

SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 5 of 1992

BETWEEN

ALFRED HARLEY

Appellant

and

THE QUEEN

Respondent

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice
The Honourable Mr. Justice D. Byron J.A.
The Honourable Mr. Justice N.J.O. Liverpool J.A.

Appearances: Messrs N. Butler and H. Benjamin for the Appellant
Mr. M. Holdip, D.P.P. for the Respondent

1992: September 29;
October 2.

JUDGMENT

LIVERPOOL, J.A.

The appellant was charged with the offence of manslaughter following the death of Ainsley Jeffers and sentenced to 18 months imprisonment.

The prosecution's case, which did not differ significantly from the evidence adduced on behalf of the appellant, was that about 8 p.m. on Monday, 8th July 1991, Victor Henry and the appellant, who were both police constables at the time were standing at the corner of Church and Central Streets in Basseterre when the deceased came along Central Street, stood in front of the two officers and said "I must kill a young policeman, I must shoot a policeman someday". Thereupon he lifted his shirt with his left hand and placed his right hand in the area of the waist of his trousers. On seeing this the appellant shouted "Henry" (referring to his fellow constable) held him in the area of his waist, pushed him against a wall, took the gun which his colleague Henry was carrying and shot the deceased in the head. The deceased then fell to the ground. He was taken to the J.N.F. Hospital where he was

pronounced dead at approximately 9.45 p.m.

The appellant gave a statement to the police between 10.00 p.m. and 10.50 p.m. on the same evening. In that statement he said that on the night in question he saw a young man walking towards himself and Constable Henry along Central Street and he continued -

"As the young man got very close to us I heard when he said '*A must shoot a young Police*'. He was about a foot or so away from me when he said that I moved back immediately as he said this. The young man again said: '*A must shoot a young Police. A must shoot a young Police*'. At the same time waving his arm in front of my face. I was stunned and frightened as he said this for I did not know who he was. I saw him before but I am not familiar with his name. I then saw him pushed his hand between his shirt and his pant as if he was pulling something from his waist. At the same time I shouted '*Henry*' and at the same time I pulled the weapon from off his side and fixed at the young man. He staggered backwards and he fell to the ground. I dropped the weapon at the same time."

He made a statement from the dock on which he relied and admitted the statement which he had given to the police. The following grounds of appeal were presented:

1. The learned trial Judge misdirected the Jury when he told them that if they believed that the accused used more force than necessary in defending himself then he is guilty of the offence charged.
2. The learned trial Judge erred in inviting the Jury to speculate as to the use of excessive force of which there is no evidence and which cannot be reasonably inferred from the evidence.
3. The Verdict of the Jury is unsafe and unsatisfactory having regard to the evidence.

4. The Verdict of the Jury is unsafe and unsatisfactory having regard to the evidence.
5. The learned Judge misdirected the Jury on the issue of self-defence.
6. The learned Judge erred in law in failing to specifically direct the Jury that the onus rested squarely on the Prosecution to negative beyond reasonable doubt self-defence and if the Prosecution failed to negative self-defence the Appellant will be entitled to be acquitted.
7. The learned Judge misdirected the Jury when he said: "If you accept that he acted reasonably, you let him go. If you are not sure whether what he did was reasonable you still let him go. For you to convict him you will have to find that he used more force than was necessary, that he was reckless or grossly negligent".

Counsel for the appellant abandoned the third ground argued grounds 1 and 2 together, and consolidated grounds 5, 6 and 7.

Counsel for the appellant raised the defence of self-defence at the trial and after listening to the summing-up of the learned trial Judge the Jury returned a verdict of guilty.

At the heart of the matter both before the jury and on appeal to this Court lay the question of the sufficiency of the prosecution's evidence to prove that the appellant had not acted in self-defence and in particular the proper directions given by the learned trial Judge to the jury on the question of the appellant's belief at the time that the fatal shot was fired.

Counsel for the appellant submitted that on the evidence the prosecution had not proved that the accused did not act in self-defence and that in some parts of the summing-up the learned Judge may have misled the Jury into thinking that excessive force had been used. He also urged that the learned Judge had misdirected

the jury in that he had applied the wrong test of reasonable belief, and had not put to the jury for consideration the question that if the accused had had a mistaken belief which had been honestly held he would be entitled to be acquitted. Finally he invited this Court to look at the evidence, the summing-up and all the surrounding circumstances of the case and to conclude that there was a lurking doubt that justice had been done in the Court below.

