JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 173/99

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE SMITH, J.A. (Ag.)

REGINA V DELROY WYNTER

Ravil Golding for the Applicant

David Fraser, Acting Deputy Director of Public Prosecutions, for the Crown

June 6, 7 and October 25, 2001

BINGHAM J.A:

On September 30 1999, in the Clarendon Circuit Court, May Pen, the applicant was convicted for manslaughter arising out of the death of Rudolph Fagan, on March 31 1999. The applicant had been indicted for Non-Capital Murder but he was found guilty of the lesser offence of manslaughter. He was sentenced to imprisonment for life. He applied to this Court for leave to appeal against the conviction and sentence. After hearing the submissions of Counsel, we reserved our decision to go more fully into the matter. Having done so, our judgment now follows.

The Facts

(a) The prosecution's case

The sole witness as to fact called by the prosecution was Cecil Lewis, the brother of the deceased. He recalled going to buy "feeding" for his cows on March 31, 1999. Afterwards while walking on the road at Hampton District he saw the deceased's truck parked on the street by where his father lived. He then went inside the premises. He saw the deceased, Rudolph Fagan, at the garage speaking to the applicant who was by his doorway. The deceased was asking the applicant for money. The applicant then went and picked up a machete from his doorway and the deceased went towards him enquiring from him as to "what he was going to do with the machete?" The applicant replied saying "nothing." The deceased requested the machete from the applicant and it was handed to him. Lewis at this time was now standing by the garage. While in that position, he saw the deceased standing at the doorway of the applicant's room. He had his left hand holding onto the door jamb and the other in which he had the machete, held up in a raised position. Lewis then said that while the deceased was in that position, he saw when the applicant who was inside his room remove a knife from off a table right by the door and he used the knife to stab the deceased in his chest. At that time the deceased used the machete to hit the applicant. The two men then held onto each other. The applicant was holding onto the right hand of the deceased with the machete, and the deceased holding onto the hand of the applicant which had the knife. He

went up to them and held onto the deceased and the applicant moved away and ran off from the scene. He noticed that the deceased was bleeding a lot. He called out for assistance. Help came and the deceased was transported to Chapelton Hospital by way of an ambulance, but by the time he got there, he was dead.

Under cross-examination, the witness, Lewis, admitted that when he saw the deceased by the door of the applicant's room with the machete held in a raised position, he called out to him saying "Don't hit him." This was not done because of anything done or said by the deceased. He called out to the deceased because a man in the position where the deceased was seen, might have decided to hit the applicant.

Dr Victor Lindo performed the post mortem examination on the body of the deceased. He observed massive bleeding from a stab wound to the heart, the pericardium and the liver. In his opinion, the cause of death was from a stab wound delivered with a moderate degree of force. Detective Sergeant Daley also gave evidence of receiving a report, viewing the deceased's body and arresting the applicant for murder.

1. The Defence's Case

The applicant gave sworn evidence. In his account, he said that the deceased, Rudolph Fagan, was a big man both in height and build. The deceased had telephoned him earlier in the same month of the incident and threatened to beat him up and to shoot him and kill him if he did not give the deceased's father Five Hundred Dollars for a piece of donkey rope. This money was to be paid to the deceased's father by one Mrs Chin. The

applicant said that he had told the father on several occasions to go to her for the money but he never did so.

On March 31, while he was at his home, the deceased came there and was talking to him in a threatening manner on the verandah by the garage, near to the door of the room which he occupied. The deceased then pulled out a ratchet knife. He held on to the hand with the knife and got away and went into his room. The deceased came into his room and took up a long machete which was in there. The deceased raised the machete and he took out his knife from his trousers pocket. The point of the machete caught the ceiling and then caught him on his shoulder. At that same time he pushed the deceased with his hand with the knife as the deceased was advancing on him and the knife caught the deceased in his chest injuring him. The deceased was coming at him with such a force that he did not know how hard the stab caught the deceased. After the stabbing they held onto each other. The deceased's brother came up and he managed to get away from the deceased and ran away.

On the Crown's case as presented, the evidence at best revealed a killing of the deceased resulting from an argument between the deceased and the applicant over payment for the cost of a piece of donkey rope. On the evidence of the sole eye witness, Cecil Lewis, the deceased though armed with a machete, at the time of the stabbing incident, was not acting in a manner to cause in the mind of the applicant, an honest belief that his life was in danger from a threatened attack being made upon him by the deceased, thereby justifying the act of stabbing.

On the defence version of the incident, if believed, the actions of the applicant given the circumstances as related by him, he would have acted in stabbing the deceased in necessary self-defence in order to protect himself from possible death or serious injury while in the very privacy of his own room, a place from which in law, he was under no obligation to retreat.

The jury in coming to a verdict of manslaughter, accepted the prosecution's case as presented through the testimony of Cecil Lewis as evidence of the truth concerning the events as they unfolded at the applicant's room on March 31, 1999.

On the evidence as adduced, the learned trial judge saw the issues of the defence of self-defence and provocation, as matters for the consideration of the jury. As to the manner in which he dealt with these issues, this will be looked at, and considered later on in this judgment.

