JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 156/89

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

R. v. LEO BOUCHER

Dr. Paul Ashley for Applicant

Diana Harrison for Crown

20th February, & 1st March, 1991

GORDON, J.A. (AG.)

On 20th February, 1991 we treated the hearing of this application as the hearing of the appeal which we allowed, quashed the conviction, set aside the sentence and directed that a verdict of acquittal be entered. We promised to put our reasons in writing and now fulfil that promise.

The applicant was convicted on an indictment in the Trelawny Circuit Court at Falmouth on the 9th November, 1989 for the murder of Gladstone Bryan on 23rd June, 1989 and sentenced to suffer death in the manner authorised by law.

The prosecution's case is that the deceased Gladstone Bryan o/c John and the applicant Leo Boucher live in the district of Coral Spring Trelawny. On the morning of the 23rd June, 1989 the applicant and another man passed by the gate of the deceased and in passing he chopped the stone wall and said he must chop off somebody's neck today. These words were accompanied by the using of indecent language. This

incident was witnessed by the deceased's paramour Gretel Houston who that night at about 8.00 o'clock was at home when she heard the voices of her paramour and that of the applicant on the main road nearby. She went out and saw Gladstone's body on the ground bleeding. He was removed to the Falmouth Hospital.

The sole eyewitness to the infliction of the injury was Anthony Bryan who said that that night at about 8.00 o'clock he saw his uncle John and the applicant on the road. There were in all about six persons there including the applicant's paramour Cheryl Wright. He heard his uncle tell the applicant to stop "trouble his family". They were there about half an hour and the talking ceased when he saw the applicant who faced the deceased raise his hand and chop the deceased on his neck. The deceased fell, called for help and spoke no more. The applicant ran off. With assistance the deceased was removed to the Falmouth Hospital. This witness said the deceased was unarmed and did not at any time assault the applicant with a machete. The applicant's paramour Cheryl Wright was offered by the prosecution for cross-examination by the defence. She testified that she was with the applicant, her nephew and another man on the road when they were approached by the deceased and two of his nephews. The deceased said to the applicant "The judge said, you are not to come to my house and molest me or anybody fe me." The deceased then began to slap the applicant with a machete. She attempted to take the applicant away, but their path was blocked by the deceased and others with him and the deceased spoke to and slapped the applicant some five or six times. The applicant then said "Okay John, you can go tell a boy say yuh beat me up and a don't do you nutten." The deceased and

others then rushed on to the applicant and surrounded him, she walked away and only returned when she heard something. She then saw deceased on the ground and smelled blood. It was too dark to see blood on the road.

Detective Sgt. Grant of the Duncans Police received a report and went first to the scene then to the Falmouth Morgue Where he saw the body of the deceased and observed a wound to the left side of the neck almost severing the neck. He went in search of applicant and called him from bushes. The applicant said when he emerged, "Mr. Grant you see how them mash up mi house?" The Sergeant did not see any damage to the house but he saw stones in the yard. Cautioned after being informed of the death of the victim he said nothing. The applicant admitted having thrown away the machete with which he slapped the deceased. Notwithstanding a search, it was not found. The applicant complained of being hit on the hand with a machete by the deceased and the Sergeant observed bruises on the applicant's right forearm. The applicant was examined by a doctor while in custody.

The applicant in an unsworn statement raised the issue of self-defence. He said he was on his way home from shop when he met the deceased. The deceased crossed the road, came in front of him, and said "The Judge said we must keep the peace and you nah stop from trouble me." He denied the accusation and the deceased struck him across his "stomach" with a machete. An argument developed and the deceased proceeded to slap him over his body with the machete. Four other fellows surrounded him and he attempted to escape as they kept backing him up. The deceased threatened to kill him as he continued his assault with the machete, urged on by the others. He saw the deceased raise his machete to chop him and he made "a slap and after I slap him .... I run."

Dr. Tin Hung of the Falmouth Hospital told of examining the applicant on the 26th June, 1989 and of his finding the following injuries:

> "(i) a very small abrasion on the forearm;
>
> (ii) some abrasions on the right side of the back and it was painful to the touch."

These injuries he said could have been inflicted by a machete.

