JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 74/95

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.

DAVID BELL
v
REGINAM

L. Jack Hines for Appellant

Mrs. V. Graham-Allen &David Fraser for Crown

December 4 & 11, 1995

PATTERSON, J.A.

On 31st. May, 1995 the appellant was convicted of the offence of unlawful wounding on an indictment which charged him of wounding Gillian Lawrence with intent to do her grievous bodily harm on 12th October, 1993. The trial took place on the 29th, 30th and 31st May, 1995, before McIntosh J (Ag) and a jury in the Home Circuit Court, and the appellant was sentenced to imprisonment for three years at hard labour.

The appellant applied for leave to appeal against his conviction and sentence and leave to appeal against conviction was granted by the single judge.

The facts on which the prosecution relied may be summarily stated. Gilllian Lawrence testified that the appellant who resided at the same premises as herself, entered her room and used a machete to chop at her head. She raised her arm in protection of her head and was chopped on it. She tried to escape through a window and the appellant chopped her twice in her back and on her leg.

The defence presented quite a different account. The appellant said he was accused of stealing ganja and attacked by Gillian Lawrence, her boyfriend and two others. They had a machete, a knife and stones. He ran and was chased by his attackers until he came upon a fence where they "backed him up." He was chopped on his hand by Gillian's boyfriend, the machete fell from him, and it was then that he took it up and tried to defend himself by chopping with it. He did not say that he chopped anyone. There were

therefore two accounts of what transpired; the prosecution's account that did not admit of self defence, and the classical case of self-defence raised by the appellant's account.

The learned trial judge correctly identified the issue of self defence raised by the appellant, and it is his direction to the jury that forms the basis for the appellant's first ground of appeal. That ground reads as follows:-

> "That the learned trial judge erred in leaving with the jury the objective test (see page 10 of transcript of Judge's address to jury) in dealing with the crucial matter of self-defence and in circumstances where this misdirection could have affected the verdict (see in particular page 11 of transcript of Judge's address to jury) as follows: 'I ask that you bear in mind, Madam Foreman and members of the jury, that the accused man is also saying that 'At the time when I used the machete to defend myself, none of my assailants were armed'."

The misdirection on self defence which counsel referred to is this-

> "Now what is self defence? The law says that 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 believes is necessary to prevent and resist that attack and if in using such force he kills his assailant or wounds his assailant or does his assailant any injury, he is not guilty of any crime even if the killing is intentional."

That direction on self-defence is a misdirection in light of the opinion of the Board expressed in **<u>Solomon Beckford v R [1987]</u>** <u>3 All ER. 425.</u> In that case, their Lordships examined the practice of judges directing the jury to apply the objective standard in judging the accused's state of mind at the time of the act in a case where self-defence is raised as an issue. It laid down as a general principle that "the test to be applied for self-defence is that a person may use such force as is reasonable in the circumstances as he honestly believes them to be in the defence of himself or another" (per Lord Griffiths at p.432). But although this imputes the subjective standard, it is not an inflexible rule that where the objective test is used, it is necessarily fatal if left for the consideration of the jury. This is borne out by what Lord Griffiths said (at p.432):-

> "If on the facts as they appear from the summing up the judge had left the matter to

> the jury on the basis of a choice between the two accounts then any misdirection as to the reasonableness or otherwise of the appellant's belief would have been of only academic interest."

This clearly means that where the evidence admits of only two accounts and those two accounts are left to the jury as a choice between them, then a direction in terms of "honest" as opposed to "reasonable" belief would be of no moment. However, where there is a possibility of a third account namely, that the accused mistakenly believed that he was under attack or in immediate danger, the subjective test and not the objective test is applicable, and the jury must be directed in terms of the test laid down in **Beckford's** case as referred to above.

Counsel before us was quite aware of what this Court said in **R. v. Owen Virgo** (unreported) S.C.C.A. No. 96/87 delivered March 23, 1988. It needs to be quoted:

> "Only in cases of mistake of facts, or where the circumstances constituting the threat of attack are such that 'there was a further possibility' namely that the accused mistakenly believed that he was under attack, would a direction not emphasising "honest belief" be so defective as to be fatal to a conviction."

Counsel argued, however, that such "further possibility" existed in the instant case, and that the learned trial judge left it to the jury. He referred to the two accounts which clearly emerged from the evidence and which were properly left to the jury but he said the third account was left in these directions:

> "I must ask you to bear in mind, Madam Foreman and members of the jury, that the accused man is also saying that 'at the time when I used my machete to defend myself, none of my assailants were armed'."

Counsel argued that the appellant was saying there, that he apprehended a continued or possibility of further attack, and that it was as a result of that belief he used the machete to defend himself. We did not share counsel's view. It was quite clear to us that the appellant's account of the incident is that he retreated from his attackers to a point where his back was against the wall, the attack continued and fortuitously the machete fell from one of his assailants and he was able to get hold of it and chopped while still under

attack. There was no question of the attack having ceased and his apprehending a renewal of it.

In our judgment, the evidence admitted of only two accounts, and the learned trial judge left both those accounts to the jury as a choice between them, and therefore the fact that he directed the jury in terms of "reasonable belief" and not "honest belief" of the appellant has not created a fatal nisdirection. This ground of appeal therefore failed.

Counsel attempted to show, in a second ground of appeal, that the appellant did not get a fair trial for two reasons, (a) no enquiry was made by the learned trial judge as to legal representation and (b) the learned trial judge failed to adjourn the matter to enable the appellant to obtain a copy of the depositions. The offence with which the appellant was charged is not one that would entitle him to legal aid. The records disclose that before he was pleaded, the court was informed that he was unrepresented, and there is nothing to say he disputed that fact. The court was informed also that the appellant had been supplied with a copy of the depositions previously, but apparently he had mislaid it. Crown counsel said he was "trying to find another one to make available to him." The appellant, when asked by the learned trial judge if he was able to read and write, replied "not so well M'Lord". It is in those circumstances that the trial proceeded. We did not think that the matters complained of deprived the appellant of a fair trial. There was no complaint that the learned trial judge did not give the appellant such assistance as an unrepresented person ought to get. We saw no merit either in this ground.

For these reasons, we dismissed the appeal, confirmed the conviction and sentence and ordered that the sentence take effect from the 31st August, 1995.