

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 109, 110, 111/90

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA VS. ALFRED JOHNSON
OTHNIEL MARAGH
RONALD DALBERT

Howard Hamilton, Q.C., Delroy Chuck &
Anthony Pearson for the Appellants

Lancelot Clarke, Assistant Director of
Public Prosecutions for the Crown

18th March & 3rd December, 1991

DOWNER, J.A.

The complaint of the appellants in this case was that the learned trial judge, Courtney Orr, J., failed to put their special statutory defence to the jury and thus deprived them of a chance of an acquittal. The appellants who are prison warders were jointly charged with the murder of Vincent Martin then a prisoner incarcerated at the Gun Court Rehabilitation Centre at South Camp Road. This accounts for the fact that the eyewitness' testimony of the offence was by his fellow inmates.

The status of the warders is a n to that of police officers by virtue of statutory provisions pursuant to the Corrections Act. Also, the fact they stated that they apprehended an escape by the inmates may have entitled the appellants in law to an acquittal on the basis of justifiable homicide.

It is Sections 14 and 15 of the Corrections Act which stipulate the powers of a warder and detail the special defence when weapons are used to prevent an escape. These sections read as follows:

"14. Every correctional officer while acting as such shall have, by virtue of his office, all the powers, authorities, protection and privileges of a constable for the purpose of his duty as such correctional officer.

15.—(1) Every correctional officer may use weapons against any inmate who he has reasonable grounds to believe is escaping or attempting to escape; but resort shall not be had to the use of any such weapons unless such officer has reasonable grounds to believe that he cannot otherwise prevent the escape." (Emphasis supplied)

It should be noted that Section 15 has eight subsections detailing circumstances where the use of weapons is permissible, none of which save one need detain us. Section 15 (8) however, is important. It states:

"15.—(8) Nothing in this section shall be construed to deprive a correctional officer, authorized person or any other person of his legal right to use such force as may be reasonably necessary for the protection of his own life or for the protection of the lives of other persons."

This subsection indicates that the statutory rights of Sections 14 and 15 are additional to the common law right of self-defence which requires simply a belief **rather than reasonable belief** to use reasonable force for defence of his life or that of other persons. See Beckford v. The Queen [1986] A.C. 130, [1987] 3 W.L.R. 611, [1987] 3 All E.R. 425. Furthermore there must be an attack or fear of an attack for the defence of self-defence to be relevant. The circumstances of a case may well require both defences to be adumbrated in the summing-up and this case is one such instance.

Before examining the circumstances of the special statutory defence raised in the Court below, and the summing-up of the learned trial judge, it is necessary to rehearse the prosecution's case.

The principal Crown witness was Derval Reid. On the night of 27th July, 1988, he, along with the deceased Vincent Martin, were in cell No. 8 when he heard gunshots. These gunshots also alerted the warders of an escape from the cells. He got up and he saw about eight or nine warders who went for keys. They were armed. The warders entered the cells by opening the gate with keys. One warder who is now dead said that they should beat all the men on the block, for by so doing, he thought they would be able to ascertain which of the men went outside. This crucial evidence came from the prosecution's case and one view of it could have been that the warders did entertain a reasonable belief that there was a break out from the cells.

At that point, Reid gave an account as to how he was assaulted by the appellants Johnson and then Maragh and Dalbert joined in the beating of other inmates. They were kicked and punched as well as assaulted with batons and sticks. The inmates, on their account, managed to crawl to the medical centre and at that point, they were handcuffed. So serious were the assaults that one warder was alleged to have rebuked the appellants for continuing to beat the prisoners at the medical centre.

Further, on the prosecution's case, the Director of Prisons ordered that the appellants dress the wounds, while on the defence version, the appellants disarmed the prisoners and dressed their wounds. Here, it should be noted, the defence being projected was that the prisoners had to be disarmed before their wounds were dressed and this could have raised the inference that the force used by the appellants was intended to quell armed inmates bent on an escape.

As regards the death of Martin, the prosecution's case was that during the assault, Martin said "a dead now" and, in fact, he did, after exclaiming with accuracy, that he did not think he would have lived. Reid said the inmates had no weapons and they did not attack the warders who were armed with guns. Moreover, it emerged from the evidence that the warders did go to the armoury

because that which initially attracted their attention was the sound of gunshots. Perhaps it should be stressed at this point, that the issue the appellants wished to have stated in the learned judge's summing-up, was that in securing arms, the warders were carrying out their duty to arm themselves to prevent an escape.

