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"In relation to the crux of this case the prosecution is saying that the deceased man never had any knife. That, Mr. Foreman and members of the jury, is the whole pith of this case. That is the main question of fact that you have to decide. Did this dead man, the man who is now dead, did he have a knife in his hand and was he attacking the policeman with it, the accused man? If you believe that he had a knife and that he was continually about ten times slashing at the police officer then you must acquit him. If you have any doubt about it you must also acquit him."

Note the absence in that passage of any reference to the necessity for the jury to find as a fact that the applicant retreated.

After reviewing the evidence for the defence the learned trial judge repeated substantially what he had already said. He finally left the case to the jury on the basis of their acceptance or otherwise of Reid's evidence, bearing in mind what had been put forward on the part of the defence.

In treating the matter in this way it cannot fairly be held that the applicant was prejudiced by anything the learned trial judge had said in his directions to the jury as to the nature of the evidence necessary to raise the issue of self-defence. This ground of appeal therefore fails.

It was also submitted by counsel for the applicant that there was no evidence upon which provocation could be "assumed" other than the evidence in support of a plea of self-defence and that although the trial judge had promised the jury to remind them of all the acts which could constitute provocation this promise was never fulfilled because no such evidence existed. In those circumstances, it was contended, the jury was left at large to reject the evidence of self-defence and to accept the same evidence in support of a plea of provocation thereby depriving the applicant of a real chance of a complete acquittal.

In the first place it seems somewhat inconsistent to say, as was said on behalf of the applicant, that no evidence existed to raise the issue of provocation and at the same time to say if there was any evidence in relation to that issue it came from the evidence in support of the plea of self-defence. Be that as it may, conduct which cannot justify may well excuse: *Bullard* v. *R.* (3) ([1957] A.C. at p. 643 *per* LORD TUCKER).

In his defence the applicant spoke of being attacked with a knife and wounded on the hand. Ordinarily in such circumstances the issue of provocation might well be a live one even though self-defence be rejected. It is not difficult to see, therefore, why the learned trial judge early in his summing-up adverted to provocation and promised to remind the jury at a later stage of the material to which regard could or should be had on such an issue. However, as the learned trial judge developed his directions in the issue of self-defence, he did so in much the same way as the trial judge did in *Mancini*'s case (4): see *per* VISCOUNT SIMON ([1942] A.C. at pp. 9, 10).

Having specifically directed a complete acquittal if the applicant's evidence was accepted or the jury entertained a doubt as to whether it was true or not, what was left on the question of provocation if the applicant's evidence was rejected? The jury would have rejected the evidence in relation to the deceased's conduct—that he had a knife and had slashed at the applicant. How then could the issue of provocation be raised where the deceased unarmed was shot at almost point blank range by the applicant? It was quite understandable therefore why the learned trial judge left the case to the jury in the way he did. It is inconceivable that his reference to provocation earlier in this summing-up could have misled the jury into rejecting self-defence and acting upon the same evidence to find provocation. The jury indeed returned a verdict of manslaughter but this is clearly explicable when it is remembered that the learned trial judge left this as a possible verdict if Reid's evidence were accepted and the jury felt that they could not be sure that the applicant intended in discharging the revolver to kill or do serious bodily harm to the deceased. Counsel for the applicant in support of his submission contended that the prosecution's case was one of murder only and that there was no room for a manslaughter verdict on the basis of an absence of proof of an intent in the applicant to kill the deceased or to do him serious bodily harm when the revolver

was discharged at such close range and the bullet struck the deceased in a vital part of the body. However, as has already been mentioned the learned trial judge in directing the jury told them that an acceptance of Reid's evidence could lead to a verdict of murder or manslaughter depending on whether or not they found an intent to kill or to do serious bodily harm. While it is true that Reid did say that a few seconds before the discharge of the applicant's revolver he heard the applicant say "Someone is going to get shot tonight", he did not purport to say that he observed the applicant take deliberate aim of the deceased before he fired the shot. Indeed Reid said that he heard the sound of a gun being fired as the applicant drew out the gun from his waist. The jury could have taken the view that although in the circumstances it was an unlawful act on the part of the applicant to draw his revolver, the discharge was occasioned not by any intention on his part to injure the deceased but rather by negligence—albeit criminal negligence—the applicant intending merely to frighten the deceased or at any rate that it would be unsafe to find on Reid's description of the incident that the intent necessary to make the offence murder was present.

