JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 2/93

COR: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A. (AG.)

REGINA VS. GARNETT SHAND

Delroy Chuck for appellant

Diana Harrison, Deputy Director of Public Prosecutions for Crown

May 31 & July 5, 1993

GORDON, J.A.

The appellant was convicted before Cooke, J. and a jury on January 26, 1993 for wounding Lilieth Reid on October 16, 1991 with intent to do her grievous bodily harm and was imprisoned at hard labour for four years. Submissions in this appeal were heard on May 31, 1993 and we reserved our decision.

The Prosecution case was given by Maxine Anderson and her mother, Lilieth Reid, the complainant. Miss Anderson said, she was on Sherlock Avenue about 7:00 p.m. on the 16th October, 1991, when the appellant, a policeman, approached her and accused her of molesting his mother. She told him she was in no mood to argue and walked away, and he followed her slapping her and jabbing her with a gun which he had in his hand. A crowd gathered and her mother, Lilieth Reid, with a broom in hand, came up and joined them. She enquired of the appellant what Maxine had done that he had slapped her. The appellant was walking away while she followed

repeating the question. The appellant told her not to come nearer to him or he would shoot. She continued to question him and he fired shots striking her in the forehead and left groin. The complainant, Miss Reid, in the main, corroborated her daughter. The crowd shouted "Police brutality." Miss Reid was rendered unconscious and was hospitalized. She did not attack the appellant. She had no machete.

The appellant in his defence gave an unsworn statement. He said, he had gone to visit his mother at Duhaney Park, St. Andrew, and on leaving he met Maxine Anderson and they spoke. Maxine became abusive and he left her. He looked behind and saw Maxine and her mother coming towards him, jeering him and calling him names. This attracted a large crowd which joined the jeering. The crowd began throwing missiles at him; a stone struck his left shoulder. Lilieth Reid came down on him with a machete. He called to her to stop but she did not, even after he had fired a warning shot in the air. He was scared, they were coming down on him and he knew they would kill him. He again told Miss Reid to stop but she approached with a machete upraised to chop him and he discharged two shots and ran from the scene. He went to Patrick City Police Station.

In Grounds 1 & 2 Mr. Chuck complained that the learned trial judge failed to give full and adequate directions on the use of excessive force and to relate the facts of the case to the issue of whether or not excessive force was used.

Be it sufficient to observe that we directed his attention to Palmer vs. Regina (1971) 12 J.L.R. 311 and to the fact that "There is no rule that in every case where the issue of self-defence is left to the jury on a charge of murder they must be directed that, if they consider that excessive force was used in defence, they should return a verdict of manslaughter." This

case is not one of murder but any reference to excessive force would be unnecessary and undesirable having regard to the nature and conduct of the defence (see R. v. Trevor Reece, S.C.C.A. 73/86 delivered November 18, 1987).

Grounds 3 & 4 of the appeal are couched in these terms:

> "The learned trial judge failed to direct the jury to consider that the retreat of the appellant, and the firing of a warning shot, were clear indication to the victim that the appellant did not want to fight and sought to disengage. The injury to the victim was therefore necessary and reasonable to avoid serious harm to the appellant and, it is submitted, demonstrates that he was acting in lawful self-defence.
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> The learned trial judge erred in law in failing to direct the jury that if the appellant honestly believed that he was under a serious and immediate attack and was in imminent danger of serious bodily injury or death then he may, nay must, use such force that he thought was necessary and reasonable in the circumstances; and, shooting or disabling his attackers may indeed be warranted if he honestly held that belief (see Lancelot Webley S.C.C.A. 84/89)."

Mr. Chuck contended that the directions given by the learned trial judge on self-defence were incomplete and inadequate in that he failed to deal with retreat and 'honest belief'.

This is what the judge said:

> "A wounding done, as in this case, in lawful self-defence is no offence at all. Self-defence is lawful when it is necessary to use force to defend yourself against an attack or when the amount of force used is reasonable. What is reasonable force depends on all the facts including the nature of the attack and whether or not a weapon, in this case he said it is a machete, is used. You must recognise that a person defending himself is not expected to weigh precisely the exact amount of defensive action which is necessary. If therefore you were to conclude that this accused man did no more than he instinctively thought was necessary, you should regard that as very strong

> "evidence that the amount of force that he used, that is the shooting, was reasonable and necessary because it is for the prosecution to prove the defendant guilty. It is for them to satisfy you so that you feel sure that the defendant was not acting in self-defence. If you conclude that he was or that he may have been acting in necessary self-defence then you must acquit him."

