[2017] JMCA Crim 12

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 39/2014

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE EDWARDS JA (AG)

VASPER WHYLIE V R

Michael Lorne for the appellant

Ms Kathy-Ann Pyke for the Crown

12, 13 December 2016 and 31 March 2017

EDWARDS JA (AG)

Introduction

[1] On 22 April 2014, the appellant was convicted for murder in the Home Circuit Court and sentenced to life imprisonment at hard labour with the stipulation that he not be eligible for parole until he had served 22 years. On 6 June 2016, leave to appeal against conviction and sentence was granted by a single judge of this court and on 12 and 13 December 2016, we heard the appeal. At the conclusion of the hearing we allowed the appeal, quashed the conviction and, in the interests of justice, we ordered

a retrial. At that time we promised to give our reasons at a later date. This is the fulfilment of that promise.

[2] As a retrial has been ordered, we will not state the facts in too much detail. It is sufficient to say briefly that the appellant was charged based on an incident which occurred at the home of the mother of Melody Lobban on 1 May 2009. Melody Lobban is the mother of the appellant's two sons. The deceased Ricardo Lobban was her brother. The prosecution's case is that on 1 May 2009 the appellant went to the home where an altercation developed between Melody Lobban and himself and he assaulted her. Her relatives intervened including her sister Denille Lobban and her brother Ricardo Lobban, at which time the appellant is said to have stabbed Ricardo Lobban to death. On the prosecution's case, Ricardo Lobban was unarmed and no one attacked the appellant at the time of the stabbing.

[3] The appellant gave sworn evidence at the trial. He gave evidence of having come under attack by the family and having to fight and wrestle his way out of the house to escape their attack. He claimed that it was the sister of the deceased who had a knife and attacked him. He also claimed that whilst they were wrestling, he at some point grabbed the knife and drew it from her. He fought and wrestled with the family of the deceased and fought his way out of the house. He insisted he had no knife and did not stab the deceased.

[4] Based on that evidence, the learned trial judge withdrew self-defence from the jury.

Grounds of appeal

[5] The appellant had originally filed four grounds of appeal in person as follows:

> "1) **Misidentity by the Witness**:- That the prosecution [sic] witnesses wrongfully identified me as the person or among [sic] any persons who committed the alleged crime.
>
> 2) **Lack of Evidence**:- That the prosecution witnesses failed to present to the court any "concrete" piece of evidence [sic] material, forensic or scientific evidence to link me to the alleged crime.
>
> 3) **Unfair Trial**:- That the Learned trial Judge fail [sic] to give adequate direction to the jury [regarding] the inconsistent and contradictory testimonies as presented by the prosecution witnesses.
>
> 4) **Miscarriage of Justice**:- That the court wrongfully convict [sic] me for a crime I knew nothing about and could not have committed."

[6] The appellant's attorney-at-law, Mr Miguel Lorne, sought and was granted leave to: (a) argue five supplemental grounds of appeal, (b) incorporate ground one of the original grounds into ground four of the supplemental grounds (c) abandon ground two of the original grounds, (d) incorporate ground three of the original grounds into ground five of the supplemental grounds and (e) argue and incorporate the original ground four into ground five of the supplemental grounds. The supplemental grounds filed for which leave was granted were as follows:

> "1. That the learned trial Judge failed to leave the legal defence of self-defence to the jury in consideration of the nature and circumstances of the case. In failing to instruct the jury accordingly, the Applicant was denied the legal defence which he

was entitled to by law. Therefore the Applicant was subjected to an unfair trial.

2. That the learned trial Judge glossed over the material discrepancies and inconsistencies in the Prosecution's case, and in some instances did not address them and therefore they were not highlighted to the jury, in a manner where they could be seriously considered, for them to arrive at a true verdict.

3. That the learned trial Judge failed to warn the jury or to adequately deal with the discrepancies or the material inconsistencies and the dangers of convicting if such inconsistencies and discrepancies are not resolved.

