence and this is why it is of importance."

Where self-defence is raised as an issue the trial judge should direct the jury in a clear and concise way as to the law relevant to the facts in that case. It is quite unnecessary to embark upon a detailed explanation of all the possible elements surrounding the concept of self-defence. Beckford v. R. (supra) has established that it is the appellant's state of mind which is important when determining the question of attack or imminence of attack and if on the facts the prosecution cannot negative the assertion of honest belief by the appellant, that issue of the necessity to resort to defensive action will be decided in favour of the appellant.

Whereas it was common practice to tell a jury that an accused person had a duty to retreat if it was possible and safe for him to do so before resorting to acts of self-defence, that is not now the law. The failure of the accused to retreat when it was possible and safe for him to do so is simply a factor to be taken into account in deciding whether it was necessary for him to use force and whether the force used by him was reasonable: R. v. McInnis [1971] 55 Cr. App. R. 551. Unless therefore the facts suggest that the accused had ample opportunity to move away from the scene and avoid conflict, a judge should not feel obliged to give a direction on retreating as this may confuse the jury. Ellis J. did not belabour the point as to retreat yet by mentioning it he may have planted a seed in the minds of the jury which required some elucidation on the facts in the instant case. It would have been correct for him to have gone on to say this question does not arise for their consideration.

In one of the passages quoted from page 186 the learned trial judge told the jury that an accused "is entitled to defend himself by using such force as is reasonable

in the circumstances to repel that attack" and at pages 167-168 he said:

> "..... if a person is attacked to the extent that he honestly believes that his life or body is in danger then you can't expect him to weigh up to a fine point the quantum or the amount of force he is going to use but remember that in all the circumstances it's for you to consider whether the supposed or alleged attack was such to merit that type of retaliation. If you, Mr. Foreman and members of the jury, think that in a moment of anguish a person did only what is reasonably necessary, did only what he honestly thought was necessary, that would be some evidence, strong evidence, that he was acting in self-defence".

In Palmer v. R. [1971] 55 Cr. App. R. 223, Lord Morris said that a man under attack "may only do what is reasonably necessary" in self-defence. He added that "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".

The English Court of Appeal considered the suggestion that the formulation given by Lord Morris was that of a wholly subjective test in R. v. Shannon [1980] 71 Cr. App. R. 192 at 194 and regarded it as a bridge between two schools of thought. That Court said:

> "This proposition is, as it were, a bridge between what is sometimes referred to as 'the objective test', that is what is reasonable judged from the viewpoint of an outsider looking at a situation quite dispassionately, and 'the subjective test', that is the viewpoint of the accused himself with the intellectual capabilities of which he may in fact be possessed and with

> "all the emotional strains and stresses to which at the moment he may be subjected."

The learned authors of Archbold in the 42nd Edition at paragraphs 20 - 21 neatly summarize the position in their treatment of the principle of Self-Defence by saying:

> "Three points should be noted. First, while the test of whether the force used in self-defence was reasonable is objective, in deciding this the jury should be directed to consider what the accused himself thought".

If what an accused says in explaining his state of mind at the time of his act is utterly incredible, a jury might very well think that he did not honestly believe that the retaliation was necessary and further that he was embarking upon the path of offence. They could then go on to reject his explanation and find that the retaliation was not reasonable in all the circumstances. When in the instant case the learned trial judge gave an example of inappropriate retaliation, its effect could only be to demonstrate to the jury that in the final analysis, when all the circumstances are taken into consideration the reasonableness test must prevail. He said at page 167:

> "..... In other cases an attack may be serious, demanding immediate action on the part of a person. If, Mr. Foreman and members of the jury, an attack is of some minor, simple nature it would not be commonsense to permit some act of retaliation far in excess of the action from which you say you are defending yourself. Wouldn't be commonsense to allow that. For example, if a man boxes you it wouldn't be commonsense to say you take up your machete and chop off his neck, wouldn't be. ....."

We do not think that the thrust of Beckford v. R. (supra) was directed to reasonableness of retaliation and we so hold.

At page 168 the trial judge directed the jury that:

> "If you find that it was self-defence or that any reasonable doubt exists in your minds that there was this self-defence, he was acting in self-defence, it's your duty to acquit because the prosecution on whom the burden rests in negativing self-defence would not have discharged that burden to your satisfaction. So, I repeat, if you think and find that he acted in self-defence you acquit him. If you are in any reasonable doubt as to whether or not he was acting in self-defence equally you have to acquit him".

And at page 170, he said:

> "..... if you find self-defence, you have to acquit .....".

These passages were criticized by Mr. Phipps on two bases. Firstly, he said that by the repeated use of the verb "find" the jury could be led to believe that the defence had an onus to prove self-defence. Once the issue had been properly raised the onus was on the prosecution to negative self-defence and there was no room for the jury to make a positive finding that the accused acted in self-defence. The second basis was that by the use of the term "reasonable doubt" when one is considering the defence, the impression could be created that the defence had to prove an issue to a fixed standard, viz., beyond reasonable doubt. As to these strictures we wish to say that it is unfortunate that the learned trial judge did not use the time honoured direction that the burden of establishing guilt rests on

the prosecution but that they must consider all the evidence, including what the accused has told them, relating to self-defence and if the evidence either convinces them of the innocence of the accused or causes them to doubt whether or not he may have been acting in self-defence, he is entitled to be acquitted: R. v. Lobell [1958] 41 Cr. App. R. 100. Crown Counsel found it difficult to support any reference to reasonable doubt upon a consideration of the defence.

