JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 50/93

COR: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

R. v. VICTOR POWELL

Frank Phipps, Q.C. for Applicant

Kent Pantry, Deputy Director of Public Prosecutions
& **Martin Gayle** for Crown

25th,26th October & 13th December, 1993

FORTE, J.A.

On the 25th October, 1993 having heard arguments of counsel, we refused the application for leave to appeal against conviction for wounding with intent. Leave having earlier been granted to appeal against sentence, we allowed the appeal against sentence, set aside the sentence of 18 years hard labour and substituted therefor a sentence of 12 years hard labour to commence on the 4th August, 1993.

The applicant was convicted in the St. James Circuit Court on the 4th May, 1993 on evidence which is hereunder briefly outlined.

On the 17th September, 1992 the virtual complainant Mr. Claver Reid was at home, where he lived with another young man Phillip Robinson. At about 3.00 p.m. Robinson was in the shower and Reid asleep. Robinson heard the door buzzer, and in responding to it saw a friend called "Renna" who asked for Reid, who apparently was called "Fresh". He woke Reid, who went downstairs to Renna, and then Robinson threw the keys for the grill door to Reid so that he could open it to give Renna access.

At that time Reid saw only Renna standing at the grill gate. While speaking to Renna, he saw the applicant come up to the gate, point at him and asked "Where is Phillip"? The applicant whom he had known for 15 years, was then in the company of three others. Although he knew Phillip was upstairs he told the applicant that he was not there. The applicant then said to him, "You little boy love disrespect big man", and followed up cursing bad-words. When the complainant remonstrated with him telling him he should not come to his home and do these things, he pulled a ratchet knife from his pocket and stabbed at him. Renna was still present at this time.

As the applicant stabbed at Reid he [Reid] stepped back inside the grill gate and was trying to put back the lock on it, but could not do so because the applicant continued stabbing at him. He took the keys out of the lock, opened a knife which was on the ring of keys, and started to "jook" at the applicant in an effort to scare him off. This had no effect on the applicant's insistence on his attack, so the complainant dropped the keys and ran up the steps to get away. By the time he had reached the second flight of stairs he was stabbed in the region of one of his ears. He then fell on his back, attempted to keep off the applicant, but with no success, as the applicant in those circumstances cut him "near his throat". He then "blocked out". He was subsequently taken to the Cornwall Regional Hospital - then to Kingston Public Hospital where he remained for 15 weeks, before being taken to the Mona Rehabilitation Centre. His injuries were very serious, causing the doctor who first treated him to testify that if he (the applicant) had not received the sort of treatment at that time, he would not have expected him to live. In fact at the hospital, they were about to abandon him as all efforts to resuscitate him had failed. However, they persisted, using intravenous fluids to raise the blood pressure, and to "a

welcome surprise he recovered." Mr. Reid maintained that throughout the ordeal of the attack on him Renna and the other three men remained there. In fact the prosecution's evidence also revealed that after the complainant received the injury to his throat, Renna the applicant and the other men ran away together.

Constable Bailey, the arresting officer testified that he arrested the applicant, cautioned him and he said nothing. He did however speak with him subsequently, and having again cautioned him, the appellant said "Me go check me friend saw Fresh. Him say Phillip was not there. An argument started and him stab me and ran. Me run after him and stab him with me knife."

In his defence, the appellant gave an unsworn statement which because of its brevity is set out in full hereunder:

> "I cut him to save my life. He was trying to kill me. If I didn't cut him, your honour, I would be a dead man. We cut one another inside the gate. I left and went to the police station. I did not tell the officer that I cut him on the stair. I did not tell him that I stab him on the stair. I did not cut him from behind. I did it to save my life. That's it sir."

Before us, and prior to hearing arguments on the substantial matter, Mr. Phipps, Q.C. for the appellant made application to call fresh evidence, which if granted would consist of testimony of Mr. James Hall, and Dr. Donovan Whyte.

In respect to James Hall, whose statement was attached to the application, Mr. Phipps submitted that he was an eye-witness who was present at the time of the incident and who was not called by the prosecution. As it turned out James Hall, was the gentleman referred to in the evidence as Renna, who had apparently accompanied the appellant to the house of the complainant, and who was instrumental in getting the complainant to go downstairs to

the grill gate. It appears also that the issue of "Renna" not being called by the prosecution caused some comments at the trial, because this is what the learned trial judge had to say in his summing up:

> "Now, members of the jury, you heard talk about Renna coming to the preliminary examination. The police not using him as a witness and so on, but on this man's [Phillip Robinson] evidence, and on the evidence of Claver Reid, these five men came there, Reid gets stab, they surrounded Reid, the moment Phillip Robinson calls out Blacka Tush [the appellant] name, five run. He calls out one name and five run. I must express my own opinion, members of the jury, you may reject it, but ask yourselves whether that does not show that the five were acting together."