4. That in light of the discrepancies pertaining to whether or not there was electricity at the premises, the issue of identification, though veiled ought to have been left to the jury for possible consideration as to who may have landed the fatal blow on Ricardo.

5. That the verdict against the Appellant is unreasonable and cannot be supported by the evidence of the case and circumstances of the case."

Appellant's submissions - ground 1

[7] Counsel for the appellant argued that although both prosecuting counsel and defence counsel had seemingly agreed on the record that self-defence did not arise in this case, the learned trial judge made a crucial error in coming to that position and in failing to leave self-defence to the jury for their consideration. This, he argued, resulted in the jury returning the incorrect verdict.

[8] Counsel submitted that self-defence arose in the case, both on the prosecution's case and on the case for the defence. He drew the court's attention to the several sections of the transcript where he argued that the evidence demonstrated that self-defence was a live issue.

[9] Counsel submitted that the learned judge misdirected the jury when he emphatically stated that self-defence did not arise in the case. Counsel argued that the circumstances of the case showed that the appellant was under attack, of which fact he gave sworn evidence at the trial. Counsel then drew the court's attention to several sections in the transcript which he contended demonstrated this. In particular he directed the court's attention to page 165 of the transcript where the appellant in his examination-in-chief said that he saw Deneil Lobban with a weapon whilst they were in the kitchen and the "whole of dem come down on me". Counsel also pointed to the appellant's evidence in cross-examination where he said, at page 179 of the transcript, that "mi and dem did a wrassle togedda". Also at page 180 where the appellant in explaining the amount of "licks" he received during the attack told the court that "if I get lick, can't really sidung pan grung, and yuh a roll".

[10] Counsel submitted that these passages show that the circumstances of the case and the evidence indicated that self-defence was a live issue. Counsel argued that based on the authorities, if in all the circumstances of the case, self-defence arises, it should be left to the jury.

[11] Although counsel conceded that the learned judge's summary of the case could not be faulted, counsel went on to point out that it was clear that the learned judge was grappling with whether or not to leave self-defence to the jury. Counsel submitted however, that the attack on the appellant was an important issue which was not explained to the jury and based on the circumstances of the case it called for an

explanation. He relied on the Privy Council's decision in **Director of Public Prosecutions v Bailey** (1993) 44 WIR 327, where it was held that, where the issue of self-defence arose on the facts, it should be left to the jury, even if a defendant does not formally raise that issue. Counsel also noted that in **Director of Public Prosecutions v Bailey**, self-defence actually arose on the appellant's unsworn statement. Counsel argued that in the instant case, the appellant gave sworn evidence and raised a stronger case of self-defence which should have been left to the jury.

[12] Counsel sought to address the issue of the defence put forward at the trial by the appellant where he maintained that he did not have a knife and did not stab the deceased Ricardo Lobban. Counsel conceded that there was a danger in putting self-defence to the jury when it could not be harmoniously considered together with the appellant's account and the possible adverse effect this may have on the defence. However, counsel asserted that there was no such risk in this case. Counsel submitted that in light of the evidence, the learned trial judge erred when he failed to leave self-defence to the jury.

Appellant's submissions-grounds 2 and 3

[13] Counsel for the appellant argued that the trial judge had failed to warn the jury of the inconsistencies and discrepancies in the evidence and failed to warn them of the danger in relying on that evidence if the inconsistencies and discrepancies were not resolved. Counsel submitted that this ought to be placed in the context of what the appellant had said about the fight. Counsel argued that the context included the appellant's claim that he was attacked and the prosecution witnesses' attempt at trial to

diminish the attack in order to make it appear as if the appellant had simply "gone beserk" without having himself been attacked.

