JAMAICA

IN THE COURT OF APPEAL

CRIMINAL APPEAL No. 98/1970

BEFORE: The Hon. Mr. Justice Luckhoo, Presiding
The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Hercules J.A. (Ag.)

NORRIS WILLIAMS v. R.

F.M. Phipps, Q.C., and Miss B. Walters for the applicant.

R. Alexander for the Crown.

18th, 19th, 25th February; 2nd April, 1971

LUCKHOO J.A.

The applicant Norris Williams was convicted on November 11, 1970 of manslaughter on an indictment charging him with the murder on June 28, 1969, of one Lionel Williams and was sentenced to 4 years' imprisonment at hard labour. His application for leave to appeal against conviction and sentence was refused by a single judge of this Court and he now applies to the Court for leave to appeal against conviction.

The evidence for the prosecution was to the following effect. A motor omnibus driven by one Jeffrey Burke was proceeding at about 11.20 p.m. on June 28, 1969 towards a parking area at Carpenters Road, in the parish of St. Andrew when its engine shut off. The bus came to a standstill in a position which impeded the free flow of vehicular traffic along the roadway. Burke tried to restart the engine. While he was doing so one of the passengers in the bus suggested that he should use a jack-handle for that purpose. One Gordon thereupon proceeded to fetch a jack-handle which was carried at the back of the bus. As Gordon was taking the jackhandle to Burke a motor car came up. As the car was passing the bus someone in the bus knocked on the roof of the car. The car was brought to a standstill behind the bus and six men including the applicant got out of the car. Some or all of the men brandished pistols. The men came towards Burke and one of their number asked Burke what he was going to do with the jackhandle. Burke said that he intended to use it to knock the starter.

One of the men thereupon took away the jackhandle from Gordon and threw it to the ground. A lad, Oscar Reid, attempted to retrieve it but desisted when one of the men threatened to strike him with a beer bottle. Burke called out to Reid to pick up the jackhandle. Burke was then set upon by some of the men. At this point of time another car driven by the deceased with one Dorothy Taffe as a passenger came up. The deceased stopped his car, came out and enquired what was happening. Burke related to the deceased what had occurred. According to Oscar Reid, the applicant then said "someone is going to get shot tonight" and a few seconds later the applicant drew a gun from his waist. The deceased who was unarmed was then a few yards away facing the applicant. Reid said that he heard the sound of a gun being fired as the applicant drew his gun. The deceased held his side and fell to the ground. Dorothy Taffe said that she was being driven by the deceased when on getting to Carpenters Road she saw a bus blocking the roadway. A car was near to the bus. The deceased left his car with the engine on. She spoke to him and he returned and switched off the engine. He was just about leaving the car again when she heard the sound of a shot and saw the deceased hold his chest and fall. She observed a man holding a gun a few yards off from the deceased who was unarmed.

The deceased was fatally injured by a bullet which entered the left side of the chest and pierced the left lung and heart causing shock and haemorrhage. At about 1.20 a.m. on the following day the applicant arrived at Hunts Bay police station where he handed Detective Constable Murray the jackhandle, his revolver and a ratchet knife. Detective Constable Murray observed a cut on the back of the applicant's hand. Scientific examination of the knife revealed the presence of human blood. The prosecution's case was that the cut on the applicant's hand was not inflicted by the deceased.

The defence advanced was one of self defence. The applicant, a police constable, said that he attended a dance held that night at premises on Carpenters Road. He was not detailed for duty that night and was not in uniform but carried his service revolver on his person. While at the dance he heard a loud noise and indecent language coming from Carpenters Road from the direction in which some of his companions including

