

SAINT VINCENT & THE GRENADINES

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.9 OF 1992

BETWEEN:

DAVID COLLINS

Appellant

and

THE QUEEN

Respondent

Before: The Honourable Mr. Justice Dennis Byron - Justice of Appeal  
The Honourable Mr. Justice N. Liverpool - Justice of Appeal  
The Honourable Mr. Justice Satrohan Singh-Justice of Appeal

Appearances: Mr. Arthur F. Williams for the Appellant  
Mr. Carl Joseph, D.P.P. for the Respondent

-----  
1992: December 9;  
1993: April 5.  
-----

JUDGMENT

BYRON J.A.

On the 30th June 1992 the appellant was convicted by a jury before Joseph J of the offence of Murder contrary to section 159(1) of the Criminal Code, Act No.23 of 1988 and sentenced to death. He appealed against that conviction on three grounds.

First, counsel for the appellant argued that the verdict was unsafe and unsatisfactory and that on the facts there was basis for reducing the crime to manslaughter on the ground of provocation. But, despite his fervour, he was unable to advocate that were any misdirections of law on this aspect of the case, and there being abundant evidence to support the jurors' rejection of this defence, we could find no basis for interference on this ground. In our view the learned trial Judge dealt with provocation in a satisfactory manner in her directions to the jury.

In the second place, he complained that in a section of the summing up the trial Judge usurped the functions of the jury by indicating what facts they should find. However, it was clear that in the passage complained of, the trial Judge was merely putting to the jury the prosecution's case and directing them as to the legal consequences if they accepted that evidence.

Thirdly and in his main ground of appeal he argued that the Judge failed to direct the jury in accordance with the principles enunciated in *BECKFORD v R* [1987] 3 All E.R. 425 that in dealing with the question of self-defence the issue should be decided subjectively that is as the matter appeared to the appellant rather than on an objective way of looking at it.

#### The facts

On 19th February 1991 Dora Baptiste was living with the appellant. She previously had children for the deceased. She had an argument with her sister Stella. The deceased and the appellant intervened. This led to an altercation between the two men and an exchange of blows with their fists. The case for the prosecution was that the appellant ran into his house saying he was coming back. The deceased then picked up two stones. The appellant returned with a .22 rifle, ran to where the deceased was standing with the stones in his hand and said to the deceased "run now, run now". He then fatally shot him in the forehead. According to Dr. Bharadi Patel the deceased died at the hospital on 23rd February 1991 from permanent brain cell damage caused by the bullet injury.

The prosecution tendered in evidence a brief statement made by the appellant to the police under caution on 25th February 1991. In that statement he described the shooting in two different passages. He said: -

"I stumble to the ground. He dip his hand into his bag pulled out a short hand gun, he was aiming at me. At the moment, I stumbled and pulled a bird gun and incidentally a shot went off. He fell to the ground. I was astonished."

and in another passage he said: -

"I had the gun at the gate behind the house and is behind the house I went for it. When he pulled his gun fearing that he would shoot me first so I run for mine and a shot went off and it catch him in his forehead. I did not mean to shoot him in his forehead."

At no stage in the prosecution's case was any evidence adduced to support or contradict the allegation that the deceased had a gun in his bag. None of the eye witnesses deposed to having seen the gun. No evidence was adduced as to the contents of the deceased's bag. This statement therefore stood on its own, unrejected and unsupported - as part of the prosecution's case.

At the trial the appellant gave evidence on oath. In his evidence he never suggested that the deceased, was armed with a gun at the time he shot him. His contention was that he shot the

deceased because he had two stones with which he feared the deceased would "blast him".

In his evidence in chief, he described the shooting in this way: -

"I came back from the house. I bring back a bird gun from house. I saw Michael in the yard. He had two stones with some bag on his shoulder. He made attempt to blast me with stone. He was three feet away. Stones little bigger than my fist. I rise gun to shoulder height and incidentally a shot went off. To blast is to hit me with stone. Stones were big enough to injure me if it had caught me. Shot was not fired by my will. My hand was on the trigger. I squeeze the trigger as I fear he would have hit me with stone."

The Judge dealt with issue of accident quite adequately and no complaint has been made on this issue.