Also of significance, is that in the statement produced, as the proposed testimony of James Hall ("Renna"), he admits to taking the applicant to the hospital for treatment for a wound which he and the applicant said was inflicted on the appellant by the complainant Reid.

The proposed testimony of Dr. Whyte related to an examination done by the Doctor of the appellant on 17th September, 1992 when he found him to be suffering from a 1½" laceration to the left side of his neck, adjacent to the jugular vein. As the applicant was obviously privy to the doctor's examination and findings on the 17th September, 1992 when he was examined, it is blatantly obvious that that evidence was available to the defence at the time of trial.

In addition, the subject of the appellant receiving an injury, quite apart from his own testimony, came from Constable Bailey who testified that that same day, on the request of the applicant's father, he wrote a letter addressed to the medical officer and later in the evening, when he saw the appellant he (the appellant) said he had a wound "right about here" showing somewhere on his

chin and that Fresh (the complainant) had inflicted it on him.

While conceding that the evidence sought to be produced as fresh evidence, was available at the time of the trial Mr. Phipps nevertheless submitted, that on the special facts of this case the evidence should be allowed. He based this submission on the fact that the prosecution's case rested entirely on the evidence of one witness and in circumstances, where other eye-witnesses were available, and the prosecution was in possession of a statement of one such witness, it was only fair that that witness should have been presented to the jury, as it was incumbent on the prosecution to make that witness available as a prosecution witness.

He rested his application on the basis of section 28 (b) and (c) of the Judicature (Appellate Jurisdiction) Act which reads as follows:

> "For the purposes of Part IV and Part V, the Court may, if they think it necessary or expedient in the interest of justice
>
> (a) ...
>
> (b) if they think fit, order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of court before any Judge of the Court or before any officer of the Court or justice or other person appointed by the Court for the purpose, and allow the admission of any depositions so taken as evidence before the Court; and
>
> (c) if they think fit receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness, and, if the appellant makes an application for the purpose, of the husband or wife of the appellant, in cases where the evidence of the husband or wife could not have been given at the trial except on such an application; ..."

In advancing his arguments Mr. Phipps sought to establish that the Act governing similar procedure in England was different to our Act, and therefore we could not rely on English precedents, as authority for deciding on the application before us.

This Court however, in many cases leading up to the case of **William Beech v. R** R.M.C.A. 179/80 delivered on the 18th December 1981 (unreported) has ruled to the contrary.

In the case of **William Beech**, Carberry, J.A. after an examination of the history of these provisions concluded that as the United Kingdom Criminal Appeal Act 1907 "corresponds almost exactly with the provisions of section 28 (a) (b) & (c) of our Act, the English cases decided prior to the 1968 Criminal Appeal Act, (which has altered the position under the 1907 Act) were relevant and applicable to this jurisdiction." In that case, Carberry, J.A. relied on the following dicta:

(1) Of Lord Goddard, C.J. in **R. v. McGrath [1949]** 2 All E.R. 495 at 497D:

> "But it is well established that this court will not hear, further evidence unless it is shown that the proposed witnesses were not available at the trial, or that some point which could not have been foreseen arose at the trial on which the evidence would have been material."

and (2) those of Lord Parker, C.J. in R. v. Parks [1961] 46 Cr. App. R. 29 at page 32:

> "it is only rarely that this court allows further evidence to be called, and it is quite clear that the principles upon which this court acts must be kept within narrow confines, otherwise in every case this court would be in effect asked to effect a new trial. As the court understands it, the power under section 9 of the criminal Appeal Act, 1907,

> "is wide. It is left entirely to the discretion of the court, but the court in the course of years has decided the principles upon which it will act in the exercise of that discretion. Those principles can be summarised in this way:
>
> First, the evidence that it is sought to call must be evidence which was not available at the trial.
>
> Secondly, and this goes without saying, it must be evidence relevant to the issues.
>
> Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but evidence which is capable of belief.
>
> Fourthly, the court will, after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury, as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial."

The relevant provisions of section 28, empowers the Court in the exercise of its discretion, to allow the admission of fresh evidence on Appeal. In determining how that discretion is to be exercised in any given case, the guidelines adopted by Carberry, J.A. in the Beech case, have always been followed by this Court, and no good reason has been advanced, why those guidelines should not be applicable in the instant case.

