[2013] JMCA Crim 53

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 78/2009

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

CLIVE MULLINGS v R

Linton Gordon for the appellant

Mrs Sahai Whittingham-Maxwell for the Crown

12 November 2012 and 22 November 2013

PHILLIPS JA

[1] The appellant was charged on an indictment for the offence of wounding with intent, the particulars of which were that on 10 August 2006, in the parish of Saint Andrew, he had wounded Derrick Smith with intent to do him grievous bodily harm. He was tried on 8 and 9 June 2009 before F Williams J and a jury, in the Home Circuit Court in the parish of Kingston, and convicted and sentenced on 10 June 2009 to six years imprisonment at hard labour. His application for leave to appeal against conviction was granted by a single judge of appeal. We heard this appeal on 12 November 2012 and allowed it, set aside the conviction and sentence, entered a

judgment and verdict of acquittal, and promised to put our reasons for doing so in writing. These are the promised reasons.

[2] This is one of those unfortunate cases concerning bad relations between persons residing on the same premises, where the situation got out of control and one of the parties was seriously injured. The prosecution called three witnesses: the virtual complainant, Mr Derrick Smith, who claimed to have received his injuries from the appellant who attacked him with a knife; the woman with whom Mr Smith lived with, who was present when the incident occurred, Miss Patricia Grant, and the investigating officer, Constable Cornell Whittaker. The appellant gave sworn evidence.

The case for the prosecution

[3] Mr Smith, a construction worker, gave evidence that in August 2006 he was living at 36 Delacree Lane in the parish of Kingston, in a one bedroom house, which he shared with his "baby mother" Miss Grant, (with whom he had two children) and her relative, the appellant. At the time of the incident which occurred on 10 August 2006, he said that he had been living there for about three years, and there had been ongoing arguments between the appellant and Miss Grant, and the appellant and himself during that period. On the day in question, he stated that he had come home from work, had gone into the yard, had taken up his two month old baby, and was standing at the front door watching the appellant walk back and forth. Miss Grant and her son, he said, were at the gate of the premises. He said that he saw the appellant with a ratchet knife wrapped up in a red towel. The knife was open.

[4] He further testified that he turned his back, went inside the house to put his baby on a bed, went back to the door which was open, and was watching the appellant. He said that he heard the baby say, "Da" and he looked around, and it was at that time that the appellant stabbed him with the said knife that he had seen him with earlier, and said the words, "P---- goh dead." He said that he was stabbed in the chest and he saw blood rushing "out of [his] stomach". He said that at the time when he had been stabbed by the appellant he never had any weapon and he had not been attacking the appellant. When asked if Miss Grant had been attacking the appellant at the time when he had been stabbed, he said that it was "when he stabbed me Patricia rushed him". His evidence was that Miss Grant had not been doing anything to the appellant before he stabbed him. He said that after he had been stabbed he lost consciousness and woke up in the Kingston Public Hospital, where he remained for approximately two weeks. He was later re-admitted for a further week and then had to continue attending the hospital for treatment of the wound.

[5] In cross-examination Mr Smith testified that the parties occupied a small concrete house with one room which had been "cut in two". He stated that when he went to live at the house with Miss Grant, she had occupied one side of the house and the appellant occupied the other. On the appellant's side there was no door so a window had been "knocked out" and used as a door. He admitted that since the appellant's departure he and Miss Grant occupied both rooms. He said that Miss Grant had nine children living at the house, two of whom, as indicated, had been fathered by him. Initially he attempted to deny that he and the appellant had any quarrels at all,

but when confronted with his earlier statement given to the police he admitted that there had been ongoing disputes with the appellant. He, however, denied that those disputes related to Miss Grant wanting the appellant to leave the house. He asserted that the disputes were as a result of the appellant "running down the kids them with the cutlass trying to chop up the kids and I could not tolerate that". He admitted that he, Miss Grant and the appellant had been having incessant quarrels since he (Mr Smith) came to live at the house. He denied that: on 10 August 2006, at approximately 5:00pm he had been sweeping the yard; Miss Grant was standing at the gate where there was a table with a knife on it; and she had been jeering the appellant, telling him that her first "baby father" had chopped him in his face and he could not do anything about it.