The second main ground of appeal fails.

It was not urged before us that the sentence imposed should not be sustained in the event of the conviction being affirmed.

In the result the application for leave to appeal against conviction is refused.

Application for leave to appeal refused.

LUCIUS WHITE v. CARLOS COTTERELL

[COURT OF APPEAL (Luckhoo, Fox and Hercules, JJ.A.), February 25, 26; April 2, 1971]

Landlord and tenant—Tenancy agreement—Landlord having no estate in land—Tenant estopped from denying tenancy—Right of landlord to recover rent.

Where a landlord has no estate in land which he lets to a tenant so that the tenancy thereby created passes no actual estate, the tenant is estopped from denying that the grant was effective to create the tenancy that it purported to create there having been brought into being a tenancy by estoppel with a right in the landlord to distrain for rent.

Appeal dismissed.

Case referred to:

(1) *Mountney* v. *Collier* (1853), 17 Jur. 503; 1 E. & B. 630: 22 L.J.Q.B. 124.

Appeal from a decision of the resident magistrate for the parish of Trelawny in favour of the respondent in an action by the respondent for arrears of rent.

H. G. Edwards, Q.C., for the appellant.

C. Rattray, Q.C., and *N. Wright* for the respondent.

LUCKHOO, J.A., delivered the judgment of the court: On February 26, 1971, we dismissed this appeal with costs $40 to the respondent and promised to put our reasons therefor in writing. This we now do.

The respondent brought a claim in the Resident Magistrate's Court for the parish of Trelawny for £3 as arrears of rent owing by the appellant for the period January 1, 1965, to June 30, 1967, at 2*s.* per month in respect of two acres of land situate at Sherwood in the parish of Trelawny and called Jack Wisdom under an agreement of tenancy

entered into by and between them on September 1, 1964. The appellant in resisting the respondent's claim alleged that the respondent in executing the tenancy agreement had represented himself to be the agent for the owner of the land whose name he did not disclose and that he (appellant) has subsequently paid the amount of the rental for the abovementioned period to one Bernard Scharschmidt who had claimed to be the owner and had demanded payment of the rent due. The learned resident magistrate found that the respondent had been in continuous possession of the land from 1939 and that Scharschmidt had never been in possession thereof nor held any right, title or interest therein. He further found that it was not until 1965 that Scharschmidt started to claim ownership of the land. He held that as the appellant had not proved that there was anyone with a title paramount to that of the respondent and as his defence to the respondent's claim was based on superior title in Scharschmidt, the respondent's claim succeeded. He accordingly entered judgment for the respondent.

At the hearing of the appeal, leave was granted to the appellant to have the original grounds of appeal filed argued. Leave was refused to argue the additional grounds of appeal filed in September 1970.

The evidence disclosed that one Joseph Cotterell had claimed to be the owner of an area of some 200 acres of land at Jack Wisdom Mountain, the two acre portion now in question forming part of that larger area. Joseph Cotterell went to reside in Cuba and by a document dated February 15, 1939, purported to appoint the respondent, whom he described in that document as his cousin, his "agent and general manager and landlord bailiff for my property Jack Wisdom Mountain situated in the parish of Trelawny from the above date exclusive". The respondent entered into possession of the lands in pursuance of that appointment, rented portions of those lands to various persons and paid taxes levied on those lands. Joseph Cotterell died in Cuba in 1963 apparently intestate and thereafter the respondent continued in occupation of the lands claiming to do so as one of the heirs *ab intestato* of the deceased. On September 1, 1964, as is evidenced by a document signed by the appellant as tenant and the respondent as landlord, the respondent agreed to rent the two-acre portion in question on a monthly tenancy for the sole purpose of depasturing cows with the right reserved to the respondent to recover possession of the portion of land upon three months' notice to quit. The amount of rental was not specified in the document but it is common ground that the sum of 2*s*. per month was agreed as rental. As a result of this agreement the respondent put the appellant in possession of the land and the appellant duly made payment of the rent for the first three months of his occupation. In 1965 Bernard Scharschmidt, who had been residing in the United Kingdom for several years, returned to Jamaica and claimed to be the owner of the lands, including the portion rented by the appellant to the respondent which Joseph Cotterell in his lifetime had claimed to be his and in respect of which he had purported to appoint the appellant as his "agent and general manager and landlord bailiff". Bernard Scharschmidt based his claim of ownership on a devise contained in the will of his father, E. B. Scharschmidt (deceased) (duly proved and registered), dated January 16, 1940, and in which he was named as one of the executors. E. B. Scharschmidt died on or about February 2, 1940, and the last clause, numbered 4, appears therein as follows:

"The same claim and authority I have on Belmont Mountain I leave to my sons."

Bernard Scharschmidt claimed that Belmont Mountain is the same as Jack Wisdom Mountain and that the words "the same claim and authority I have" in the clause referred to ownership and possession in E. B. Scharschmidt. The opening words of the devises which preceded the clause numbered 4 were as follows: "I devise my piece of land"; "My portion of land at . . ."; and "I leave a house spot", and they leave no doubt as to the quality of the testator's claim to ownership in the respective areas of land. The learned resident magistrate rejected the appellant's contention that cl. 4 had the effect of devising Belmont Mountain to Bernard Scharschmidt and his brothers and we see no reason to differ from him in this regard. In 1966 Bernard Scharschmidt obtained a consent judgment against Zachariah Williams and Rosalind Cotterell for damages

and an injunction restraining them from entering upon certain lands "at Belmont Mountain" which the respondent had rented to them as being lands formerly in the ownership of Joseph Cotterell. Apparently Bernard Scharschmidt's claim against those two persons was in trespass.

There was no evidence of a paper title in either Joseph Cotterell or E. B. Scharschmidt or in any other person.

For the appellant it was submitted that even if Joseph Cotterell was the owner of the land at his death, the agency in the respondent came to an end on his death in 1963 and the land would have devolved upon the deceased's personal representatives upón statutory trusts by virtue of the Real Property Representation Law, Cap. 332, s. 3 (1), had there been persons in whose favour such trusts could operate as provided for by s. 4 (1) of the Intestates' Estates and Property Changes Law, Cap. 166. There being no such persons, it was submitted that the deceased's estate escheated to the Crown and it was therefore incompetent for the respondent after the deceased's death to rent any portion of that estate to the appellant. It was further submitted on behalf of the appellant that if a tenant repudiates a tenancy agreement under which he holds and pays rent to a third party, possession of the land passes to the third party. For the respondent, Mr. Norman Wright submitted that even assuming that the respondent had no estate in the land and conceding that in such a case the grant of a tenancy of the land can pass no actual estate, the appellant is estopped from denying that the grant was effective to create the tenancy that it purported to create there having been brought into being a tenancy by estoppel with the right of the respondent as landlord to distrain for rent. In support of this submission Mr. Wright referred to para. 2 appearing at p. 652 of the LAW OF REAL PROPERTY (3rd edn.) by Megarry and Wade. This submission which we accept is a complete answer to Mr. Edwards' first submission as to the legal effect of the tenancy agreement entered into between the parties in 1964. Further, the payment of rent to the respondent as landlord and the fact that it was the respondent who put him into possession of the land operated to estop the appellant from disputing the title of the respondent, there being no suggestion that the payment of rent was made through a mistake or in consequence of any misrepresentation by the respondent. In any event the appellant has failed to show a better title in anyone else. The second submission by Mr. Edwards, that if a tenant repudiates a tenancy agreement and pays rent to a third party possession of the land would pass to the third party, is untenable and is unsupported by authority. The case of *Mountney* v. *Collier* (1) cited by Mr. Edwards really supports the proposition that a tenant is not estopped from showing that his lessor's title has determined and that if he has a new arrangement with the person who really has the title to hold under him it is not necessary that he should actually go out of possession; otherwise he must surrender possession before he disputes his lessor's title or have been evicted actually or constructively by a person having title paramount.

Both submissions made by Mr. Edwards having failed we dismissed the appeal.

Appeal dismissed.