The defence to the charge was self-defence. It emerged from the evidence that the applicant was a witness for the prosecution in a case brought against a man named Bunny who lived in the home of the deceased's father. This man was convicted and sent to prison and thereafter the relationship between the Bryans and the applicant deteriorated. This incident was brought to the fore in the confrontation on the night of the 23rd June, 1989.

Dr. Ashley argued two grounds of appeal with leave of the Court:

> "1. The learned trial judge erred in law by failing to alert the jury to the dangers of acting on the uncorroborated evidence of a witness who was related to the deceased and likely to be affected by the history of the hostilities between the family of the deceased and that of the accused.
>
> 2. The verdict was unreasonable and cannot be supported by the evidence.
>
> PARTICULARS
>
> (a) The context in which the confrontation occurred, together with the content and conduct of the altercation, suggest that the deceased was the main agitator with the accused adopting a defensive stance.

" (b) The injuries to the accused observed at the time of arrest and attested to by the medical examiner - are consistent with the account of an attack given by the accused and a Crown witness."

We found no merit in these grounds and they were dismissed. He craved and obtained leave to argue an additional ground formulated thus:

"Where self-defence arises on the Crown's case then it is incumbent on the trial judge to give a special direction to the jury in order to assist them in evaluating the evidence of that witness and in certain circumstances to direct the jury to return a formal verdict of not guilty if the Crown has failed to negative self-defence."

This ground was formulated and developed as counsel addressed arguments on ground 2 (b) and the impact of the evidence of the prosecution witness Cheryl Wright. Miss Wright was tendered for cross-examination and her evidence in the Crown's case introduced self-defence as an issue. Dr. Ashley submitted that that being so the learned trial judge had a duty to deal with her evidence in his charge to the jury and to point out the dichotomy in the Crown's case where the eye-witness Bryan denied suggestions that the circumstances were such that the applicant acted in self-defence.

Miss Wright said that there were two nephews of the deceased at the scene. The sole eye-witness admitted he was a nephew of the deceased and he was present. The witness agreed that the scene of the crime was very dark and Miss Wright was unable to identify the witness Bryan as one of the deceased's nephew present.

We find that the trial judge gave correct general directions on self-defence and using the case of **Solomon Beckford v. R** [1987] 3 All E.R. 425 as an appropriate guide, he pointed out to the jury the statement the applicant made raising self-defence as an issue and he dealt with the evidence of Dr. Tin Hung as to the injuries he saw on the applicant, in this manner:

> ".... His testimony or statement, not testimony, statement, is supported by what the doctor tells you, that he saw bruises on the right side of the back and on the forearm. So it is supported. The doctor examined him three days, after you know and saw evidence of this thing and the doctor says it was sensitive because the man responded when he touched it, responded in a painful way. So the abrasions were there.
> So what the accused man is telling you, supported by the doctor's evidence is yes, he says he was hit over the back and you have to ask yourselves the question then, could he have hit himself when he was in custody to give this impression; so is he speaking the truth. There is something there. It is a matter for you. You have to consider it."

Why did the learned trial judge invite the jury to speculate as to the manner in which the applicant received his injuries when the only evidence in the case both from the prosecution and the defence is that he had the injuries on the very night of the homicide and there was an explanation of how they were inflicted.

Self-defence was raised in the prosecution's case in the evidence of Miss Wright and inferentially in the evidence of Sgt. Grant who said that on arrest the applicant had bruises on his right forearm and he said the deceased had struck him on the hand with a machete. The only reference made to this evidence by the judge in his summation was found on page 60 of the record thus:

> "Mr. Salmon cross-examined him and he said, 'yes, I saw injury to the right forearm and bruises and the accused man was medically examined'."

This treatment of the evidence was of no assistance to the jury and did not do justice to the defence; equally unhelpful was the treatment afforded the evidence of Miss Wright which followed immediately on the reference to Sgt. Grant's evidence on page 60 of the record:

> "The witness Cheryl Wright was put up to you for cross-examination, and Mr. Salmon cross-examined her. She told you she was out there the evening, but at the material time she wasn't there, she had left because she told you that she said, 'I can't stand up here and see them kill you.' Well, I don't know how you are going to take that, because if this is the man's common-law wife and she - I don't know if she was not protective, but you see something going to happen to your man, you would stand up and watch it, you would fight back too, but she says she went away and left him there. It is a matter for you, because she is not on trial. She walked away and she didn't see it; she went away."