[6] He specifically denied running from the gate for a machete that he had at the door, or rushing the appellant with it and using it to chop at him. He further denied that the appellant, while trying to defend himself, put up his hand to protect himself and was chopped on the hand, and that it was then that the appellant pulled a knife and pushed it towards him. He also denied that Miss Grant took the knife from the table and rushed towards the appellant.

[7] Miss Grant gave evidence. She said that she was present on the day of the incident. She confirmed that there had been ongoing disputes and "fuss-fuss and quarreling" between the appellant, Mr Smith and herself. She said that on the day of the incident she had been in the yard at the gate with her son, making a fire. She said that Mr Smith was in the house at the front. She saw the appellant come from his

room, saw him walking through the gate, then he turned back, passed her and went to the step where Mr Smith was standing in front of the door to the house. She said that Mr Smith had nothing in his hand, he had been holding on to the door, but as the baby inside started crying, Mr Smith turned towards the baby and it was at that time that the appellant pulled a ratchet knife and stabbed Mr Smith in the chest, on the left side of his body. Miss Grant said that on withdrawing the knife the appellant said, "Goh and dead now." Miss Grant said that she and her son took up stones to throw at the appellant but he pulled his ratchet knife on them. She said the appellant went through the gate and subsequently other persons threw stones at him, but he escaped by jumping over a wall and running through the bushes. Miss Grant said that Mr Smith collapsed after having been stabbed, lost consciousness, was bleeding profusely and was assisted by neighbours to the hospital. She maintained that Mr Smith had not attacked the appellant during the incident, and she had not seen him go for any machete. She also said that there had not been any quarreling on that evening.

[8] In cross-examination Miss Grant also attempted, in spite of the evidence given in examination-in-chief, to say that there had not been any ongoing disputes between herself, Mr Smith and the appellant but was forced to accept that to be the case. She maintained that the disputes did not have to do with her wanting the place for herself although she accepted that at the time of the trial she had the whole place for herself, Mr Smith and her children, the appellant having left the house. She initially said that only three children were living with her, then she adjusted that number to seven. She also denied that there had ever been any close relationship between the appellant and

herself before he came to live at that premises. She denied most of the suggestions put to her by counsel for the defence with regard to Mr Smith having a machete and rushing at the appellant with it, or the appellant taking out a ratchet knife to defend himself. However, although she denied that she had been jeering the appellant about a "baby father" of hers having previously chopped him and that he was not able to do anything about it, she admitted that she did have a "baby father" named Basil Minott who had chopped the appellant.

[9] Constable Cornel Whittaker, the investigating officer, gave evidence of visiting Mr Smith while he was in hospital and he said that he observed his condition. He commenced investigations into a case of felonious wounding. He said that he took a statement from Mr Smith, and sometime thereafter he visited the Hunts Bay Police Lock Up where he asked for, and met, the appellant. He said that he took the appellant to the CIB office where Mr Smith was. He said that he asked Mr Smith if that was the man who had injured him and he replied in the affirmative. He said that he informed the appellant of the allegations against him and cautioned him. He said that having been cautioned, the appellant responded, "I have nothing to say."

The case for the defence

[10] The appellant gave sworn evidence that he and Miss Grant were cousins, that he had known her from she was a little girl going to basic school and that he had assisted her as she was a member of his family and her mother had died. He said that initially he had lived at the house at Delacree Lane alone and that subsequently Miss Grant had

come to live there. He said that the relationship had deteriorated between them as he had not been able to provide for her as he had done in the past. He felt that she had "vindictive feelings" towards him. He testified that when Mr Smith had come to live at the house, Miss Grant had six children living with her. He said that the relationship between them was not good as one of Miss Grant's "baby fathers" had chopped him several times and before the wounds had healed she had brought Mr Smith into the house. Additionally, he said, they took up the front of the house, the living room, the kitchen and bathroom and only left him a room around the back with a window and no door. He said that he "just mek a little make shift put a piece of ply board there and use it and blocked as an entrance and a exit".