A number of authorities were cited to this Court but the one which I found most helpful is the case of *Beckford v R.* (1987) 36 W.I.R. 300. This is a decision of the Judicial Committee of the Privy Council on appeal from the Court of Appeal of Jamaica in which that Court had certified the following question as of exceptional public importance:

- "1. (a) Must the test to be applied for self-defence be based on what a person reasonably believed on reasonable grounds to be necessary to resist an attack, or should it be what the accused honestly believed?
- (b) Where, in the instant case, on a trial of an indictment for murder the issue of self-defence is raised, is it a proper direction in law for the jury to be told by the trial judge?

'A man who is attacked in circumstances where he reasonably believes his life to be in danger or that he is in danger of serious bodily injury may use such force as on reasonable grounds he thinks necessary in order to resist the attack and if in using such force he kills his assailant he is not guilty of any crime even if the killing is intentional'."

In that case the Court of Appeal of Jamaica had dismissed an appeal against conviction on a charge of murder where the trial Judge had given the direction mentioned above.

It was accepted by all parties before the Judicial Committee of the Privy Council that there is no difference on the law of self-defence between the law of Jamaica and the English Common Law; and the same may be said of the relationship between English law and the law of St. Christopher and Nevis on this point. The

Judicial Committee traced the movement away from the test of the "reasonable belief" of the accused in cases where the defence of self-defence had been raised, to the more modern test of his "honest belief", and approved the following passage from the judgment of Lord Labe C.J. in the English Court of Appeal decision of *R. v Gladstone Williams* (1987) 3 A.E.R. 411 at page 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, or 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 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 upon it."

In the instant case the learned trial Judge made various references to the reasonableness of the appellant's belief that he was in danger of an immediate attack by the deceased, in what was otherwise agreed to be a summing-up which was generally favourable to the accused. In so doing he was applying the old test of "reasonable belief". He failed, however to direct the jury on the test of "honest belief".

In fact in the only reference to "honest belief" in the summing up, the learned trial Judge invited the jury to look at all the circumstances, and continued: "If you as a jury are of the opinion that in a moment of unexpected anguish the person attacked

did only what he honestly and reasonably thought was necessary that should be regarded as the most potent evidence that only reasonably defensive action was taken". In my view the wrong test was applied, and that should have been a sufficiently good ground of appeal.

The Court was, however, invited by the Director of Public Prosecutions to apply the proviso to **Section 39(1) of the West Indies Associated states Supreme Court (Saint Christopher, Nevis and Anguilla) Act, 1975, (No. 17 of 1975)**. He submitted that the jury must have, in accepting the evidence placed before it, come to the conclusion that the appellant had used unlawful force, otherwise they would not have returned a verdict of guilty.

The evidence which was before the jury for consideration was that the appellant, who was not carrying a gun; on hearing the deceased express an intention twice to kill a young policeman, and seeing him lift his shirt with one hand and placing the other hand in the waist of his pants; pushed his colleague, grabbed his gun and shot the deceased in the head at a pretty close distance, which according to the medical evidence was probably less than six inches from the point of contact. When the deceased fell Constable Victor Henry who was the only other person present rested his hand on the chest of the deceased; he did not see any bulges under the shirt where the deceased had put his hand, nor did he see the deceased with any stick, knife or gun.

In my view this was sufficient evidence for a reasonable jury if they had been properly directed on the test of "honest belief" to have come to the conclusion that the appellant had not acted in self-defence. I must now ask myself whether having regard to the evidence in the whole case there was any substantial miscarriage of justice and whether the jury certainly would have come to the same conclusion if the proper direction had been given. After reviewing the facts of the case and carefully considering the manner of the

summing up, I have come to the conclusion that a reasonable jury would certainly have arrived at the same verdict.

The result is that the appeal is dismissed and the conviction and sentence affirmed.

(Sgd.) N.J.O. Liverpool

 N.J.O. LIVERPOOL
 Justice of Appeal

I concur. (Sgd.) V.F.Floissac

 V.F.FLOISSAC
 Chief Justice

I concur. (Sgd.) C.M.D. Byron

 C.M.D.BYRON
 Justice of Appeal

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