In his cross examination he gave evidence of seeing the deceased with a gun before he went in the house to get his gun. Then he said this:-

"When I came back with my gun he had two stones in his hand and I fired at him because I was afraid he would hit me with stone. I did not see gun he had at that time."

The prosecution did not adduce any evidence as to negative or cast doubt on the allegation that the deceased had a gun before the appellant went to arm himself. The prosecution eye-witnesses all gave evidence that the deceased had two stones in his hand when the appellant shot him. It was clear from his sworn testimony that the appellant was asserting that he had shot the deceased because he feared he would hit him with the stones in his hand. The prosecution witnesses had testified that at the time the shot was fired the deceased did have the stones in his hand.

The learned trial Judge put the case to the jury on the basis that it was for them to determine whether when the appellant came back from the house with his gun he in fact shot the deceased because of the stones he feared the deceased would throw, and if so whether the degree of force was reasonable or excessive, or whether he shot him in retaliation for what happened before he went in to get the gun.

Counsel has contended that nowhere in the summing up did the Judge follow the guidelines of Beckford and tell the jury that they should apply the "honest belief" test instead of the "reasonable"

test.

In *BECKFORD v R* [1987] 3 All E.R. 425 the appellant was part of a police posse investigating a report that an armed man was terrorising and menacing his family. When they arrived a man ran out of the back of the house. The Crown's case was that the man was unarmed and was shot by the appellant and another police officer after he had been discovered in hiding and had surrendered.

The appellant claimed that the man had a firearm, had fired at the police and had been killed when they returned the fire.

The headnote recorded the decision as being that if a plea of self-defence was raised when the defendant had acted under a mistake as to the facts, he was to be judged according to his mistaken belief of the facts regardless of whether, viewed objectively, his mistake was reasonable. Accordingly, the test for self-defence was that a person could use such force in the defence of himself or another as was reasonable in the circumstances as he honestly believed them to be.

Lord Griffiths in delivering the decision of the Privy Council stated the proposition at page 425: -

"If then a genuine belief, albeit without reasonable grounds, is a defence to rape because it negatives the necessary intention, so also must a genuine belief in facts which if true would justify self-defence be a defence to a crime of personal violence because the belief negatives the intent to act unlawfully. Their Lordships therefore approve the following the passage from the judgment of Lord Lane C.J. in *Williams* [1987] 3 All E.R. 411 at 415 as correctly stating the law of self-defence.

"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 recognise 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; secondly, if the defendant may have been labouring under a mistake as to the facts, he must

be judged according to his mistaken view of the facts; thirdly, 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 came 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 came to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely upon it."

The factual basis of *R v WILLIAMS* was that the appellant attacked a man whom he saw attack a youth, but the appellant did not know that the man had just witnessed the youth attempting to rob a woman in the street. The Court of Appeal in England had to consider the law where there was an issue of a possible mistake on the part of the appellant as to the circumstances in which he used violence on the virtual complainant. Lord Lane C.J.'s statement of the law was therefore relevant to the allegation of the appellant that he was labouring under an honest but mistaken belief as to the facts.

In the *Beckford* decision Lord Griffiths specifically approved the guidance given in the draft summing up produced by the Judicial Studies Board with the approval of the Lord Chief Justice as follows: -

"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."

This court has followed *BECKFORD v R* in *HARLEY v QUEEN* St.Kitts No.5 of 1992 where a police officer who had fatally shot an unarmed man stated, in his defence that he thought the man was reaching for a gun to shoot him, and applied the principle that if the accused had acted on a mistaken belief which he honestly held

he would be entitled to be acquitted.

These cases all deal with the legal effect of a mistake as to the circumstances in which an accused person used violence on another. They establish that if the accused used violence because of some circumstances he believed to exist which did not in fact exist he should be judged according to his honest belief and not on an objective test as to what a reasonable person would have believed from the proven circumstances.

In the instant case, however there was no allegation coming from either the prosecution or the defence that the appellant had any mistaken belief of the circumstances in which he shot the deceased.

There was no conflict in the evidence which could give rise to the view that the appellant was labouring under any mistake as to the circumstances under which he discharged the fatal shot. The Judge did not have to contrast what the appellant said he believed with evidence which contradicted that belief. The issue of mistake never arose in this case.