[11] On the day in question the appellant said that he had come home from selling goods, and then dressed in underpants and a merino he was on his way to have a bath next door with his towel and soap, when Miss Smith blocked him at the gate. He said that she was jeering him about the injuries received at the hand of her "baby father", which he had been unable to defend, even though he indicated that she said he liked to behave like he was a "bad man". Mr Smith, he said, who had been sweeping the yard, stated that he was not afraid of him, and went inside the house and returned with a machete. Mr Smith began behaving increasingly aggressively. The appellant said that he had been looking at Miss Grant at the gate, talking to her calmly, when he saw Mr Smith with the machete aimed to chop him. He said that all he could do was to put up his hand to protect himself. He received a chop on his hand which started to bleed. He said he pulled the knife that he had in his waist, shut his eyes and plunged it. He

confirmed that after the incident he fled the area. He said that he went to the Kingston Public Hospital the next day where he was treated for the wound.

[12] The appellant said that when Mr Smith was about to chop him with the machete he felt that he was going to die, and that while he was under attack he remembered how Miss Grant had brought her previous "baby father" to the house who had chopped him several times. The appellant maintained that he had his knife with him to protect himself as "they always attack me and harass me". He further maintained that when Mr Smith attacked him with the machete he put his hand up and shut his eyes because he thought he was going to be chopped, particularly as Mr Smith was so close to him.

[13] In cross-examination he stated that prior to the incident he had wanted to leave the house but had wanted some time to sort himself out so that he could "leave in peace and not in pieces". He denied that he was the aggressor and insisted that he had been defending himself when Mr Smith was injured. He conceded that when he had been arrested he had not told the police that Mr Smith had chased him with a machete and that he had a knife, as on several occasions attempts had been made on his life and the police had not helped him.

[14] The appellant said that he returned to the house after he had left the area, and he noticed that his furniture including his brand new bed and all his possessions had been put outside of the house and they had been destroyed by the elements. He also observed that Mr Smith and Miss Grant were in occupation of the entire house at that time.

The grounds of appeal

[15] The appellant abandoned the original grounds filed and obtained leave to argue six supplemental grounds of appeal filed. They are as follows:

> "**GROUND 1**:
>
> The Learned Trial Judge misdirected the Jury on the issue of [sic] standard of proof required in order for the Jury to return a verdict of guilty.
>
> **GROUND 2:**
>
> That the Learned Trial Judge fell into error when he withdrew Accident from the jury even though the evidence adduced in the case made Accident a live issue.
>
> **GROUND 3:**
>
> That the Learned Trial Judge could have confused the Jury but in any event failed to properly direct and assist them in understanding and interpreting the legal meaning and consequence of Self-Defence when he stated to the Jury as follows:
>
> > *'In this case the Prosecution's case is that after the actual stabbing, the accused man is said to have uttered some words to the effect "Go dead now", and that is one of things the prosecution is asking you to consider in gleaning what the intention of Mr Mullings was at the time, and that is if you accept the evidence of Mr. Smith and Miss Grant's evidence, Mr Foreman and members of the jury, that those words were in fact said.'*
> >
> > *(page 6, paragraph [sic] 14-25)*
>
> **GROUND 4:**
>
> That the Learned Trial Judge did not conduct the Trial in a way fair to the Applicant in that he ridiculed the Applicant's Defence of Self Defence, in particular, at page 7 paragraphs [sic] 1-13 and page 8 paragraphs [sic] 9-18.

GROUND 5

That the Learned Trial Judge failed to guide and assist the Jury to an understanding that once the Defence raises Self Defence it is the duty of the Prosecution to prove that there is no Self Defence and not the duty of the accused to prove Self Defence (Page 15 paragraphs [sic] 11-24).

GROUND 6:

That the Learned Trial Judge failed to tell the Jurors that once [sic] Prosecution fails to negative Self Defence they should acquit and instead directed them in a way that must have confused them on the issue when he directed them as follows: (Page 20 paragraphs [sic] 12-19)

> '*So if you find that he was under attack on the day in question, if you accept his evidence in which case you would have to reject the evidence of Mr. Smith and Miss Grant, and if you accept that he was in fact under attack on the day in question, then it would have been open to him to take such steps as were reasonable to defend himself*.'

[16] At the hearing of the appeal counsel on behalf of the appellant indicated that he would not be proceeding with ground two on accident and was not therefore relying on that ground of appeal.

[17] In essence, the issue arising out of the remaining grounds of appeal is that the learned judge erred in his directions to the jury with regard to the law on self-defence and its application in respect of the facts of this case.

Submissions

[18] In respect of ground of appeal one, counsel for the appellant submitted that the learned trial judge gave inadequate directions on the burden and standard of proof.

