**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO. 152/96**

**BEFORE: THE HON. MR. JUSTICE FORTE, J.A.**
**THE HON. MR. JUSTICE DOWNER, J.A.**
**THE HON. MR. JUSTICE HARRISON, J.A.**

**R. v. CARL BAKER**

**Delford Morgan for applicant**
**Miss Paula Tyndale for Crown**

**February 26 and June 2,1998**

**HARRISON, J.A.**

This is an application for leave to appeal against the conviction of the applicant in the St. Elizabeth Circuit Court on the 27th day of November, 1996, for the murders of Lacy Baker, Renee Baker and Ena Baker, on either the 9th or the 10th day of August, 1995, he was sentenced to suffer death in the manner authorised by law.

Having refused leave we dismissed his application on the 26th day of February, 1998. As promised these are our reasons in writing.

The applicant argued three grounds of appeal which summarised read:

> "(1) The jury was not properly assisted by the learned trial judge in the consideration of the issue of whether the defence of self-defence was made out, in that they were directed to consider,
>
> > the conduct of the applicant subsequent to the incident and

ll. that the absence of evidence of the finding of a screwdriver in the house after the fire gave rise to an inference that none was present at the time of the incident;

(2) Comments by the Learned Trial Judge that the applicant "... clapped her with the axe... Is it a matter of self defence or he clapped Ena in the house?... Its a matter for you," amounted to a ridicule of the defence and may have served to prejudice the mind of the jury and may have deprived the applicant of a fair trial and the chance of acquittal.

(3) This ground was abandoned.

(4) The Learned Trial Judge having failed to give directions on the defence of accident was a misdirection, in that it deprived the applicant of the consideration by the jury of his said defence.

The facts of this case, based on the evidence adduced by the Crown, namely, circumstantial evidence and the unchallenged cautioned statement of the applicant, are as hereunder.

The applicant lived in a one-bedroom board house at Coker District in the parish of St. Elizabeth, together with the three deceased, namely, his wife Ena, and their two daughters, Lacy, two and a half years old and Renee, one year old. On the morning of Thursday, the 10th day of August, 1995, the said house was discovered burnt to the ground with only the concrete flooring upon which lay the charred skeletal remains of the deceased, Ena, and on a burnt out bed were similar remains of the two children.

Beside a fowl coop to the rear of the burnt-out house, the police found a barrel containing a guitar, and items of men's clothing, namely a jacket and shirts, pants and shoes. On the floor within the fowl coop, containing live chickens, were a television

set, a fairly new four-burner gas stove, and two plastic buckets containing knives, forks and plates. The applicant admitted in evidence that all these said articles were his, and that he had removed them from the house the evening of the 9th of August, 1995, because he had intended to leave his wife and return to his mother's house. Also found outside was an axe, lying in a stony area between the house and the fowl coop, with blood on the blade. About two feet from the said house were four metal 45 gallon drums, each filled with water. In his cautioned statement , admitted in evidence, without objection by the defence as a part of the Crown's case, the applicant stated that on the said evening of the 9th of August, he had a quarrel with his wife, he then removed from the house the said things; that they had had another quarrel in the night and then they all went to bed; that his wife awoke in the night, they had a further quarrel and a fight, that he thumped her on her mouth and she fell and hit her head; that she got up took a screwdriver from underneath a table and stabbed him twice, as a result of which he "draw de axe" from underneath the said table and "lick her in her head. She knock out." He further said that when he was taking up the axe, the table shook and the lamp on the table fell off and broke and the oil spread, 'The place start blaze" and he ran from the house leaving his wife and children. In cross-examination, he admitted that he never attempted to take out his wife or children from the burning house, never attempted to put out the blaze, although he heard the screaming when he was in the act of running away, took the said axe out of the house, did not shout for help, passed several houses of neighbours on the way to the house of a church brother, one Morgan, half mile away, and whom he first told of the fire.