The supporting witness for the prosecution was Clive McPherson. He too heard an explosion and saw the warders advance towards the cells with guns and he overheard a warder say that one of his fellow inmates was shot and that he ought to be left to suffer until the morning. By and large, his version of events is similar to that of Reid. What is significant coming from this witness, was that he too heard the gunshots before the confrontation between warders and inmates. To reiterate, that was the event which alerted the warders.

The remaining evidence comes from the arresting officer Sergeant Spence. He went to the Centre some time after 9:00 a.m. on the morning following the incident and he saw Martin apparently then still alive, sitting at the Centre and he noted the bruises on the inmates. He could not recall the warders complaining of any injuries. Of interest to the appellants, was that Sergeant Spence saw a hole in the metal fence. To them that was evidence of an attempted escape and it ought to have been in the forefront of the judge's summing-up, explaining the defence of belief on reasonable grounds of an escape or an attempted escape.

Then Dr. Clifford, the pathologist gave evidence of the assaults on Martin. He found abrasions and fractured ribs. But the vital finding was the chest injuries which, he found, were the result of a severe degree of force. His opinion was that a blunt instrument was used for those injuries or that it resulted from kneeling in the chest. The chest injuries, were, in his opinion, the cause of death.

There was thus raised on the prosecution's case the gunshots which alerted the warders to advance on cells, as well as evidence that they feared a break out was being attempted or had occurred. There was, as we have noted before, some evidence of a hole in the fence from which it could have been inferred that a break out was contemplated and being effected. The unsworn statements of the appellants advanced this version much further and we must now turn to them as the omission to explain the legal implications to the jury is the foundation of the appellants' arguments before us.

The narrative of the appellants was that they went to the armoury for weapons, as they apprehended an escape from the remand section. The crucial evidence here, was the sound of gunshots within the prison walls. They moved forward in two groups and as they approached, they saw Martin the deceased and Derval Reid advancing towards them with two drums. This was a circumstance which warranted the defence of self-defence and that defence was put to the jury and rejected. No complaint was being made on that score. Further, it was stated that one of the appellants, Dalbert was stabbed at, with an improvised knife. The warders said that they fired shots in the air and that Reid used an ice-pick to attack Dalbert. Dalbert reported that he also found evidence of implements which could be used for a break out and that a hole was dug in the wall which was part of the appellants' evidence of a planned escape.

Maragh, another appellant added that he was attacked with a knife and that he used necessary force to repel the attack. Dalbert was the senior officer in charge that night and said he was attacked by Martin with a drum which he avoided. He was also attacked with a knife which grazed his skin and cut his shirt and he admitted that Derval Reid and Martin had injuries which was the result of the warders' counter-attack.

It was against this background that the appellants complained that their duties as warders was never put to the jury. They contended that, to put self-defence alone, was not adequate when the law provided for a special defence. The summing-up therefore contained an omission which amounted to a misdirection. Moreover, there was evidence on record at page 81 that the defence was raised at the trial. It is of sufficient importance to quote it. Counsel (Mr. Pearson) said in his address on mitigation.

" Your Lordship will recall that in :
addressing the jury, I read for them, sections
of the Correctional Act which deals with the
powers, duties, the responsibility of prison
warders. Your Lordship will note that among
the powers, are the powers to use such
reasonable force so as to restrain inmates of
correctional institutions when it is so
necessary."

Before us Mr. Hamilton and Mr. Chuck relied on R. v. Astley Ricketts (unreported) S.C.C.A. 77/87 delivered on 25th September, 1987 (Rowe, P., Campbell, J.A. and Downer, J.A. (Ag.)). That case concerned the defence of a police officer and would in general circumstances be applicable to warders in the course of their duties. The law and facts of this case, however, are concerned with a special defence when weapons are used by warders when on reasonable grounds they believe there is an **escape** or attempted escape.

On the basis of the foregoing analysis, we think that the learned judge erred in failing to instruct the jury in accordance with the provisions of the Corrections Act. Because of that failure, at the end of the hearing we quashed the convictions for manslaughter, set aside the sentences and entered a judgment and verdict of acquittal in respect of the three appellants.