It was therefore unnecessary for the Judge to direct the jury in accordance with the Beckford guidelines that the accused must be judged according to his honest belief as to what the circumstances were and not on what it would be considered reasonable for him to have believed.

In explaining the law of self-defence the Judge nonetheless used language which unequivocally indicated that the jury had to use a subjective test in deciding whether the appellant was acting in self-defence.

She explained that: -

"a man who is attacked or against whom there is a threatened attack may defend himself, and defending himself may do what is reasonably necessary".

that: -

"a person who is attacked, may in defence strike the first blow"

and that:

"an accused person cannot be expected to measure precisely the amount of force that is necessary".

She said: -

"So this is what the accused is saying, is that he was acting in self-defence. So you have to see if, first of all you believe that and you have to look at the evidence

as I go through it to see if he was in fact acting in self-defence."

Her language indicated to the jury that they must be concerned with the appellant and what was in his mind. This form of direction does not impose an objective test as it required the jury to determine whether the appellant was genuinely acting in self-defence.

In my judgment the Judge put the issue of self-defence fairly to the jury. There was sufficient evidence to justify the jury's rejection of self-defence and to have come to the conclusion that they reached. I would therefore dismiss this appeal.

SATROHAN SINGH, J.A.

On June 30, 1992, the appellant was convicted by a jury before Joseph J of the offence of murder contrary to section 159(1) of the Criminal Code Act No.23 of 1988 and sentenced to death. He now appeals to this court from that conviction.

The case for the prosecution shows that on February 19, 1991, Dora Baptiste, who has children for the deceased Kenneth Michael and who lived with the appellant, had an argument with her sister Stella Baptiste. The deceased and the appellant intervened in that argument which intervention resulted in an argument between themselves. The appellant then "boxed" the deceased. The deceased retaliated by hitting the appellant causing him to stagger. The appellant ran into his yard saying he was coming back. The deceased then picked up two stones. The appellant returned with a gun in his hand. He ran towards where the deceased was standing. He pointed the gun at the deceased and said to him "Run now, run now". He then shot the deceased in his forehead. Kenneth Michael died from that wound on February 23, 1991. Dr. Patel testified that death was due to permanent brain cell damage caused by the bullet injury.

In a statement to the police under caution, the appellant said that having observed an argument by his gate, he enquired of the deceased what was happening. The deceased hit him with his arm in his face and he stumbled to the ground. The deceased then dipped his hand into a bag he was carrying, pulled out a short hand gun and aimed it at the appellant. The appellant states that as he stumbled he pulled a bird gun and "incidentally" a shot went off. He was astonished and ran and put away his gun. When the police told him they heard he shot a man he replied "it was to defend".

In that same statement he says he is still wondering what happened. He said he had the gun behind the house and it was there he went for it. He said when the deceased pulled his gun, he feared the deceased would shoot him first so he ran for his and "the shot went off and it catch him on his forehead". He further said he did not mean to shoot the deceased in his forehead.

In his evidence before the jury he testified that he asked the deceased why he was cursing Stella. The deceased then "boxed him". The deceased then unzipped a black bag he had. The appellant then ran in his house and returned with a bird gun. He saw the deceased within the yard with two stones in his hands a little bigger than his fist. The deceased made an attempt to blast him with the stones from about eight (8) feet away. He then raised his gun shoulder high and "incidentally" the shot went off. He testified that the shot was not fired by his will, his hand was on the trigger and he squeezed the trigger as he feared the deceased would hit him with the stones. He also testified that after the deceased hit him he ran away as he saw the deceased pull a shot gun from his bag and pointed it at him but when he returned with his gun, all he saw in the deceased hands were the stones. The appellant also testified that when he ran into his house it was not for the purpose of getting his gun to shoot the deceased and that he did not return with the gun intending to shoot the deceased but only to scare him as he also had a gun. In her summation to the jury, the learned trial Judge directed the jury on the defences of self-defence, accident and provocation.

The appellant challenges the validity of his conviction on three grounds:

1. That the verdict of the jury is unsafe and unsatisfactory.
2. That the trial Judge usurped the functions of the jury by making a finding of fact on one aspect in her summing up to the jury.
3. That the trial Judge failed to direct the jury that in dealing with the question of self-defence that the issue should be decided subjectively i.e. as the matter appeared to the appellant, rather than objectively.