In his sworn testimony the applicant in his defence said that he and the deceased Ena went to bed that said night after the argument, she "woke up in the night

with the same argument, she "drew a screwdriver " and stabbed him twice on his hand, he hit her in her head with an axe, which hit the lamp off the table and caught the house afire. He said that he was so frightened that he did nothing and came out of the house through the window leaving his wife where she had fallen on the floor and his two children asleep in bed. He ran to the home of one Morgan and made a report to him. He denied that he set fire to his house and professed his love for his deceased wife and children.

Mr. Morgan for the applicant, in support of his first ground of appeal submitted that the learned trial judge failed to assist the jury adequately in directing them how to apply the facts found to the issue of self-defence, is so far as they were directed to take into consideration events subsequent to the incident, namely, the continuing conduct of the applicant after the incident in the house and the absence of evidence of the finding of a screwdriver after the fire, to determine whether or not the applicant was acting in self defence.

The learned trial judge in dealing with the issue of self-defence said, at page 104 of the record:

> "In this case, you will recall that there was this concept of self defence raised. You will remember this piece of evidence about a screwdriver being used to attack the accused. Members of the jury, once that concept of self defence is raised, it is not for the accused person to show you that he acted in self defence. No burden is cast on him. It is the Prosecution who must show you, so that you are satisfied until you are sure, satisfied beyond a reasonable doubt, that the accused man could not have been acting in self defence. That duty to satisfy you so that you feel sure that there was no self defence, rests with the Prosecution throughout the case. If therefore, on consideration of all the evidence, you find that the accused person acted in self defence, when I knocked out my wife with the axe, or you are not sure by entertaining a reasonable

> doubt whether he acted in self defence, you would have to say not guilty of murder. That is how you approach this concept of self-defence. And remember, no burden is cast on the accused man to prove his acting in self defence."

In defining self defence he said at page 105:

> "Members of the jury, what is self defence? Self defence is this, a person who is attacked, so that he honestly believes that his life is in danger, or that he is in danger of serious bodily injury, may use such force as on reasonable ground, he believes is necessary to prevent and resist that attack. He may do so even if he kills intentionally, and if that happens, he would commit no offence in law. You will therefore be required, members of the jury, when you go to deliberate, you will be required to consider all the circumstances, that is to say, all the circumstances put forward by the evidence, in other words, to conclude whether there was or there was not self defence. You have to be satisfied as to three main elements when you are considering this concept of self defence. One, you have to be satisfied that there was in fact an attack. Secondly, you will have to be satisfied that there was an honest belief that there was imminent danger to life or body. Thirdly, you have to be satisfied that the force used, was used for the protection of the accused. Those three elements deserve your consideration to see if you are satisfied. Members of the jury, that is self defence. It is a commonsense concept. But you must remember, if an attack is over, done, the force used can only be - and I am not telling you that you must go fighting. But I am saying you haven't got to take it from me, the force used when an attack is over, can only be by way of revenge. In such case, the concept of self defence would not avail"

In analysing the testimony of the applicant, the learned trial judge said to the jury, at page 124:

> "... he says that the wife started the same argument, and then he says 'she drew a

> screwdriver and stab mi with it. I hit her with an axe in her head' point to the left side, the axe hit the lamp off the table. It caught the house on fire. Children were in the house asleep. After I hit Ena Baker she fell to the floor. The house caught fire. I was so frightened I could do nothing. I ,came out through the window. I left from my house to a Mr. Morgan. I ran. I made a report to Morgan and went to Siloah station.'
>
> Now members of the jury, here you have to look at this carefully because that is his testimony now. Ask yourselves the question... Here is your house catching afire, caught fire, according to him. Three live people in the house and you ran gone to Siloah police station, and you don't call out to anybody along the road, not even your near neighbour down there? Water is in the drums there. You did nothing. You don't even tek up a half pint can and throw on it. You run gone. All those are matters for you, but that is in the statement..."