The appellant said he was walking and the complainant was following him, threatening him, and after discharging a warning shot in the air which did not cause the complainant to desist, he shot at her when his life was in danger from her immediate attack with an upraised machete. In these circumstances the question of retreat did not arise and it was unnecessary for directions on retreat to be given. In R. v. Lancelot Webley, S.C.C.A. 84/89 delivered November 12, 1990, this court said at p.9 per Rowe, P.:

> "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."

On Ground 4 Mr. Chuck submitted that the failure of the learned trial judge to direct the jury on honest belief was a fundamental error which should be resolved by the quashing of the conviction. He urged "I strongly believe the appellant could have perceived that he was under attack and used such force as he thought necessary."

The appellant said he was under attack when he discharged his firearm in self-defence. The defence was presented on this basis. In his state of mind there was an attack and he articulated this. There is no room for there being in him an honest belief in an imminent attack. A distinction must be drawn between an actual attack and a belief in the imminence of an attack. When there is attack then directions on self-defence in this regard are indicated. This is clearly stated in Lancelot Webley, p.9:

> "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. Regina (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." (emphasis supplied)

When the defence claims there was an attack they may seek to adduce supportive evidence by cross-examination of the prosecution witnesses, or by a statement from the appellant given from the dock, or evidence given by him and/or evidence given by witnesses called by the defence. However it may be placed before the jury, the issue of self-defence is raised on the evidence, it cannot be left to conjecture. There must be direct evidence or evidence of facts from which the inference may be drawn that the appellant was acting in self-defence.

When there is belief in the imminence of an attack this must be articulated and directions on honest belief must be given.

When there is no evidence of an attack, direct or inferential, then for honest belief to arise, there must be an assertion of this state of mind emanating from the appellant. This must necessarily be coupled with the circumstances which induced that state of mind. Evidence of the circumstances inducing in the appellant an honest belief in the imminence of an attack will be subject to the scrutiny of the jury. Honest belief being a state of mind is subjective. In Lancelot Webley this court said:

> "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." (emphasis supplied)

In Solomon Beckford (1987) 3 All E.R. 425, Lord Griffiths at p. 432 d said: "... no jury is going to accept a man's assertion that he believed that he was about to be attacked without testing it against all the surrounding circumstances. ... Where there are no reasonable grounds to hold a belief it will surely only be in exceptional circumstances that a jury will conclude that such a belief was or might have been held."

This statement surely attests that an assertion of honest belief should be made by the person charged in sworn testimony. If not made on oath, it becomes a bare untested statement which a jury may not be disposed to accept. In England an accused person cannot make a statement from the dock so the reference to assertions must necessarily mean assertions on oath. The appellant did not testify and in

his unsworn statement he did not assert a belief in an imminent attack. It is timely to repeat the warning given by the Privy Council per Lord Griffiths in the final paragraph of the judgment in Solomon Beckford at p. 433:

> "Before parting with this appeal there is one further matter on which their Lordships wish to comment. The appellant chose not to give evidence but to make a statement from the dock which, because it cannot be tested by cross-examination, is acknowledged not to carry the weight of sworn or affirmed testimony. Their Lordships were informed, to their surprise, by counsel for the Crown that it is now the practice, rather than the exception, in Jamaica for an accused to decline to give evidence in his own defence and to rely on a statement from the dock, a privilege abolished in this country s 72 of the Criminal Justice Act 1982. Now that it has been established that self-defence depends on a subjective test their Lordships trust that those who are responsible for conducting the defence will bear in mind that there is an obvious danger that a jury may be unwilling to accept that an accused held an 'honest' belief if he is not prepared to assert it in the witness box and subject it to the test of cross-examination."

Self-defence being the issue raised by the defence it was necessary for the learned trial judge to direct the jury in clear and precise language on the law relevant to the facts of the case. This is what he did. The jury had a choice between two accounts: the case for the prosecution which left no room for self-defence, and the case for the defence which raised self-defence as an issue. We find that the learned trial judge did not fall into error, his directions were fair and accurate and we find that there is no merit in these grounds.

In the result the appeal is dismissed, the conviction and sentence affirmed. We direct that the sentence should commence on April 26, 1993.