The Grounds of Appeal

At the time of the filing of this application, learned counsel for the applicant filed six original grounds of complaint, and one supplementary ground. These read as follows:

The Original Grounds

> "**1.** The verdict of the jury is unreasonable having regard to all the circumstances of the case.
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> **2.** The Crown failed to negative the defence of self-defence which actually arose on its own case and therefore the learned trial judge erred in not upholding the submission of no prima facie case being established made by defence counsel at the end of the Crown's case.

3. The learned trial judge left the issue of provocation to the jury a factor which did not arise in the case.

4. The learned trial judge wrongly left the issue of accident to the jury which compounded the prior misdirection and serve to further confuse the jury."

The Supplementary Ground

This reads:

> "The learned trial judge failed to deal adequately with the issue of accident thus undermining any chance of acquittal that the applicant had on this defence. In particular the Learned Trial judge failed to explain or to direct the jury as to the meaning of accident in law and to critically analyse the evidence as it relates to this defence."

Of these grounds of complaint, the Court was of the view that the sole ground calling for our consideration was Ground 2 which relates to the complaint as to the defence of self-defence and the treatment of that issue by the learned trial judge.

Learned counsel for the applicant forcefully submitted that the defence of self-defence was raised on the Crown's case and not negatived at the end of that case. In the circumstances, even if the directions of the learned trial judge on the law were correct, the evidence on the Crown's case showed clearly that a threatened attack was imminent viz, the evidence being that the applicant was in his room and the deceased by the doorway with his left hand on the door jamb and the right hand with the machete raised and this coupled with the deceased's brother, Cecil Lewis, calling out to him "don't knock him!" This evidence was not negatived by any other evidence coming

from the Crown. In the circumstances, the defence ought not to have been called upon to answer the charge of murder.

In responding, learned counsel for the Crown referred to the dictum of Lord Morris of Borth-Y-Gest in ***Palmer v The Queen*** [1971] 12 J.L.R. 311, in which the Board of the Privy Council sought to lay down guidelines in relation to the law of self-defence. Learned counsel submitted that the apparent difficulty that the learned trial judge was faced with in the instant case, is that there was no attack being made on the applicant by the deceased at the time of stabbing the deceased. Counsel to his credit conceded that all attempts by the deceased's brother Cecil Lewis, to quell the anger of the deceased were unsuccessful.

Learned counsel, nevertheless, submitted that the question of honest belief did not arise in the case. There was no common agreement on the evidence as to what actually took place before the stabbing. On the evidence it was a matter of inference to be drawn from the proven facts. In such circumstances, the matter was rightly left to the jury.

Counsel relied in support on ***Regina v George Burke*** SCCA 112/87 (unreported) delivered on April 18, 1988. He further contended that before circumstances can be objectively viewed and used as a basis for presuming or inferring a subjective belief held by the accused, he has first to, by evidence, or an unsworn statement, establish that such circumstances exist by:

(a) embracing those circumstances as put by the Crown;

(b) or relying on a different set of circumstances from which on an objective view, this contention can be accepted;

(c) if he remains silent then there is no evidence on which his objective view of the matter can be viewed.

Counsel also cited in support ***Regina v Stanley McKenzie*** [1992] 29 J.L.R. 47 at 52(D-I) and 53(D-I). He also cited ***Solomon Beckford v The Queen*** [1987] L.R.C. (Criminal cases) 467 at 477(B). He conceded that in directing the jury on self-defence the learned trial judge left to them a third possibility, but in doing so, he misdirected them in so far as he used an objective, and not a subjective test. In that regard, it was only on an objective view of the evidence that the facts would admit of such a possibility and that such a course could be justified. He cited in support of this proposition ***Regina v Owen Virgo*** S.C.C.A. 96/87 (unreported) delivered on March 23, 1988.

It is now necessary to examine the manner in which self-defence was left to the jury. These directions commence at page 12 of the summation. Here the learned trial judge said:

> "Normally where one person uses deliberate violence towards another and injures and kills that person he acts unlawfully. However, it is both good law and good sense that a person who is attacked and believes that he is about to be attacked may use such force as is reasonably necessary to defend himself. If that is the situation then his use of force is not unlawful because he is acting in lawful self-defence and he is entitled to be found not guilty as it is the prosecution's duty to prove the case against the accused. It is for the prosecution to make you sure that the accused was not acting in lawful self-defence. The accused does not have to prove that he was."