Crown's Submission- Ground 1

[14] Counsel for the Crown was invited to submit on ground one only. Both in her written and oral submissions, counsel argued that self-defence did not arise in the case at all and therefore the learned trial judge did not err in not leaving it for the jury's consideration. Counsel pointed out that although the appellant said there was a fight and wrestling, he never admitted to being in possession of a knife, or that he attempted, or did any violence to the deceased or anyone else. Counsel submitted that the trial judge was only obliged to direct the jury on matters which arose in the case.

[15] Counsel submitted that based on the appellant's defence at the trial and the evidence he gave in his sworn testimony, he had taken self-defence out of the picture and had in effect, disabled it. Counsel pointed out that the appellant's evidence was that he had to fight his way through and he did not stab anyone. Counsel noted that at no time did the appellant say that the knife came into his possession and that he used it to defend himself.

[16] Counsel argued further that the question this court would have to ask is: what is the evidence which distinctly raised the issue of self-defence so that it ought to have been left to the jury? Counsel conceded that the issue of self-defence could arise either on the case for the prosecution or the case for the defence and that once it arose it must be left to the jury for consideration. Counsel also conceded that it may even be

necessary to leave self-defence to the jury where the appellant himself did not state that he acted in self-defence, if it otherwise arose on the evidence. Counsel argued however, that it would be confusing to a jury to leave the issue of self-defence to them where the appellant himself had disabled it or had given evidence which neutralized it.

[17] In dealing with the tenor of the cross-examination of the witnesses for the Crown, counsel pointed out that it had only been suggested to the witnesses that the appellant had been attacked. This, she said, had to be viewed in light of the appellant's evidence that during the attack he fought his way out and left, that he did nothing to Ricardo and did not cause his death. Counsel argued that a 'suggestion' was not evidence. Counsel submitted that in the light of the case of **R v Bonnick** (1977) 66 Cr App Rep 266, which she argued was similar to the instant case, the learned judge would have been faced with the dilemma of having to direct the jury in relation to two defences that were contradictory. Counsel argued further, that to the extent that a portion of the appellant's evidence suggests that he might have come into possession of the knife, it still would require the jury to speculate as it relates to the issue of self-defence and the sequence of events that led to the stabbing.

[18] Counsel also argued that when the instant case was examined in the light of the authorities on the point, it seemed clear that self-defence did not arise in a manner which would require the learned judge to leave it for the jury's consideration. Counsel submitted that for self-defence to arise on a given set of facts, the accused has to take responsibility for inflicting the wound which caused the death and that he had a legal

justification for acting as he did. Counsel pointed out that in the instant case, the appellant removed himself from any responsibility, and does not, even at the minimum, accept that he had a knife or sharp instrument at any time during the incident. Counsel noted that the authorities were clear that there must be evidence arising on the case which raised the issue of self-defence before it can be left to the jury. Counsel submitted that the trio of cases, that is, **Director of Public Prosecutions v Bailey**, **Director of Public Prosecutions v Leary Walker** [1974] 1 WLR 1090 and **R v Bonnick**, were authorities which provided sufficient guidance on how the court should correctly treat with the issue of self-defence.

Analysis

[19] The central question which was left to the jury in this case, was whether the appellant had stabbed the deceased in the manner indicated by the prosecution witnesses. According to their account it was an unprovoked and unlawful attack on the deceased. Identification was not in issue. Credibility was a live issue. It was a matter of whose account the jury accepted. On the appellant's account, he was the one who was attacked. This was by no means a straightforward case. The account given by the prosecution witnesses was not entirely consistent. The appellant's account approbated and reprobated. He had suffered some injury during what, he said, was an attack on him. However, despite his evidence that he had to fight his way out of the house after the attack, he insisted he had no knife and he did not stab the deceased. In those circumstances, it is perhaps understandable why that the learned judge did not leave

the issue of self-defence to the jury. At page 221 of the transcript the learned trial judge said:

> "...And there are some cases in which you will find that killing takes place but that there was a lawful excuse for the killing. And that, for example, occurs in cases of what we call self-defence, where in some situations the law gives the person who is under attack the right to take such force as, on reasonable grounds, he believes is necessary to defend himself. That does not arise in this case for one reason which I will deal with in a short while..."