There was here a complete failure to place fairly before the jury, the evidence of this witness and to assist them to evaluate it in the context of the issue of self-defence. This witness had told of the deceased confronting the applicant and accusing him of continued interferance with his family. The deceased then rained blows on the applicant with a machete and when the applicant endeavoured to get away he was pursued and was surrounded by the deceased and his cohorts. On this evidence without more the inference a reasonable jury properly directed could draw is that the applicant honestly believed he had cause to fear death or serious bodily injury.

A trial judge has a duty to lay before the jury all the evidence that supports or tends to support a defence raised in language they can easily appreciate and assist them to evaluate it in its proper context. **R. v. Badjan** 50 Cr. App. R. 141 **R. v. Michael Bailey** S.C.C.A. 141/89 (unreported) delivered 31st January, 1991. It is not sufficient to mention evidence without reference to, or placing it in the context of, the defence raised.

The fact that self-defence arose in the evidence of the prosecution assumes greater significance as at the close of the Crown's case there was before the jury the evidence of Bryan and Miss Wright which were at variance. One sought to negative self-defence the other may fairly be said to raise the issue and in addition there was the evidence of Sgt. Grant re the allegation of the applicant and the significance of the bruises on his forearm. These called for a careful presentation by the judge and painstaking examination of the details in assisting the jury in their assessment. Merely to warn the jury as he did that it was the duty of the prosecution to negative self-defence was not enough.

This court has in innumerable cases pointed out the duty of a trial judge in his charge to the jury. In Archbold Criminal Pleading 42nd edition at paragraph 4-423 under the rubric "Scope of judges task" these functions are indicated thus:

> "..... it is incumbent on the judge to assist the jury by dealing with the salient features of the evidence; but in a short case, and one in which the issue of guilt or innocence can be simply and clearly stated, it is not necessarily a fatal defect to a summing-up that the evidence has not been discussed: **R. v. Attfield** (1961) 45 Cr. App. R 309.

> "Where the judge does consider that some reference to the evidence is appropriate, as is invariably the case, he should remind the jury of the evidence for the defence: **R. v. Tillman** [1962] Crim. L.R. 261, whether or not the defendant gives evidence; **R. v. Jarman** (1962) 106 S.J. 838. The judge should look for any possible defence to the charge arising from the evidence and refer to it even though the defence has not been relied on by defending counsel: **R. v. Porritt** (1961) 45 Cr. App. R. 348; **R. v. Kachikwu (1965)** 52 Cr. App. R. 538. A person faced with a serious charge is entitled to have his defence laid before the jury in a form that they can appreciate. Where therefore the summing-up did not deal adequately with the evidence (no attempt was made to analyse it and in dealing with one witness, the judge read out parts of his deposition which differed from his evidence) the court quashed the conviction: **R. v. Hamilton** [1972] Crim L.R. 266, C.A.; see, too **R. v. Dennick** (1909) 3 Cr. App. R. 77 and **R. v. Badjan** (1966) 60 Cr. App. R. 141.
> For other cases in which the importance of the defence being adequately put to the jury was stressed, see **R. v. Mills** (1936) 25 Cr. App. R. 136 (murder); **R. v. Waters** [1954] Crim. L.R. 147 (false pretences); **R. v. Olliffe** [1955] Crim L.R. 570 (wounding with intent to cause grevious bodily harm). As a general rule the Court of Appeal will quash a conviction where the jury ought to have had the assistance of the judge's directions upon a material aspect and he failed to give them: **R. v. Finch** (1917) 12 Cr. App. R. 77; see too, **R. v. Currell** (1935) 25 Cr. App. R. 116."

We have extracted this paragraph at length because in our view, too much emphasis cannot be placed on the duty which the trial judge must discharge in his summation.

Miss Harrison conceded that the non-direction on the issue of self-defence amounted to a misdirection and invited us to apply the proviso to section 14 (2) of the Judicature (Appellate Jurisdiction) Act. This we decline to do. In our

view the omission of proper directions on self-defence deprived the applicant of a favourable verdict of the jury. For these reasons we allowed the appeal with the consequences already set out herein.