and at page 128,

> "... members of the jury... You can draw inference... Ask yourselves the question, we are common sense people, was Ena doing something outside of the marriage, and thus cause this type of behaviour that was deliberate. You take out your clothes, why you doing this?
>
> He owns a screwdriver, and it was under the table, and she going for the screwdriver.. I saw my wife took (sic) up the screwdriver and stabbed me twice... Members of the jury, nobody, or you have heard no evidence that any screwdriver was seen on the concrete. Matter for you. A screwdriver is not made out of plastic... or out of wood that it bUrri§: ittA , metal. Matter for you.
>
> Remember all this have to come within the context of claim of the raising self defence, but bear in mind that the prosecution has the burden of proving not in self defence.. He said after she stabbed me twice I reach for the axe... So according to him the stabbing passed and him reach for the axe and knocked her out. And this was taken from under the same table. And remember what he said again,

> that he had passed her with the screwdriver when he reached for the axe."

The learned trial judge, repeatedly recited the evidence of the applicant as to what transpired inside the house, the hitting off of the lamp with the axe, as opposed to the hitting of the table causing the lamp to fall off, the fire which started, his fright and flight, the attack with the screwdriver, and then (at page 129) told the jury:

> " But remember in his own words, he said the stabbing had taken place before. He didn't plan to kill his wife. 'I hit my wife once and I was so frightened. I am not lying.' That was the case for the defence.
>
> Members of the jury, analyse that case in relation to the concept of self defence as I told you about. If you accept that he was acting in self defence, looking at all the circumstantial evidence, and by the way, circumstantial evidence members of the jury, comes when you can have an opportunity to be at the place. There is no doubt about that because the accused man says he was there. Your behaviour subsequent to and after what you did. Those are things you look at.
>
> So you look at his presence there. He had the opportunity. He hit his wife down on the floor. He left the children in the house on the bed. He had water outside. That is behaviour now after. He had water outside when the fire started. He did nothing about that. He called for no assistance. He told you that he was sure that the house was going to burn down. That is to say without more, it must burn down unless there was some unforeseen intervention. He was certain, but he ran and leave it. So you look at all that in the circumstantial evidence, in relation to self defence, to see if you find self defence. If you are not sure, equally it is the end of the matter, because the prosecution would not have satisfied you so that you feel sure

A man who is attacked or honestly believes that he is being attacked and that his life is in danger or that he is in danger of serious bodily injury may defend himself

using reasonable force and in so doing if he kills his attacker or supposed attacker, he is not guilty of any offence (See **Beckford v R [1987] 3 All E.R. 425 and Palmer v R** (1971) 12 J.L.R.311).

The learned trial judge, however, directed the jury in the above quoted passage from page 105 of the transcript, that included in the three elements to be proven, in determining whether self-defence availed the appellant was that they must be satisfied that there was in fact an attack. This statement though not a correct statement of the law, [as an honest belief than an attack is being made on a person would permit him to defend himself], would not in our view affect the determination by the jury given the factual basis offered by the defence.

No complaint was made in respect of the learned trial judge's direction in that regard, and given the circumstances of this case, none could successfully have been made, as he placed before the jury in detail the account given by the applicant in his defence, which was devoid of any assertion that the applicant was mistaken as to an attack being made on him.

It is the law that each case has to be decided on its peculiar facts and circumstances, and the onus is on the prosecution to prove beyond a reasonable doubt that the applicant was not acting in self defence, in which event, if so proven the said defence fails.

In the instant case, the Crown's case, based principally on circumstantial evidence, was that **it** was the deliberate act of the applicant, in setting fire to the house which caused the death of the three deceased. In that regard, the learned trial judge directed the jury to consider those bits of evidence, led by the Crown to show that the conduct of the applicant after the incident in the house, followed a continuing pattern

consistent with that deliberate act and inconsistent with his posture of an accidental start of a fire in his act of self defence.