In considering the appellant's evidence, the learned judge told the jury that:

> "...On the other hand, his evidence, he is saying that he was not armed with a knife at all, and he denied stabbing anyone at all on the night in question. He does not know by what means Ricardo met his death, and he does not know by what means Marlon was stabbed. So, in other words, what he is saying is that....Ricardo was not killed by him, so he is denying that second ingredient which the Prosecution has to prove; that is, that the act was done by the accused. He is denying that..."

Later on (at page 270 of the transcript) the learned judge directed the jury that:

> "...So it will either be guilty of murder or not guilty of murder because I do not believe Mr. Campbell or Mr Duncan is saying self-defence is really an issue since he is denying that he didn't [sic] attack..."

[20] However, as was stated in **Palmer v R** [1971] 55 AC 814, "it is always the duty of a judge to leave to the jury any issue (whether raised by the defence or not) which on the evidence in the case is an issue fit to be left to them". On examining the

evidence given by the appellant, we were of the view that there was sufficient basis on which self-defence could have been left.

[21] Counsel for the Crown accepted that if the issue was raised on the evidence it should be left to the jury. Her contention however, was that the issue was not raised in this case at all and to leave it to the jury would have been to invite them to speculate. Counsel relied on the statement by the Board in **Director of Public Prosecutions v Leary Walker**, where according to the head notes it was held that:

> "(1) ... since the force used by the respondent was far greater than could have been necessary to defend himself, his statement did not disclose that he had acted in self-defence and, since the issue of self defence had neither been raised by the defence during the trial nor was there any evidence to support it, the judge was right not to leave that issue to the jury.
>
> (2) That, the appeal involved a point of law of exceptional public importance and if the decision of the Court of Appeal were allowed to stand it would tend to divert the due and orderly administration of justice because, in future, a trial judge might feel obliged to direct a jury to consider not only possible defences but also any impossible defence not raised by the defendant." (Emphasis added)

[22] In **R v Bonnick**, in considering when there was sufficient evidence of self-defence to be left to the jury, the English Court of Appeal made the following statement:

> "...self-defence should be left to the jury when there is evidence sufficiently strong to raise a prima facie case of self-defence if it is accepted. To invite the jury to consider

> self-defence upon evidence which does not reach this standard would be to invite speculation. It is plain that there may be evidence of self-defence even though a defendant asserts that he was not present, and in so far as the judge told the jury the contrary, he was in error; but in the nature of things it would require to be fairly cogent evidence, when the best available witness disables himself by his alibi from supporting it..."

Later it was said that:

> "The duty of the prosecution to negative the possibility that the stabbings were acts of self-defence arose only if there was evidence from which self defence could properly be inferred; until there was evidence raising that possibility there was nothing for the prosecution to negative..."

[23] In **Director of Public Prosecutions v Bailey** at page 330 Lord Slynn, delivering the judgment of the Board, stated:

> "It is clear that perfectly hopeless defences which have no factual basis of support do not have to be left to the jury. But it is no less clear, in their Lordships' view, that if the accused's account of what happened includes matters which if accepted could raise a prima facie case of self-defence this should be left to the jury even if the accused has not formally relied upon self-defence.
>
> Where, as here, there was a struggle between three men, two of them wanting to get the gun held by the other, then it is possible that the killing was murder, or that it was provoked and so was manslaughter, or that it was an accident, or that it happened deliberately but in self-defence. Self-defence in this context could well include stopping antagonistic men from trying to get a gun which they might have used to injure the accused.
>
> ...Even if the appellant is right in saying that the evidence here, from which self-defence could be deduced once accident is rejected, was not strong, it seems to their Lordships that the Court of Appeal was entitled to conclude on the facts that self-defence should have been explained to

> and left to the jury. As the appellant accepts, if accident is rejected, then the shooting here was deliberate. It is at that stage necessary to consider whether in the struggle the shooting took place by way of self-defence."