Constable Harrison had gone. He left the dance on foot and when he got onto the roadway he saw a parked bus. He saw Harrison being hit by two men. Harrison was holding a jackhandle. He (applicant) went to one of the men, the deceased, who was hitting Harrison, patted him on the shoulder, identified himself as a policeman by exhibiting his identification booklet, and enquired what had happened. His revolver was in his waist. The deceased took a step backward, said "Where rass cloth police come from at this time?" and put his right hand into his right back pocket. He (applicant) stepped back an arm's length. The deceased advanced upon him with a "slashing movement" and he (applicant) made about 5 steps backwards finding himself against the bus which was across the roadway. The deceased continued to slash at him twice with a double action. He (applicant) put forward his left hand to see if he could ward off the deceased and on feeling a burning sensation on his left hand he said to the deceased "You cut me". As the deceased was completing the second slash he pulled his revolver from his waist and fired one shot. The deceased walked a distance of about 5 yards and fell. On going up to the deceased he saw that the deceased's hand was grasping a ratchet knife. He later handed the knife to Detective Constable Murray together with the jackhandle and his service revolver. He had received a wound on his hand and this wound was attended to at the Kingston Public Hospital at 2 a.m. on the following day. Supporting evidence for the defence came from Constables Harrison, Simms and Brown. On this state of the evidence it was contended for the defence at the trial that the sole issue which arose on the applicant's evidence was that of self defence and that no issue of provocation arose for the jury's consideration. In the course of his charge to the jury the learned trial judge appeared, however, to think otherwise for after defining murder and distinguishing that offence from manslaughter where the evidence might disclose not an intent to kill or to do serious bodily harm but rather an intent to frighten or merely to cause some harm less than serious harm the learned trial judge went on to define provocation and told the jury that at a later stage in his summing up he would deal with the evidence in so far as it related to that question. However, when he came to deal with the issue of self defence he dealt with the evidence in relation to that issue in such a way that it no longer became

necessary for him to [illegible]rt to the question of provocation. Eventually, he left the jury to [illegible]hether, if they accepted the evidence of Oscar Reid, the verdict should be [illegible]rder or manslaughter depending on the view they took as to the applicant's intent in discharging the firearm at the deceased, and he directed the jury that if they did not accept Reid's evidence or were in doubt about it they were to acquit the applicant entirely. He advised the jury to commence their deliberations with the determination of the issue - did the deceased have a knife in his hand; was he using it to attack anyone? - this being, the trial judge said, one of the main facts the jury had to decide, the determination of which would assist them considerably in the whole case.

The first main ground of appeal argued was that the learned trial judge misdirected the jury by telling them that when considering self defence the first or main question for them to decide was whether the applicant was acting in the execution of his duty as a policeman and if he was not there must be evidence of retreat before a plea of self defence could succeed in law.

The learned trial judge dealt with the issue of self defence in the following way. First of all he said that if a policeman in endeavouring to execute his duty as a police officer is resisted or attacked he is under no duty to retreat. He can repel force with force and, if necessary, kill the person who is preventing him from carrying out his duty or who is attacking him. On the other hand, said the judge, in the ordinary case of self defence an ordinary citizen, i.e. one other than a police officer endeavouring to execute his duty as such, is under a duty to retreat if there is a possibility of retreating without endangering life or body. Then the learned trial judge said "so that, perhaps the very main question that you will have to decide in this case is: was this accused man acting in the execution of his duty as a police officer. And the other main question which is equally as important is whether or not he was a police officer, was he acting in self-defence. That is, defending himself against the knife of the deceased man when he shot the deceased man, if you find he did shoot the deceased." The trial judge then went on to emphasise that although a police officer acting as such is not bound to retreat there must be apparent necessity for the killing and he must be acting legally in the

execution of a duty which is imposed on him by law otherwise he may be guilty of at least manslaughter or may be murder. The learned judge continued -

> "Now let me deal with the general position with regard to self defence. In order to raise the issue of self defence in a trial for murder there must be some evidence of these three things; (a) that the accused man had some reason to fear death or bodily injury from some action or word of the deceased or of a person or persons acting in complicity with the deceased, and (b) that the accused had no opportunity to retreat or retreated as far as he could. This is taking the position not as a police officer but as an ordinary individual; that is, if you find that he was trying to carry out his duty as a police officer, he was under no duty to retreat but if you find that he was doing what he was doing but that it was not as a police officer then he is under a duty to retreat as far as the necessity of the situation allows him to retreat. And (c), that the accused dealt the blow or inflicted the harm, that is, in this case fired the shot which resulted in the deceased's death with the intention of defending himself from death or injury. That is to say the accused man considered that his life or his limbs were in danger."

