JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 20/90

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA

VS.

DAVID GREEN

E.B. Johnson for Appellant

Lloyd Hibbert, Deputy Director of Public Prosecutions for Crown

March 11 and 22, 1991

ROWE P.:

The appellant who had been convicted of wounding with intent on January 26, 1990 and sentenced to a term of imprisonment for five years, appealed against his conviction and sentence on two grounds: firstly, that the verdict was unsafe as there existed unchallenged medical evidence that the appellant received serious injuries consistent with a severe beating which was unexplained by the Crown and secondly, that the learned trial judge failed to direct the jury on the legal question of self-defence and to properly relate those principles to the facts of the case. As we were convinced at the close of the arguments that there was merit in both grounds the application for leave to appeal was treated as the hearing of the appeal which was allowed, the conviction quashed, the sentence

set aside and a verdict of acquittal entered. We now set out the reasons for our decision.

Mr. Alfred Thompson was severely injured on September 13, 1988. He lost the little finger of his left hand at the distal interphalangeal joint, he lost the 4th finger from the metacarpal phalangeal joint, and there was a wound to the palm of that same left hand 5 cm long from the 4th webbed space to the thenar eminence cutting muscle, bone and skin. In the opinion of the medical witness the left palm was open when the injury to the hand was received.

Evidence from Alfred Thompson established that he turned his herd of cattle loose on the morning after Hurricane Gilbert in the vicinity of Moorelands Farm in Clarendon. He received word that his cattle were impounded at Moorelands Farm and in a discussion with the appellant, a sum of five hundred dollars was demanded as the fee for releasing the cattle, some eight animals. An argument developed because in the mind of Mr. Thompson the appellant had no authority to demand a pound fee, although he could impound the animals. The prosecution alleged through the mouth of Mr. Thompson that while his back was turned to the appellant, his youthful assistant, a boy of 15 years shouted to him to watch out and on looking around he saw the appellant approaching with a machete. The complainant said he began stepping backwards, lost his foothold and fell on his back. While in that prone position the appellant advanced upon him and chopped at his neck. He held aloft his left hand to ward off the blow and was wounded. A second chop caught him at the side of his neck.

On the prosecution's case only three people were present at the time of the actual injury, viz., the appellant, the virtual complainant and the youthful assistant, who incidentally did not testify at trial. Mr. Alfred Thompson admitted that his

brother John Thompson had been present at the commencement of the argument with the appellant but had left before the attack upon him.

The defence which was foreshadowed in cross-examination was that the appellant impounded a number of trespassing cattle some of which were the property of Mr. Alfred Thompson and that Mr. Thompson, his brother John and a large crowd of men arrived at his home demanding the release of the animals. At an earlier encounter Mr. Alfred Thompson having satisfied himself that some of his cows were in the Moorelands Farm pound had promised to go to his house for the pound fee and to return for the animals. But he did not return alone. The appellant in a long unsworn statement said Alfred Thompson held him while Alfred's brother, John Thompson and a number of other men severely beat him with a pick-axe handle and a machete. So severe was the beating that "when he looked at Alfred Thompson he looked like he saw fifteen men ..... instead of one man. Darkness came over his eyes, pure darkness and mini-mini came over his eyes." One man threatened to kill him and another threw a machete at him which missed the target and stuck in the floor. It was this machete that he took up when during the attack he had fallen to the floor and which he used to fan at his attackers to keep them at bay. The appellant said he went to Lionel Town Police Station and on the following day he was examined by the doctor.

Mrs. Thompson corroborated her husband's evidence as to the details of the attack adding that there were eight men in the crowd who attacked the appellant. Dr. Morgan said he examined the appellant on the day of the incident, which account does not exactly co-incide with the appellant's evidence that he visited the doctor on the following day. At the time of the examination the appellant walked with a limp,

had marked tenderness and contusion at the right iliac forsa, i.e. the right hip; marked tenderness and contusion in the lower abdomen; marked tenderness at the pericardium, i.e. just below the heart; tenderness and contusion at the left side of his back; marked tenderness and contusion of the right shoulder; marked tenderness and contusion of the lumbar sacral region, i.e. the back around the loins; marked tenderness and contusion across the left thigh, the inner part of the left thigh and the knee section. In the doctor's opinion the injuries he saw to the appellant would require a very heavy blunt force for infliction. A pick-axe stick and the flat side of a machete could be used to inflict the injuries which would cause severe pain.

These physical injuries to the appellant told their own story which was not in any way dependent upon the oral testimony of a credible witness. The appellant was quite severely beaten by some person or persons which was as much a fact established in the case, as the fact that Mr. Thompson's left hand was severely injured.

The trial judge having narrated the state of injuries to the appellant directed the jury as follows:

> "So there you have it, Mr. Foreman and members of the jury, as I said, this is essentially a quesion of fact for you. How did Mr. Green - how did Mr. Thompson get these injuries to his hand? Was it as the defence have said, in the course of this attack on this accused man or was it when he was on the ground as he said? How did Mr. Green, the accused man get all these injuries which the doctor saw? Bear in mind that the evidence of Mr. Thompson is, as far as he is concerned there was no crowd, only himself and this youth. His brother wasn't there. Nobody touched him."

In our view the learned trial judge failed in the above passage to assist the jury as to the manner in which they ought to approach and to consider the defence. He began, quite properly, to invite their attention to the injuries which the appellant undoubtedly suffered and one would have expected him to develop the point by reminding the jury that unless the prosecution could negative self-defence which in the circumstances of that case meant that the prosecution would either have to account for or to provide some credible theory through which the appellant could have been injured other than as the appellant had stated, then the verdict would have to be one of not guilty. Instead of continuing on that logical path the learned trial judge introduced into the consideration and analysis of the defence, the evidence concerning the prosecution witness and his injury. At best the passage quoted above was confusing to the jury and at its worst it robbed the jury of the opportunity of a proper consideration of the defence. This was Mr. Johnson's first complaint and it is demonstrably meritorious.

At page 14 of the summing-up the learned trial judge having summarised the case for the prosecution and the defence, introduced the legal question of self-defence and gave the following direction:

> "Well, that is his story. According to him he was under attack. If you accept his story that he was under attack and then he only used the machete to ward off the attack, this man has a pick-axe and a machete attacking him and he used the machete just to ward him off, in that case he would be defending himself, acting in self-defence. In other words, it is a matter for you."

Mr. Johnson has criticized the final sentence in that paragraph on the ground that the trial judge was there telling the jury that even if they found the facts as given in the defence, it was a matter for them to decide whether the appellant was guilty or not guilty.

Counsel for the Crown submitted that the impugned sentence can only mean that the jury have the overall responsibility to determine the truth or otherwise of the defence and then to determine whether or not the appellant was acting in self-defence.

If the final sentence is to be given any rational meaning, it must have left the jury with the impression that even if they accepted the appellant's story, they had a function other than to say not guilty. Here the trial judge was giving the jury a clear direction as to the legal effect of the defence and yet he reduced it to a question of fact. This mis-direction coupled with the unclear and inadequate presentation of the defence compelled us to the view that the verdict was unsafe and unreasonable in the circumstances with the result stated earlier, i.e. that the appeal is allowed, the conviction quashed, sentence set aside and verdict of acquittal entered.