[24] Counsel for the Crown sought to distinguish **Director of Public Prosecution v Bailey** from the instant case, in that in the case of the **Director of Public Prosecution v Bailey** there was an admission of a deliberate act but in the instant case, there was a total denial of any act by the appellant. Be that as it may, we disagreed with counsel with regard to the question of whether self-defence arose on the evidence. In our view it is clear that self-defence did arise on the evidence and the learned trial judge was in error when he withdrew it from the jury's consideration.

[25] Now the prosecution's evidence is that the accused deliberately and unlawfully killed the deceased. The appellant's account is that the deceased's sister had a sharp object in her hand and he was attacked by her, the deceased and the rest of their family. They started to fight him and he tried to escape through the kitchen but could not get away. There was wrestling, dropping to the floor and rolling. He had to fight his way through and received injuries during the melee. At pages 162-163 of the transcript the appellant gave this account of what took place:

> "A: By time she push mi, mi push har back and turn roun', an when mi turn roun' mi si Marlon and the whole crew of dem come and start to fight mi and seh, yuh nah lef mi sista alone, because she have har man a farrin.
>
> Q. So you say you saw Marlon?
>
> A. Marlon, him thump me right here soh.

Q. Thats to your?

A. Right side of my face and from him thump mi everybody start fight mi and mi start fight. Mi run to the kithchen, try fi get away.

Q. Yes?

A. And there is no get away, because the kitchen door couldn't open. An him—dem seh a inside here soh mi want yuh, man. And dem start draw di pat dem, and everybody—and mi hear one Vannie seh, pass di blood claat, go fi di half a cutlass wi put dung in di corna.

Q. Yes?

A. By time she seh dat done, mi a shub, soh di whole of us start wrassle.

...

We start wrassle. We drop on the ground in the kitchen and start roll. Some step pan mi, some start lick mi, all sort of thing. Get a cut right here soh, get a stab right here soh.

Q. Get a stab where?

A. Right here soh, and a cut on mi finger. I hold on the knife, draw the knife from her and it cut me on the finger right here soh.

Q. What of your fingers?

A. This one.

Q. That's on the left hand?

A. On the left hand.

Q. You recall what happened after that?

A. We start to wrassling, wrasstle, fight, fight, draw, a pull, mi start lick dem, find mi way out of the house. Mi reach outside, Marlon back me up wid a bamboo stick."

[26] At page 164 of the transcript the appellant was specifically asked whether Ricardo was in the kitchen at the time of the fight and he said yes. He said he was also wrestling with Ricardo as everybody was fighting him. With regard to how Ricardo got stabbed, this was his testimony (at page 165 of the transcript):

> "Q. Did you stab Ricardo Lobban?
>
> A. No, Sir, I didn't have no weapon, at all, sar.
>
> Q. Deneil Lobban, did you see her with a weapon whilst you were in the kitchen?
>
> A. A see when we in the dining hall, I see a weapon, yuh know, she come inside the kitchen wid the weapon because the whole of dem come down on me, I couldn't see because the place did dark."

[27] Later in his evidence (at page 166 of the transcript), when asked by his attorney whether he had used violence against the persons who attacked him, he gave this answer:

> "A. Sir Campbell, from somebody try fighting you fi roun' half hour and or more, you have to fight out yuh way. I couldn't tek no more lick, a one foot a shoes mi leave di yard wid. Dem kick mi dung in a di gully mi roll. When mi drop bottom side di gully, a run mi run bottom side di bush go pan di road.
>
> Q. So, what, if anything, did you see Venice Lobban Akin do whilst you were in that kitchen?
>
> A. She a di first one hole on pan di pot and start beat mi wid it. She a di first one start the fight, first one start all the action.