Counsel for the applicant contends, and counsel for the Crown agrees, that the direction at paragraph (b) in that passage is incorrect in that there is no duty to retreat in the face of a violent and felonious attack made on a highway. The judgment of Lewis, J.A. in R. v. Shaw (No.2) (1964) 6 W.I.R. 17, was cited in support of that contention where as the headnote to that case indicates it was held that "the authorities establish that for the prevention of, or the defence of himself or any other person against the commission of a felony where the felon so acts as to give him reasonable ground to believe that he intends to accomplish his purpose by open force, a person may justify the infliction of death or bodily harm provided he inflicts no greater injury than he in good faith might in the circumstances reasonably believe to be necessary for his protection; and that in such cases he is under no duty to retreat but may stand his ground and repel force by force." In that case the trial judge failed to give a direction to that effect and the conviction was quashed. In the instant case, however, after the trial judge had referred to what he termed the "general position" with regard to self defence which included at paragraph (b) thereof the reference to a duty to retreat to which exception has been taken, the trial judge continued -

"A person who is attacked or who reasonably apprehends an imminent attack is entitled to defend himself by the use of such force as is reasonably necessary. The probability of retreating is only one of the relevant factors which you are entitled to consider in deciding whether the degree of force used in self defence was reasonably necessary in all the circumstances of the case. A man who is attacked may use such force as on reasonable grounds he believes to be necessary to prevent or resist the attack and if in so doing he uses such force and in using such force he kills his assailant he is not guilty of any crime even if the killing was intentional. In deciding whether it was reasonably necessary to have used as much force as was in fact used regard must be had in (sic) all the circumstances including the possibility of retreating without danger or yielding anything that a man is entitled to protect."

The learned trial judge then went on to relate that direction to the fact that the defence raised in the instant case was that the applicant did retreat. The passage just referred to appears to have been taken verbatim from the judgment of Menzies, J., in the Australian case of R. v. Howe (1958) 32 A.L.J.R. at p.219 approving the view expressed by the Full Court of the Supreme Court of South Australia on appeal from a conviction for murder. The point as Menzies, J. emphasized is that there is no requirement of a duty to retreat additional to the requirement that the force used must be only such as is necessary for self protection. The learned trial judge continued -

"A person who is subjected to a violent and felonious attack who is endeavouring by way of self defence to prevent the consummation of that attack by force exercises more force than a reasonable man would consider necessary in those circumstances but no more force than he, the accused, honestly believes to be necessary in the circumstances of the case is guilty of manslaughter and not murder."

The learned trial judge was there endeavouring to explain that if there is no honest belief that it was necessary to use the degree of force in fact used and the assailant is killed an accused person may be found guilty of murder whereas if there is an honest belief that it was necessary to use the degree of force used but in fact the degree of force used was more than the accused could reasonably in the circumstances have considered necessary he would not be guilty of murder but should be convicted of manslaughter.

Then the learned judge gave the following direction -

> "But in this case, members of the jury, I am directing you quite plainly that if you find as a fact that the deceased man was attacking the accused man with a knife, a ratchet knife, and that he actually slashed at him ten times or thereabouts, then the accused man would be perfectly justified in shooting and killing, perfectly justified."

It will at once be noticed that no reference is made in that direction of any necessity for the jury to find as a fact that the accused retreated or that he considered the possibility of retreating. This was the clearest direction that could possibly have been given that acceptance of the defence put forward must result in complete acquittal and that no question of manslaughter arose on its acceptance. The question of manslaughter was indeed left to the jury but it was only left in relation to the Crown's case and so only in relation to whether an intent to kill or to do grievous bodily harm could be inferred. After reviewing the evidence for the prosecution the learned trial judge said -

> "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 10 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 (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 Maneini's case. See per Viscount Simon at (1942) A.C. 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.

J.A.

J.A.

J.A.