The applicant's prior removal of his items of clothing and other articles from the house before the fire, and his testimony of a subsequent retirement to bed with the deceased, is evidence for consideration of anticipated anon requiring prior removal and protection of such articles. The jury may well have been rightly asked to consider that the prior removal of articles such as the television set and the stove, are more consistent with his prior knowledge of an anticipated later "escape" from fire in fright through the window of the bolted room, following his deliberate act, than an accidental act starting a fire, in his act of self defence. The applicant's conduct, in not attempting to rescue the occupants of the house, not attempting to use available water to douse the fire, not alerting any of his neighbours, either by way of informing them or to get assistance, removing himself from the scene, in all the circumstances, is evidence, properly left by the learned trial judge, for the consideration by the jury as to whether or not it was consistent with the conduct of a man who accidentally started a fire in the act of self defence or was more consistent with the circumstantial evidence led by the Crown, in disproof of self defence and pointing to the deliberate and pre-meditated act of the applicant. For these reasons we are of the view that this first ground is without merit, and accordingly fails.

The applicant complained secondly, that the comments of the learned trial judge of the conduct of the applicant amounted to a ridicule of his defence which may have prejudiced the minds of the jury thereby depriving the applicant of a fair trial.

A judge conducting a trial in a criminal case is permitted to make any comments that he may deem appropriate in the circumstances but such comments should not

amount to a ridicule of, or cause to be whittled down in any way, the case of the person charged **(Dave Robinson v R** (unreported) S.C.C.A. 146/89 delivered 24. 4. 91).

In the light of this complaint we examined the record, and observed that the learned trial judge said, at page 125:

> "You remember what I told you about self-defence, that if the attack - if you find that there was an attack, a stabbing, and it pass gone, irrespective how short a time has elapsed, and you draw an axe from under the table and lick the person who stabbed you, you must decide whether that was done in self-defence, because in cross examination he said when he went for the axe he passed Ena who had the screwdriver, but you heard nothing from him that Ena shaped at him, leave her with the screwdriver at that time, but he chopped her with the axe then. Is it a matter of any self defence, or he clapped Ena in the house? He took the axe in the house and clapped Ena with it, knock her out and knock down lamp on it. It's a matter for you."

The learned trial judge in using the words complained of, was pointing out to the jury the distinction between necessary self defence entitling one to an acquittal and the use of force after the danger of an attack had passed which would be an act of revenge negating legitimate self-defence.

His directions to the jury in this respect, were given in the context of the answers of the applicant himself, in cross examination, at page 92:

> Q. So wait, you wife got the screwdriver from under the table, came at you and stabbed you, yes?
>
> A. Yes, sir
>
> Q. And then you passed her and went under the table for the axe, that is what you are saying?
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> A. Yes, sir.

> Q. And when you were passing her, she still had the screwdriver? You heard the question?
>
> A. Talk again
>
> Q. When you were going for the axe, your wife had the screwdriver in her hand at that time?
>
> A. Yes, sir.
>
> Q. But she didn't stab you at that time?
>
> A. No, se

The learned trial judge was here mindful of the guidance given in **Palmer v R,** supra, where Lord Morris inter alia, said at page 322:

> " 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 aggression. There may no longer be any link with a necessity of defence. Of all these matters the good sense of a jury will be the arbiter."

The learned trial judge quite properly left these matters to be determined by the jury, and we do not agree that these directions could be construed as ridiculing the defence or could have prejudiced their minds in any way. This ground also fails.

The applicant abandoned ground three.

In his fourth and final ground the applicant argued that the learned trial judge failed to give directions to the jury on the defence of accident thereby resulting in a misdirection by depriving the applicant of the consideration of his defence by the jury,

having regard to the manner in which the applicant stated that the fire started and the absence of any evidence to the contrary.

It is a settled principle that the law imposes a duty on a trial judge to leave for the consideration of a jury all issues and defences that arise fairly on the evidence, and this is so even if such defence is not raised by the accused. In **R v** Porritt [1961] 3 All E.R. 463 Ashworth, J., said, at page 468.