As regards ground (1), Mr. Arthur Williams for the appellant dealt with the issue of provocation. In doing so, learned Counsel did not challenge the trial Judge's directions to the jury on the issue but he referred to the evidence on the issue to show what he described as the unsatisfactory nature of the jury's verdict. I do not find merit in this ground. The jury had all the evidence on

the issue before them with proper and adequate directions from the trial Judge as to how they should deal with the issue. On the evidence, the jury as they did, could have properly discarded the defence of provocation. I do not find any legal justification to interfere.

The second ground of appeal challenges this paragraph of the trial Judge's summing up to the jury:

"So this is what the prosecution witnesses are saying. And what the prosecution is saying is that there was this cursing and there was a boxing, a slapping of face and chucking, and at that point Michael had nothing in his hands, and that the Accused said to Michael he was going to come. And he left to go to the house and it was at that point that Michael took up the two big stones, held them in his hands and waited. And that the Accused having been stopped by his girlfriend Stella from coming out the front door of the house, jumped through the back door around the house, ran to Michael, pointed the gun at him, told him to run now, and shot him. And if you believe this it is open to you to find that no self-defence arises. Because at the time that he left the house and he ran out he was not being attacked by Michael".

Learned Counsel for the appellant argued that the direction by the trial Judge in the last three lines of this passage was a finding of fact made by the trial Judge and as such a usurpation of the functions of the jury. I do not agree. Taken in context, it is clear that the trial Judge in this paragraph was merely putting to the jury what the prosecution was saying was their case and directing them as to the legal consequence if they accepted that evidence coming from the prosecution, and explaining to them the reason for such consequence.

As to his third ground of appeal, learned Counsel referred to the "honest belief test" in a matter where the defence of self-defence was made an issue as dealt with in *R v DECKFORD* (1987) 3 A.E.R. 425 P.C. and contended that at no stage in her summation did the trial Judge give the jury directions referable to this test. In *R v BECKFORD* their Lordships of Her Majesty's Privy Council in holding that the test for self-defence was that a person could use such force in defence of himself or another reasonable in the circumstances as he honestly believed them to be expressed their approval of the learning of Lord Lane C.J. in *R v WILLIAMS*, as correctly stating the law of self-defence.

In *R v WILLIAMS* (1978) 3 A.E.R 411 at 415 Lord Lane C.J. laid down these principles:

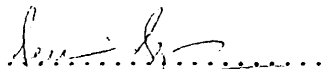
"The reasonableness or unreasonableness of the defendant's belief is material to the question of whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, is neither here nor there. It is irrelevant. Were it otherwise, the defendant would be convicted because he was negligent in failing to recognise 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 labouring 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 labouring under it, he is entitled to rely on it".

A perusal of the summing up of the learned trial Judge shows that no or no proper or adequate directions were given to the jury on this question of honest belief. This is to a certain extent conceded by the learned Director of Public Prosecutions. I consider this a non-direction amounting to a misdirection. In *R v BECKFORD* this misdirection was held to be fatal to the conviction. However, the learned Director of Public Prosecutions argues, that if in fact there was this omission, that this was a fit case for the application of the proviso in accordance with section 39(1) of the Eastern Caribbean Supreme Court (St. Vincent) Act 1973. As stated in *R v BECKFORD*, this being a capital offence, for this court to accede to this application, we would have to feel with utter certainty that the jury would necessarily have returned the

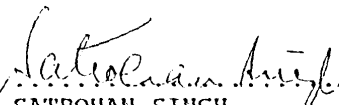
same verdict if they had been directed in terms of "honest" as opposed to "reasonable" belief.

From the evidence placed before the jury, already narrated above, I am of the view that the issue of self-defence was only left to the jury by the Judge ex abundante cautela. The evidence shows clearly that at the time when the deceased was fatally injured, it was the appellant who was the aggressor and who initiated that attack and that he was not at that time defending an assault on himself or against any one else.

Looking at the evidence as a whole I feel utterly certain that a jury properly directed would have returned the same verdict. For these reasons I would apply the proviso aforementioned and dismiss this appeal. The conviction and sentence are affirmed.

  
DENNIS BYRON  
Justice of Appeal

.....  
NICHOLAS J. O. LIVERPOOL  
Justice of Appeal

  
SATROHAN SINGH  
Justice of Appeal