He said that the learned judge had indicated in the summation that the burden of proof rested on the prosecution throughout, that it was for the prosecution to prove and convince the jury of the appellant's guilt beyond a reasonable doubt, and that they should consider all the evidence carefully. He said that although the learned judge also stated that the jury should return a verdict of guilty if they were satisfied of the guilt of the accused, but return a verdict of not guilty if they had a reasonable doubt, his complaint was that the learned judge then stated with regard to the accused:

> "...if the sworn testimony that Mr Mullings has given, if you accept his testimony then you are also required to enter a verdict of not guilty."

It was counsel's contention that the statement made above would have suggested to the jury, which would have confused them, that there was an onus on the appellant to satisfy the jury of his innocence whereupon they could enter a verdict of not guilty.

[19] Crown counsel accepted that the learned judge at the commencement of the summation referred to the fact that "there were certain elements or ingredients of the offence, certain things that the prosecution will need to prove to establish this case," without specifically referring to the actual words "burden of proof", which would have clarified the same for the jury. Counsel further conceded that the learned judge could have expanded on the subject, indicating that the appellant bore no burden of proving anything and that it was not his task to prove his innocence. She also submitted that the learned judge could have gone on further to say that the fact that the appellant had given evidence did not imply that any burden had been imposed upon him to prove his innocence. However, in spite of that, counsel maintained that the learned judge had

complied with what was required of him, namely to present the law and a summary of the evidence in a way which would best enable the jury to reach a conclusion. Counsel submitted that although the judge could have said more on the subject of the burden of proof, what he had said was sufficient for the jury to understand where the burden of proof lay.

[20] With regard to the standard of proof Crown counsel submitted that the judge had dealt with this adequately. Counsel stated that the judge was not bound to use any particular words in advising the members of the jury that they ought to be satisfied beyond reasonable doubt. Counsel cited **Ferguson v The Queen** (1979) 1 WLR 94, and the decision of the House of Lords in **Woolmington v DPP** [1935] AC 462, in support of these submissions and submitted further that in **R v Majid** [2012] EWCA Crim 1023 it was decided by the Court of Appeal of England that any further explanation was unwise, and also that there was no need to explain reasonable doubt to a jury.

[21] With regard to ground of appeal three, counsel's complaint was that the learned judge having advised the jury of the ingredients required to be proved in respect of the offence of wounding with intent, he then referred to the prosecution having to prove, inter alia, that the act of wounding was deliberate and not accidental, and that it was done without lawful excuse, for example, not done in self-defence. The jury were also told that the prosecution must prove that the act of wounding was done with the intention of causing grevious bodily harm or really serious bodily harm or injury. But in addressing the meaning of intention, counsel submitted, the learned judge focused on

the words allegedly spoken by the appellant, "go dead now," suggesting that the jury could use them to glean the intention of the appellant, and failed to address the jury in respect of the facts of this particular case, as to what could have been in the mind of the appellant and so his intention, if he was in the act of defending himself.

[22] Counsel for the Crown submitted that the learned judge in his summation was referring to the ingredients of the offence of wounding with intent, particularly the aspect of intention, and he was explaining to the jury, in a way that they could understand, the law and how to apply the same to the facts. The words referred to by the trial judge were led in evidence by the prosecution. The learned judge's reference to the words therefore, that the witnesses had said that the appellant was supposed to have said, at the time the virtual complainant suffered injury, must, she said, be taken in its context. The words were dealt with by the learned trial judge when he was addressing intention within the context of the offence, and not when he was addressing the legal meaning of self-defence. Counsel submitted that this ground was therefore misconceived.

[23] Counsel for the appellant, in respect of ground of appeal four, submitted that the learned judge in the summation ridiculed the defence, and thus the trial was not conducted in a fair manner. Counsel pointed to pages 7 and 8 of the transcript where the judge, in completing his summation on the issue of intention to the jury, referred to a certain example of a person picking up a loaded firearm, pointing it at another person and pulling the trigger and suggesting that certain consequences would flow from that action and would have been reasonably expected to flow from that action.

Counsel argued that similarly the learned judge equated that situation to someone picking up a knife and inflicting a wound on someone else, indicating that the inference was that that person would have foreseen those consequences. Counsel complained that the treatment of the defence of self-defence after this statement did not do justice to the defence but only suceeded in ridiculing it.

