Privy Council Appeal No. 2 of 1992

The Director of Public Prosecutions *Appellant*

v.

Michael Bailey *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 6TH DECEMBER 1993.

DELIVERED THE 15TH DECEMBER 1993

Present at the hearing:-

LORD TEMPLEMAN
LORD ACKNER
LORD MUSTILL
LORD SLYNN OF HADLEY
LORD WOOLF

*[Delivered by **Lord Slynn of Hadley**]*

The respondent, who was a Special Constable in Jamaica, was indicted for the murder of Granville Angus on 20th February 1988. The jury on 9th October 1989 returned a unanimous verdict of not guilty of murder but guilty of manslaughter. He was sentenced to five years imprisonment. On 17th December 1990, their reasons being given later, the Court of Appeal quashed the conviction and directed that an acquittal be entered. The Director of Public Prosecutions now appeals against that decision.

At the conclusion of the hearing, their Lordships agreed humbly to advise Her Majesty that the appeal ought to be dismissed, for reasons to be given later, and directed that the appellant should pay the respondent's costs. Their Lordships now give their reasons.

The respondent came upon the deceased and his brother Patrick with other young men on 19th February 1988 in the street. There was an altercation. The respondent's account in his unsworn statement at the trial was that Patrick Angus used indecent language and threatened to shoot him. Patrick Angus, on the other hand, said that the respondent warned him that he would arrest him. The

respondent said that he had no intention of doing so. Whatever was said the respondent told the policeman on duty at the Harbour View Police Station of what had happened.

It is common ground that on the next day the respondent saw Patrick Angus again. The prosecution evidence was to the effect that whilst the respondent was speaking to Patrick the deceased came out of the house and sat on a pipe. The respondent pushed the deceased and pointed a gun in his face threatening to shoot him. When the deceased dared the respondent to shoot he did so causing the death.

In his statement the respondent said that Patrick asked "How you mean to carry my name go a station? It nah go like that". Patrick put a finger in his face and said "It nah go" and "me going to see what going happen". The respondent held on to Patrick and told him to follow him to the police station. The deceased then came on the scene and "chucked me, in the chest, and said you can't lock up my brother ... he grabbed in the shirt front and I boxed off his hand and he said 'yuh want me tek wey you gun from you'". The respondent's statement continued:-

> "Then he grabbed at my waist towards my gun at my side, my right side. I push off his hand and the second time he tried again I held on to the gun. I took it out, and Granville grabbed on to my hand while Patrick Angus held on to my left hand, wringing it up and down, and the same time Granville held on to the gun in my right hand. Granville was trying to pull it away from me. During a struggle, the two of them tried to take away my gun from me, the shot went off accidentally. I did not have the intention to fire the gun, nor to shoot anyone. I am innocent of the charge."

On the respondent's case there was thus a struggle with the two men who were antagonistic to him trying to get his gun which he sought to protect from them. At the trial the principal defence was that what happened was an accident, the alternative defence being that the respondent was provoked. The learned judge summed up on these two defences in a way which has not been criticised. He added however:-

> "So also, Mr. Foreman and members of the jury, such killing that is a deliberate, intentional killing done in lawful self-defence is no offence at all, but let me tell you this here and now that self-defence does not arise in this case so you will not hear more from me about self-defence. It does not arise in this case. I am only telling you for your own edification that killing done in lawful self-defence is no offence at all."

When prosecution counsel at the end of the summing-up said that she had heard nothing about self-defence the judge said:-

"No, I told the jury that they wouldn't be hearing anything more about self-defence. It did not arise."

It was this withdrawal of the issue of self-defence from the jury's consideration which provided the ground of appeal. The Court of Appeal took the view that "it is too clear for words that self-defence arose on the appellant's unsworn statement". They thought that the jury should have been told that the respondent was obliged and entitled to protect his firearm (he was a police officer) and to protect himself from any intended or actual attack on him by the two brothers. "Self-defence as a concept embraces not only aggressive action such as a pre-emptive strike or aggressive reaction but equally to a wholly defensive posture". The Court of Appeal added:-

"It seems to us absolutely illogical that the judge left to the jury the issue of provocation which has all the ingredients of self defence in a murder case, but omitted to mention self defence. The actus remains the same in both situations."

The appellant contends that the respondent's essential case was that there had been an accident and that neither prosecution nor defence counsel had raised the issue of self-defence at the trial, though it is to be noticed that prosecution counsel both at the trial and before the Court of Appeal seem to have considered that self-defence was a relevant matter. The appellant says, however, that the respondent's case was that he had not deliberately shot the deceased nor did he give evidence that he believed that it was necessary to defend himself by firing the gun. At best he was trying to keep his gun. In any event self-defence not only was not raised but could not have been relevant on the facts contained in his statement in any way.

The appellant drew the attention of the Board to *D.P.P. v. Walker* [1974] 1 W.L.R. 1090 at page 1095 where it was said, in allowing the decision of the Court of Appeal to stand,:-

"... it would follow that, in addition to the defences actually raised on behalf of an accused, trial judges might, in the future, feel obliged to leave to the jury not only any possible but also any impossible defence which had not been raised but which human ingenuity might conceivably devise. Otherwise, after the defences put before the jury at the trial had failed, the accused might succeed in having his conviction quashed on the ground that the impossible defences had not also been left to the jury. Moreover, to leave such defences to the jury would only tend to confuse and hinder them in reaching a true verdict. This would indeed divert the due and orderly administration of justice."

At the same time it is to be noticed that at page 1094 D-E their Lordships said:-

> "It is just possible that cases may occur in the future ... in which the defence relies on provocation but fails to rely upon self-defence although such a defence might possibly be inferred from the evidence. In this unlikely event, it would, no doubt, be the duty of the trial judge to leave self-defence to the jury and to give a careful direction on that defence."

In *Bonnick* (1978) Cr.App.R. 266 at page 269 the Court of Appeal said:-

> "When is evidence sufficient to raise an issue, for example, self-defence, fit to be left to a jury? The question is one for the trial judge to answer by applying common sense to the evidence in the particular case. We do not think it right to go further in this case than to state our view that self-defence should be left to the jury when there is evidence sufficiently strong to raise a prima facie case of self-defence if it is accepted. To invite the jury to consider self-defence upon evidence which does not reach this standard would be to invite speculation. It is plain that there may be evidence of self-defence even though a defendant asserts that he was not present, and in so far as the judge told the jury the contrary, he was in error; ..."

It is clear that perfectly hopeless defences which have no factual basis of support do not have to be left to the jury. But it is no less clear, in their Lordships' view, that if the accused's account of what happened includes matters which if accepted could raise a prima facie case of self-defence this should be left to the jury even if the accused has not formally relied upon self-defence.

Where, as here, there was a struggle between three men, two of them wanting to get the gun held by the other, then it is possible that the killing was murder, or that it was provoked and so was manslaughter, or that it was an accident, or that it happened deliberately but in self-defence. Self-defence in this context could well include stopping antagonistic men from trying to get a gun which they might have used to injure the accused.

Whether self-defence can fairly be said to arise depends in any case on an analysis of the facts relied on by the accused. Even if the appellant is right in saying that the evidence here, from which self-defence could be deduced once accident is rejected, was not strong, it seems to their Lordships that the Court of Appeal was entitled to conclude on the facts that self-defence should have been explained to and left to the jury. As the appellant accepts, if accident is rejected, then the shooting here was deliberate. It is at that stage necessary to consider whether in the struggle the shooting took place by way of self-defence.

The summing-up, which was otherwise careful and clear, failed to deal with this issue and to that extent the judge was in error as the Court of Appeal held.