Up to this stage one could have no quarrel with these directions, following as they were the guidelines in ***Palmer v The Queen.*** (supra) The learned trial judge then continued in the following vein:

> "Now what does acting in lawful self-defence, mean? The law is that a person only acts in lawful self-defence if in all the circumstances he believes it is necessary for him to defend himself and the amount of force which he uses in doing so is reasonable. It follows, therefore, that in relation to this issue you must answer two main questions. Firstly, did the accused believe or did he honestly have the belief that it was necessary to defend himself?
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> If the prosecution has made you feel sure that the accused did not strike in the belief that it was necessary to defend himself then self-defence simply does not arise and the accused is guilty. If you decide that he was or may have been acting in the belief that it was necessary for him to defend himself you must go on to answer the second question. That is, having regard to the circumstances in which the accused believed them to be was the amount of force which he used reasonable?
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> The law is that force used in self-defence is unreasonable if it is out of proportion to the nature of the attack or if it is in excess of what is really required of the accused to defend himself. If, for example, the accused began by defending himself but then totally overreacted, turning an act of self-defence into a punitive attack and caused injury or death in the course of that attack that would not be lawful. It is for you, the jury, to decide whether or not the force used by this accused was reasonable. Your judgment about that must depend on your view of the facts of this case and in considering these matters you must have regard to all the circumstances." (Emphasis supplied)

An examination of the above directions does indicate that they were structured to some degree along the guidelines laid down by the Board of the

Privy Council in ***Palmer v The Queen.*** (supra) In the manner in which they were applied by the learned trial judge however, when considered in the light of the facts and circumstances of this case, those directions fell far short of the directions called for in the matter. In this regard it may be necessary to advert to the ***Palmer*** guidelines in so far as is necessary to fit it into the facts of this case. At page 322 (D-F) Lord Morris of Borth-Y-Gest in delivering the advice of the Board said:

> "Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure naked aggression. There may be no longer any link with the necessity of defence. Of all these matters the good sense of a jury will be the arbiter. There are no prescribed words which must be employed or adopted in a summing up. All that is needed is clear exposition in relation to the particular facts of the case of the conception of necessary self defence. If there has been no attack then clearly there will be no need for defence. If there has been an attack so that defence is reasonably necessary it will be recognized that a person defending himself cannot weigh to a nicety the exact measure of the necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked did what he honestly and instinctively thought was necessary that would be the most potent evidence that only defensive action was taken." (Emphasis supplied)

The underlined words referred to speak to the evidence adduced in the case as presented by the prosecution. These facts establish beyond a peradventure that a threatened attack by the deceased was imminent. A direction by the learned trial judge which sought to follow these guidelines while ignoring the material facts of the case, for example by referring to the applicant's conduct as amounting to "defending himself but then totally overreacted," could hardly be regarded as a fair and proper direction, given the undisputed facts of the case.

While ***Palmer v The Queen*** (supra) and the guidelines laid down by the Board still continues to offer some guidance to trial judges in cases where the issue of self-defence falls for consideration the law in this area has now moved beyond that stage. The current state of the law is to be found in the decision of the Board of the Privy Council in ***Solomon Beckford v The Queen*** (supra) (one of the authorities cited by learned Crown Counsel). In their advice to Her Majesty the Board sought to review the current state of the law on self-defence and laid down further guidelines to assist trial judges in directing juries in this difficult area of the law. For the purposes of this judgment it is sufficient to refer to the headnote which states:

> " **Held**
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> (1) In all crimes of violence the prosecution must prove the unlawfulness of the defendant's actions. A genuine belief in facts which, if true, would justify self defence was a defence to a crime of personal violence because the belief negatived the intent to act unlawfully. If the belief was in fact held, its unreasonableness was irrelevant. The proper test to apply in a case raising the issue of self defence was whether the accused had used such force as would have been

> reasonable in the circumstances which he honestly believed to exist, in defence of himself or another. 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." (Emphasis supplied)

When the submissions of counsel are examined against the background of the issues falling for determination in the case, we are of the view that there is support for the contentions advanced by learned counsel for the applicant. On the evidence the learned trial judge having overruled the no-case submission made by counsel identified the issues of self-defence and provocation as matters calling for his directions to the jury. It is open to question as to whether on these facts, provocation in law as an issue fit to be left to the jury for their consideration did arise. What is clear was that the cardinal line of defence in the case was that of self-defence. The learned trial judge having taken upon himself the responsibility of leaving these two defences to the jury, it was incumbent on him therefore, to give to the jury a clear exposition of the law and the facts as it related to both defences. In this regard there was no complaint levelled at the directions on provocation, and on examination we found the directions in this area to be correct. However, when the directions given by the learned trial judge on self-defence are examined and assessed, while they contain to some degree what could be regarded as acceptable directions on the law relating to self-defence, contain, nevertheless material mis-directions and non-directions sufficient to amount to a grave miscarriage of justice, thereby vitiating the conviction arrived at.

Conclusion

The evidence for the prosecution when taken at its highest revealed what to the mind of the applicant would have amounted to a threatened attack by the deceased, an attack that was imminent and which called for defensive action on his part. If the applicant believed this to be so then the reasonableness or unreasonableness of this belief in the circumstances was irrelevant: Per ***Solomon Beckford v The Queen*** (supra). The applicant's actions in this regard could be seen as being in the nature of a pre-emptive strike. The defence of self-defence would be available to him in such a situation.

In the light of the foregoing the issue of provocation does not fall for our consideration. In the result the application for leave to appeal is treated as the hearing of the appeal which is allowed. The conviction is quashed and the sentence is set aside. A judgment and verdict of acquittal is entered.