[24] Crown counsel submitted that the learned judge on the referenced pages in the transcript merely tried to explain the ingredients of the offence, with particular reference to the requirement of intention. Counsel submitted that the examples cited by the learned judge, were not generic to the instant case and were only used in an effort to assist the jury in understanding how to infer intention. Counsel rejected the argument that the learned judge was in any way ridiculing the defence but she maintained that he was simply trying to break down what could be a complicated concept for the jury's better understanding.

[25] Grounds five and six of counsel's submissions can be outlined as one. Counsel for the appellant argued that once self-defence was raised on a sound evidential base, as in the instant case, it was not sufficient for the learned judge to give general directions on the burden of proof and on the meaning of self-defence without more. It was the duty of the judge, counsel submitted, to point out to the jury clearly, that once self-defence was raised, the burden was on the prosecution to destroy its validity and not for the accused to establish it. He submitted that nowhere in the summation had the judge performed that duty nor had he specifically guided the jury with regard to a proper understanding in respect of the law of self-defence, which, he argued, was

fatal to the conviction. Additionally, counsel submitted, the judge should have directed the jury that once the prosecution failed to negative self defence then they must return a verdict of acquittal. Having failed to do this, the conviction, he submitted, was not safe. Counsel referred to the transcript on page 15 to support the submission that the judge's direction was inadequate and flawed, and as a consequence the conviction could not be sustained.

[26] Crown counsel submitted, in response, that although the summation was not a fulsome exposition on the law of self-defence the direction given by the judge was adequate. The learned judge, counsel argued, had reiterated the evidence and indicated that the appellant had said that he was under attack. He set out the circumstances in which he could have been convicted or acquitted in light of the issue of credibility. Counsel posed a rhetorical question: how does the prosecution negative self-defence when the issue is one of credibility? She submitted that the sole eye witness corroborated the virtual complainant's account and there was no other evidence available to the Crown. Counsel submitted further, that the case was a short one, the matter was not technical, and it was a simple issue of whom the jury believed. The judge, she submitted, did not have to go beyond what was said by the witnesses. Anything else, she argued, would only have confused the jury. The learned judge, she submitted, did what was required of him to guide and assist the jury in their deliberations.

Analysis

[27] As indicated earlier (paragraph [16]), the real issue on this appeal is: what are the proper directions which ought to be given to the jury in relation to the defence of self defence, particularly with regard to the circumstances of this case? As a consequence, we will deal with the grounds of appeal all together.

[28] It is trite law that the judge in his summation must make reference to the burden and standard of proof (**Lawrence v R** [1982] AC 510). In this case the learned judge on page 15 of the transcript, set it out in this way. He said:

> "Now, the burden of proof in this case has rested on the Prosecution throughout. They are the one [sic] who brought the accused man, Mr Mullings, here. It is for them to prove or convince you of his guilt and they are to give proof beyond a reasonable doubt. This does not mean you have to be one hundred percent sure of the guilt of the accused. Some would say you could only be one hundred percent sure if you were there yourself at the time and saw and heard what happened. It is open for you to consider all the evidence very, very carefully. Having considered the evidence carefully and you are satisfied of the guilt of the accused then you can return a verdict of guilty. If you have a reasonable doubt, not just any doubt, a reasonable doubt about the guilt of the accused then you should return a verdict of not guilty or if the sworn testimony that Mr. Mullings has given, if you accept his testimony then you are also required to enter a verdict of not guilty."

[29] From the above, it is clear that the learned judge did not go on to say, as he should have, that if the jury did not accept the sworn testimony of the appellant, then on that basis alone they ought not to return a verdict of guilty, but they should go back to the case laid by the prosecution to see whether the prosecution had proved their

case beyond a reasonable doubt, and if the jury thought that they had, then and only then could they return a verdict of guilty. When posited in the way that it was, one could conclude that there is some burden on the appellant to prove his case. This omission will have some significance when we review the directions which ought to have been given in respect of the law on self-defence.