Q. And aside from the pot, did you see her with anything else?

A. She have a knife in di hand, in this, lifting the arm, an she approach mi.

Q. And did you see her use it?

A. I didn't see when she a use it when I was there, the place did dark and me a wrassle fi come up and mi hand a swing, hand a swing all over and mi a swing mi hand fi find my way out."

[28] In cross-examination the appellant stuck to his story that he was attacked by the family of the deceased and had to fight his way out.

"Q. And you say that you ran into the kitchen?

A. Mi nuh run in a di kitchen said time, sir.

Q. Eventually?

A. When the fight start, trying to escape, whole of them come round and mi in the middle, mi start to push, run out."

[29] It was put to him that he stabbed the deceased and his brother Marlon and he denied that he did so. He maintained that he did not have a knife. He denied killing the deceased. At page 182-183 of the transcript in cross-examination the appellant was again asked about the stabbing. This is what he said:

"Q. Now, you know, I listened very carefully to what you were saying, and I never heard you mention Ricardo getting stabbed throughout all of this, you don't know, you are saying you don't know how Ricardo get stabbed?

A. I don't know.

Q. Excuse me, sir, you have answered my question. And you don't know how Marlon got stabbed?

A. Don't know.

Q. You don't have – you see, I am going to tell you, sir, that you stabbed Ricardo Lobban. What do you say to that?

A. I didn't stab Ricardo Lobban. I didn't have a knife."

In further cross-examination at page 184 of the transcript he said:

"Q. And I am suggesting to you, sir, that you went to their house armed with a rachet knife.

A. I don't carry a knife.

Q. I am suggesting to [sic], that night you did carry a knife.

A. Don't have any knife.

Q. And I am suggesting to you that you used that same knife to murder their brother, Ricky.

A. I don't kill nobody at all, sir, I didn't have a knife."

[30] The appellant called a medical doctor to whom he went for treatment after the incident and who gave evidence of the injuries he saw on the appellant at the time. The appellant's account that he was attacked also found minor support in the evidence of the prosecution's witnesses. Marlon Lobban gave evidence that when he came on the scene his siblings were all lined up in front of the appellant. He said his sister took up a pot, after Ricardo was stabbed, but he did not see her use it. Melody Lobban stated that when the accused took out his knife, her sister pushed him away and went and called the deceased. Her further evidence was that when the deceased came out of his

room he took her to another room and told her to stay there. When she came out of that room they were all in the kitchen. She said she saw Ricardo "ease off" the appellant and told him to come out of the house. It was then the appellant used the knife to stab Ricardo. Later in cross-examination she said Ricardo only pushed the appellant and told him to come out of the house before the appellant stabbed him.

[31] Faced with the two divergent scenarios, it is easy to sympathise with the learned trial judge's dilemma in this case. The appellant was saying he was attacked and had to defend himself from the attack. At the same time, although Ricardo Lobban died from a stab wound resulting from the incident, the appellant was saying he did not kill him and he did not have a knife. The knife, the appellant claimed, was in the possession of Ricardo's sister Deneil who attacked him and it must have been when she was attacking him with the knife, she missed and stabbed her own brother.

[32] However, in our view, implicit in that account as well as the account given by the prosecution's witnesses are three possible scenarios. The first is that the killing was the result of a deliberate, unprovoked stabbing and was therefore murder; or the second, that it was an accident when the deceased's sister attacked the appellant with the knife and accidentally stabbed her brother; or the third possibility being that it happened in self-defence when the appellant was wrestling with his attackers and drew the knife from Deneil and stabbed the deceased at some point during the fray, when, as he said, "mi hand a swing, hand a swing all over and mi a swing mi hand fi find my way out".

[33] On the appellant's case at least, he was attacked by a "crew" of family members, one armed with a knife and a pot, who were all hostile to him because of his treatment of their sister and he sought to protect himself from them. There was fighting and wrestling during which time, at some point he held onto the knife, drew the knife from the deceased's sister. He claimed he received a cut on the finger as proof of that fact. Medical evidence was led in support of that fact. The only evidence which suggested a point in time when he may have received that injury was his evidence that he got cut when he held onto the knife and drew it from the deceased's sister.