> "....there is ample authority for the view that notwithstanding the fact that a particular issue is not raised by the defence, it is incumbent on the judge trying the case, if the evidence justifies it, to leave that issue to the jury." (Emphasis added).

This principle was embraced and followed by Forte, J.A. in **R. v. Stanley McKenzie** (unreported), S.C.C.A. No. 62/91 delivered 3.11.92.

In the instant case the issue of accident arose on the case of the applicant. In his said cautioned statement admitted in evidence, the applicant said, at page 37 of the record:

> "When mi draw di axe it shake di table and di lamp turn over off di table and break and di oil start spread and di place start blaze, an mi run out di house lef she and di children dem."

and under cross-examination, he said at page 96:

> "A. Mi hit her and mi coming down with the axe, it hit the lamp and the lamp fell off the table and it spill over the place."

The learned trial judge was faced with this evidence, namely, the utterances of the applicant himself.

For someone who was relying on an accidental act there was also evidence of the applicant's improbable conduct, in the circumstances, namely, the prior removal of personal items of clothing and other appliances from the fateful house, no attempt to

assist in removing the three deceased from the burning house, his flight therefrom without utilizing the water available in the drums to put out the blaze and the neglect to raise an alarm or summon help from his neighbours. Despite this, the learned trial judge did direct the jury's attention to the issue of accident. He referred to it, generally, at page 102:

> " In this case„ members of the jury, the accused man gave sworn testimony. That testimony or evidence which he gave was cross-examined. You will have to decide if it stood up to cross-examination, or it did not. It's a matter for you, If you think it stood up to cross-examination and was not in any way discredited and you are impressed with the truth of what he says there, then the prosecution would not have made out the case to your satisfaction and you would have to acquit. Equally, if it leaves you in any reasonable doubt, you have to acquit."

and specifically the learned trial judge said at page 109:

> " Members of the jury, the cases which you are trying here, you try one case, but when I say cases, I mean the different versions. The Prosecution's case is that on the 9th or tenth of August, 1995, the accused man murdered three persons by causing a fire which consumed them. And the defence's case is, no, it is not so. I was acting in self defence or raised the issue of self defence and raised the issue of accident. I didn't intend to do it at all, or it was an accident. And those are the things that you will have to consider. And it will be your function when we review the evidence, to see which version is correct."

The learned trial judge, in addition directed the jury to examine the conduct and activities of the applicant, in the circumstances, after the fire started.

We are of the view that the learned trial judge dealt fairly and adequately, in all the circumstances of this case, with the issue of accident and left such issue for the consideration of the jury. Accordingly, this ground also fails.

The Crown's case was that the applicant deliberately, set fire to the house with the intention to kill or cause grievous bodily harm, knowing that his wife was immobilized and his two infant children were asleep in the house with its door bolted, and that his conduct negatived any claim that the axe accidentally struck the lamp which caused the fire.

In dealing with the intention of the applicant the judge directed the jury, inter alia, that the result of a person's act may be taken as intended if it is desired or foreseen as a probable result of a person's act Hyman v D.P.P. (1974) 2 All ER 41. He said at page 112:

> " Remember it is his intention that you are seeking so you have to take into account everything that he says or said in explanation of his intention, then on the totality of all the evidence in the case you will come to a decision whether the required intention has been proved by the prosecution... you have to consider the probability of a consequence. The probability of the consequence here is the probability of death resulting from fire being set to a house with people in it. So the probability of a house set alight with people in it burning down and killing those people, exist in this case...
>
> The greater the probability of that happening, members of jury, the more likely it is that consequence, the burning up of the people was foreseen, that is to say, somebody reasonably ought to see that that would have happened, was foreseen, and if that consequence, if you as judges of the fact find that that consequence, that is the burning up of the place, that it was foreseen, the greater is the probability that the consequence, that is again, the burning up of the people, was intended..... "

For the above reasons we made the order referred to earlier.