[30] Indeed, Edmund Davies LJ in the English Court of Appeal case of **Alan Abraham v R** (1973) 57 Cr App R 799, pointed out on behalf of the court that once the general direction has been given to the jury as to the onus and standard of proof, if there is a special plea of self-defence, then the jury should be told that the accused is raising a special form of the plea of not guilty. And since it is for the Crown to show that the plea of not guilty is unacceptable then the Crown must convince the jury beyond reasonable doubt that self defence has no basis in the case. In fact, Edmund Davies LJ approved the statement made by Winn LJ in **Wheeler** (1967) 52 Cr App R 28, that defences such as self defence "are not defences in respect of which any onus rests upon the accused, but are matters which the prosecution must prove as an essential part of their case before a verdict of guilty is justified".

[31] It was in **Solomon Beckford v R** [1987] 3 All ER 425, a decision by the Privy Council on a case from Jamaica, where Lord Griffiths on behalf of the Board, indicated that there was no difference on the law of self-defence between the law of Jamaica and the English common law, namely, that the defence of self-defence depends on what the accused honestly believed the circumstances to be and not on the reasonableness of that belief, and that the law on self-defence was correctly stated by Lord Lane CJ in

R v Willliams [1987] 3 All ER 411, which was specifically approved by their Lordships. Lord Griffiths quoted the relevant passage from the judgment of Lord Lane CJ at page 431 paragraphs f-j, it reads:

> "The reasonableness or unreasonableness of the defendant's belief is material to the question of whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, is neither here nor there. It is irrelevant. Were it otherwise, the defendant would be convicted because he was negligent in failing to recognize that the victim was not consenting or that a crime was not being committed and so on. In other words, the jury should be directed, first of all, that the prosecution have the burden or duty of proving the unlawfulness of the defendant's actions, second, that if the defendant may have been laboring under a mistake as to the facts he must be judged according to his mistaken view of the facts and, third, that that is so whether the mistake was, on an objective view, a reasonable mistake or not. In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury come to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If, however, the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been laboring under it, he is entitled to rely on it."

[32] In England, the Judicial Studies Board, with the approval of the Lord Chief Justice, produced a model direction on self-defence which, Lord Griffiths stated in **Beckford v R**, has been widely used by judges when summing up to juries, and contains the following guidance:

> "Whether the plea is self-defence or defence of another, if the defendant may have been labouring under a mistake as to the facts, he must be judged according to his mistaken belief of the facts: that is so whether the mistake was, on an objective view, a reasonable mistake or not."

[33] Lord Griffiths, on behalf of the Board also made it clear that it has always been recognized that a person has a right to defend himself from attack and to inflict violence if necessary in so doing, and if no more force than is necessary is used, then no crime has been committed. However, he went on further to say that a man does not have to wait for another to strike the first blow, or to fire the first shot, as circumstances may justify a pre-emptive strike. However, in relation to the duty of the prosecution in the proof of the crime where self-defence is raised, he stated with clarity:

> "It is because it is an essential element of all crimes of violence that the violence or the threat of violence should be unlawful that self defence, if raised as an issue in a criminal trial, must be disproved by the prosecution. If the prosecution fail to do so the accused is entitled to be acquitted because the prosecution will have failed to prove an essential element of the crime, namely that the violence used by the accused was unlawful."

[34] In the case of **R v Whyte** [1987] 3 All ER 416 in the Court of Appeal in England, Lord Lane CJ on behalf of the court addressed the issue of the reasonableness of the force which may be lawfully used to repel a violent attack and stated:

> " ... A man who is attacked may defend himself, but may only do what is reasonably necessary to effect such a defence. Simple avoiding action may be enough if

> circumstances permit. What is reasonable will depend on the nature of the attack."

Lord Lane referred to the test as being an objective one and approved of the words of Lord Morris in **Palmer v R** [1977] 1 All ER 1077 in that regard, namely:

> "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."

[35] So it is clear from the above that once it is understood what the factual basis for the defendant's actions is, and therefore on what basis he is to be judged, namely whether things were as they actually happened and he knew that to be so, or whether they were as he genuinely believed them to be, which is a matter for the jury, the jury should be directed that that is a subjective test, and that he is to get the benefit of any mistaken view once it is honestly held. Thereafter, the only question which would remain would be the issue as to whether the defendant's response was reasonable or proportionate in the circumstances, that is, whether it was an honest and instinctive reaction in a moment of unexpected anguish, which is the objective test, and the jury should also be directed accordingly. If the defendant held an honest belief that he was being attacked and he reacted honestly and reasonably in fear of being harmed, and the prosecution has not disproved that that action was taken in those circumstances, the action would not be unlawful and the defendant would be entitled to be acquitted, and the jury should be so directed.