[34] He claimed that the wrestling and fighting continued during which time he had to swing his arms to get away. The jury were entitled to consider whether Ricardo was stabbed in self-defence when the appellant got hold of the knife and there was wrestling and fighting. For if the appellant took hold of the knife and adopted a wholly defensive posture, he was entitled to have that defence left for the jury's consideration. In that regard the jury could be directed to consider the evidence of the pathologist as to the nature of the injuries sustained by the deceased.

[35] We strongly disagree with counsel for the Crown that if the trial judge had left self-defence to the jury it would have invited speculation. As was noted in **R v Bonnick**, the question as to when there is sufficient evidence in a particular case to raise the issue of self-defence, is a matter for the trial judge but in making that determination a commonsense approach ought to be taken to the evidence.

[36] We also did not find that there was any possibility of confusion. The fact that the appellant distanced himself from having a knife on the scene is not irreconcilable with the notion of justification, in the context where his evidence is that the knife was in the possession of someone else and he only came into contact with the knife during a struggle and 'wrestling' in an attempt to defend himself. Although the appellant said he did not stab or kill the deceased, we consider that in circumstances where the evidence (if accepted by the jury) pointed to the fact that there was a knife which came into the possession of the appellant at some point during a struggle with the deceased and others, who he said were attacking him, the learned trial judge was duty bound to leave to the jury the question whether the deceased was killed in those circumstances, rather than in those outlined by the prosecution's witnesses.

[37] Once the jury rejected the appellant's evidence that it was the sister who accidently stabbed her own brother, they were left with the evidence of a deliberate killing. They were then entitled to consider, based on the appellant's account, whether that deliberate killing occurred at the time when the appellant said he was involved in a struggle and got hold of the knife and was therefore done in self-defence.

[38] We do not consider that if the learned trial judge had left that third scenario to the jury he would have been inviting them to speculate or that to have done so it "would divert the due and orderly administration of justice" (**DPP v Leary Walker**). Neither do we consider it to be an impossible defence bearing in mind the appellant's evidence that Ricardo Lobban had participated in the attack on him. The deceased was

stabbed in the chest and buttock. Death was caused by the stab wound to the chest. The evidence from the pathologist was that the deceased had two stab wounds but death was caused by the wound to the chest. The pathologist said further that death would have resulted within two to five minutes of the injury being inflicted. He also said the injury could have been inflicted either when the deceased was lying down or standing up, either was a possibility.

[39] The evidence of the witness Melody Lobban was that she saw when Ricardo received the stab to the chest and then he stuck onto the appellant. She said the appellant came around and slapped her again. He also pushed down Ricardo and everyone fell, and she ran. She did not see when Ricardo received the stab to the buttock. She only saw one stab. She also did not see her brother Marlon who she said was not there at the time.

[40] The evidence of Marlon Lobban is that he came to the kitchen and saw the appellant standing facing Ricardo with Deneil behind Ricardo and Melody behind Deneil, all in a line. He stood close behind Melody. He said he saw when the appellant spun Ricardo around and stabbed him in the buttock. He only saw that one stab. He said Melody was present when the deceased was stabbed in the buttock. He said she ran right past him but he did not know if she saw him.

[41] This evidence, along with that of the pathologist, would have to be considered by the jury in determining whether the deceased received his injuries in the way the

prosecution claimed he did or whether he received them during the melee, as the appellant claimed.

[42] We did not think it necessary to call on counsel for the Crown to respond to the remaining grounds in light of our findings on ground 1. We took the view that self-defence arose on the evidence and the judge was wrong to withdraw it from the jury's consideration. In those premises the appellant was denied a fair trial. For those reasons we allowed the appeal, quashed the conviction and ordered a retrial in the interests of justice.