The evidence of witness James Hall o/c "Renna" on the face of it, and given the other evidence in the case, was without doubt available at the time of the trial. In addition, the fact that he went to the scene in the company of the appellant, and ran away with him after the incident, suggests that he was a witness known by and available to the appellant at the time of trial. In those circumstances, we are of the opinion that the application in respect of this witness ought to be refused, and consequently ruled accordingly.

The evidence of the doctor was also available at the time of the trial, and the appellant would be privy to his findings and could have had him testify at the trial if he so desired. Consequently, the application in respect of this proposed witness was also refused.

Mr. Phipps thereafter argued the following:

1. The learned trial judge misdirected the jury on the issue of self-defence. He complained of the following passage from the learned trial judge's summing-up -

   "The accused man's defence is one of self-defence and I have to tell you that a person, a man is entitled to use reasonable force to defend himself against an attack or threatened attack so that if a man wounds another or kills another or assaults another while another one is attacking him or while he fears that the other person is about to attack him it's an action in self-defence and not a crime."

The complaint advanced is that the learned trial judge did not **use** the formula laid down in the case of <u>Solomon Beckford v R</u> [1987] 3 All E R 425 in which the Board of the Judicial Committee of the Privy Council approved the subjective test as it relates to the honest belief of the accused in self-defence.

In the light of the defence in which the applicant alleged an actual attack upon him, there was no room in the evidence for any determination as to whether the appellant "honestly believed" that he was being attacked by the complainant see **<u>R v Garnett Shand</u>** S.C.C.A. No. 2/93 delivered July 5, 1993 **(unreported)**. **In** any event the learned trial judge did tell the jury that if the applicant "feared" that he was about to be attacked, and in those circumstances inflicted the injuries, it would be "an action in self-defence." In our view, based on the circumstances of the case, the omission to use the "honest belief" formula created no adverse effect on the applicant's case. For those reasons, we concluded that there was no merit in this ground.

One other ground was argued by Mr. Phipps and concerned comments, made by the learned trial judge during the course of his summing-up, on the appellant's failure to give sworn testimony. He contended that the comment eroded the defence and thereby deprived the applicant of having the opportunity of having his case considered fairly by the jury. The comments complained of are:

> "Now, you may be wondering why he didn't go in the witness-box, since he decided to talk. It can't be that it is because he is objecting perhaps on religious reasons, to take the oath, because the law allows, and you might have seen it at one stage during this circuit, allows someone who doesn't want to swear, to affirm. Could it be that he is afraid to be cross-examined? Asked questions? And if so, why? It can't be that he fears that he may be asked unfair questions, because you have seen both Miss Graham and Mr. Fairclough. Plus his lawyer, a very capable Lawyer, is there, if Crown Counsel were to try and ask unfair questions, to object. So, members of the jury, you decide whether his statement, his unsworn statement has any value, and if so, what weight you will attach to it, bearing in mind that the burden is on the prosecution to make you feel sure of his guilt."

To dispose of this ground it is only necessary to refer to the following passage from the speech of Lord Salmon in the case of **D.P.P. v. Walker** [1974] 12 J L R at page 1373:

> "The judge could quite properly go on to say to the jury that they may perhaps be wondering why the accused had elected to make an unsworn statement; that it could not be because he had any conscientious objection to taking the oath since, if he had, he could affirm. Could it be that the accused was reluctant to put his evidence to the test of cross-examination? If so, why? He had nothing to fear from unfair questions because he would be fully protected from these by his own counsel and by the court."

On a cursory glance it can be seen that the learned trial judge had indelibly in his mind, the dicta of Lord Salmon in the **Walker** case, when he uttered those directions to the jury. These are words which have been approved by this Court in several cases decided subsequently to the Privy Council's decision in the case of Walker. We again do so, and conclude that there is also no merit disclosed in this ground.

The application for leave to appeal against conviction was therefore refused.

The appellant, however was granted leave by a single judge to appeal against the sentence, and Mr. Phipps in support of the appeal argued that having regard to the circumstances of the offence and the antecedents of the appellant, the sentence of 18 years hard labour was manifestly excessive. The appellant at the time of trial was twenty-four years of age and had two convictions - one for possession of and the other for smoking ganja - both on the same date. These convictions of course ought not to be taken into consideration and the appellant consequently ought to be treated as a first offender.

We therefore agreed with Mr. Phipps and allowed the appeal against sentence and made the order heretofore set out in this judgment.