The gravamen of the defence was that the appellant having been attacked by the deceased, supported by a large hostile crowd, escaped from the Lady May Club. At Sheriya Lane he was faced with the deceased and the same hostile crowd some of whom were armed with missiles and he was attacked by the deceased and in those circumstances he fired upon the deceased. He had spoken of feeling dizzy from an earlier injury inflicted by the deceased and it was apparent that he was saying not only that he anticipated an imminent attack but that the attack did come before he fired. In his directions to the jury the trial judge concentrated upon the incident at the Club, invited them to say that if that had spent itself then the actions of the appellant on the Lane were in revenge and not capable of giving rise to self-defence. That indeed was the Crown's case, but the defence was never put. Nowhere did the trial judge even say that if the jury believed or were in doubt as to the truthfulness of the appellant, they were to acquit him. What he did say about the appellant consisted in the main of adverse comments unsupported by the evidence. For instance the trial judge portrayed the appellant as a bully throwing his weight about in the Club without mentioning the appellant's statement that the

deceased thumped the appellant in his mouth before he enquired why the appellant had been treating his friend in that manner.

Another illustration of mis-interpretation of the evidence occured at p. 186 of the Record. There the learned trial judge said to the jury:

> "The crowd was making noise. So what he is saying there, the crowd is making noise. There is the suggestion, Mr. Foreman and members of the jury, that this crowd was hostile to the accused but there is nothing which tells you that the deceased was a part of that hostile crowd. Nothing to say that the deceased was a part of this hostile crowd. Barton Blake tells you that he saw the crowd and at that time he didn't see the deceased and when he went there he saw the deceased and the deceased was holding his belly with blood on him asking for help".

In this passage and especially by his use of the underlined words the learned trial judge completedly ignored the assertion by the appellant at page 154 of the Record that:

> "As I stepped out on to the street I was confronted with the said man that had hit me previously at the Club with objects in his hand and the angry crowd behind him also armed with bottles and other implements".

A fair presentation of the defence required that the attention of the jury be drawn to the accused's version of what occurred as it is upon his assertions that the issue of self-defence arose.

Shortly before their retirement the learned trial judge summarized the law on self-defence in a manner calculated to erode the defence absolutely. He returned to the theme of retaliation and to the "cavalier attitude" of the

appellant in the handling of the firearm that night which was so apparent in earlier passages in the summing-up. At page 194 the learned trial judge is reported as saying:

> "In relation to the law, let me relate the self-defence there now to the law. You remember I told you that if the attack is past and something is done after that that can be by way of revenge or retaliation, that is not self-defence, and the evidence here is that at the Lady May Club, the man hit me and I fired shots'. Nobody knew whether anybody was hit and then down at Sherria Lane he saw the man, fired more shots at him. You could say in the circumstances there, if you accept that, that any attack if any had passed and what was done could not have been done in self-defence."

On any interpretation, this final statement to the jury appears to have ignored the stated defence and implied that the appellant gave no reason for firing shots at Sheriya Lane. The prosecution's case was ever so clearly presented but we feel compelled to accept the submissions of Defence Counsel that the appellant's real defence was never put to the jury for their consideration.

We find no merit in the complaint that the learned trial judge in his general remarks as to the treatment to be accorded to the unsworn statement of the appellant left it open to the jury to infer that the appellant had a purpose of his own to serve in refraining from giving sworn evidence and subjecting his testimony to cross-examination. What the trial judge said is in our view in accord with the guidance provided in Walker v. D.P.P. [1974] 1 W.L.R. 1090.

An issue of common design arose when evidence was led that a second policeman fired at the deceased at about the same time that the appellant fired. On the evidence common

design was not a live issue. The appellant admitted that he fired at the deceased and on the ballistic evidence bullets from his firearm could have caused the fatal injuries. Whether or not the learned trial judge misquoted the evidence on this issue was irrelevant to the outcome of the trial.

We propose to allow the appeal on two grounds. Although the learned trial judge said on numerous occasions that there was a duty on the prosecution to negative self-defence, he used language with regard to the defence which left the distinct impression that the jury had to find that self-defence was proved. As we have said earlier the true rule is that once the issue of self-defence is raised on a proper evidential basis, unless the prosecution negatives that defence, the accused must be acquitted. See R. v. Abraham [1973] 57 Cr. App. R. 799. The appellant squarely raised the issue of self-defence. He was entitled to have his account placed fairly before the jury. As the learned trial judge did not relate his general directions on self-defence to the defence offered, there was a material non-direction which vitiated the conviction. The application for leave to appeal is treated as the hearing of the appeal, the appeal is allowed, the conviction quashed and verdict of acquittal entered.