[36] In the summation the learned judge on page 8 of the transcript at lines 3-8 stated:

> "Now, the accused man had pleaded not guilty, and his defence is one of self-defence, that he was under attack at the time, and he pulled the ratchet knife which he had in the waistband of his shorts or his underpants, and thrust it in the defence of his life.
>
> And you would have heard him give evidence that he had come under attack from the complainant and Miss Grant, and her family before. So he is indicating that he was fearful of his life. And this he says has something to do with bad blood which existed between himself, on the one hand, and Miss Grant and Mr Smith, on the other hand, that it had something to do with this desire to evict him or eject him from the premises where he was living."

[37] On page 20 of the transcript at lines 6-19 the learned judge said:

> "In relation to the [sic] self defence I will just reiterate that if you accept his evidence that he was under attack on the day in question, then the law gives him the right to take such steps that are reasonably necessary to defend himself to repel the attack.
>
> So if you find that he was under attack on the day in question, if you accept his evidence in which case you would have to reject the evidence of Mr Smith and Miss Grant, and if you accept that he was in fact under attack on the day in question, then it would have been open to him to take such steps as were reasonable to defend himself.
>
> If, on the other hand, you do not accept what he says, but you accept the evidence of Mr Smith, and Miss Grant, that Mr Mullings attacked Mr Smith while he was unharmed, and did not attack him on the day in question, then that defence of self defence should be rejected."

[38] The evidence in the case had disclosed that the appellant had been chopped up by another "baby father" of Miss Grant and that his injuries had not yet healed before Mr Smith came to live at the premises. He said that on the day in question, he saw Mr Smith with a machete; he remembered the previous attack; he thought he was going to die, and the only thing he could do was to put up his hand to protect himself, shut his eyes and plunge the knife. He stated that in this altercation his hand was injured and required treatment at the hospital. In those circumstances, it required the learned judge to direct the jury to consider whether the appellant had an honest belief that he was under attack, not whether the jury believed he was under attack, and that if he held that honest belief, even if a mistaken belief, he was to be judged according to that mistaken view of the facts. The learned judge should therefore have directed the jury specifically that the test as to whether the appellant held that view was a subjective one and was not dependent on whether a reasonable person would have held that belief. This, he failed to do.

[39] The learned judge should also have directed the jury that if they found that the appellant believed that he was about to be attacked, he did not have to wait for the complainant to strike the first blow, as a pre-emptive strike may be justified in the circumstances. The jury should also have been directed that once self-defence had been raised as an issue, as had been in this case, it would have to be negatived or disproved by the prosecution, and that if the prosecution failed to do so then the appellant was entitled to be acquitted. This, he also failed to do.

[40] The learned judge should have also directed the jury that in deciding what would have been a reasonable reaction in the circumstances of this case, they should consider whether what the appellant had done was what he honestly and instinctively thought was necessary in a moment of unexpected anguish, which would be indicative as to whether the defensive action he took was reasonable. That would be determined by whether the jury believed the evidence of the appellant that he had the knife in his waist unopened, and that he had the knife because he felt that he needed to defend or protect himself in a hostile environment. In **R v Kerr** (1999) All ER (D) 1020, the court held, *inter alia*, that the jury had not been directed with regard to what constituted a reasonable response in respect of a defence of self defence, resulting in the appeal being allowed and the conviction quashed. In the instant case, the learned judge also failed to do this.

[41] In the light of the above we found that the directions of the learned trial judge with regard to the defence of self-defence were woefully inadequate and we therefore, as set out in paragraph [1] herein, allowed the appeal, set aside the conviction and sentence and entered a judgment and verdict of acquittal. This was not a case where one would consider a retrial, although the appeal succeeded as a result of an error of the judge in the summation. The incident took place on 10 August 2006, the trial on 8 and 9 June 2009, and on 10 June 2009, the appellant was sentenced to six years imprisonment at hard labour. The appeal was heard and disposed of on 12 November 2012. He would have by then, already have served over three years of the sentence

imposed on him. In keeping with the principles enunciated by **Reid v R** (1978) 27 WIR 254, a re-trial in those circumstances would have been unjust.