[2011] JMCA Crim 37

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 1/2009

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE HIBBERT JA (AG)

ERNIE WILLIAMS v R

Norman Godfrey for the applicant

Mrs Lisa Palmer-Hamilton and Greg Walcolm for the Crown

10 June 2011

ORAL JUDGMENT

PANTON P

[1] The applicant Ernie Williams was convicted before Mr Justice McIntosh and a jury sitting in the Circuit Court for the parish of Saint Elizabeth held at Black River on 1 December 2008. The offence for which he was convicted was wounding with intent, the particulars being that he, on 11 September 2007, in the parish of Saint Elizabeth wounded Rannie Williams with intent to do him grievous bodily harm. The sentence imposed on him was one of seven years imprisonment at hard labour.

[2] The circumstances giving rise to this conviction have been narrated by both the prosecution and the defence. The prosecution has stated that this was a case in which

the complainant Rannie Williams is the brother of the applicant. There was a dispute between them in relation to damage to a motor vehicle. There was a discussion between them on the day in question which resulted in the complainant being infuriated and he proceeded to damage agricultural produce belonging to the applicant. Thereupon, the applicant pulled his cutlass and went in the direction of the complainant. Their father called out to him and he turned back. The complainant then put down his cutlass and was walking away when he was stabbed in the back by the applicant. The complainant fell to the ground and the applicant continued to stab him. The applicant was using one of their mother's kitchen knives. The evidence from the doctor presented at the trial indicated that there had been four stab wounds to the back of the complainant.

[3] The applicant gave evidence at the trial and in his evidence he said that he was a higgler, and on the date in question he had returned from purchasing supplies for his trade when he was confronted by the complainant who threatened to kill him and their parents. At that moment the complainant was armed with a machete advancing towards the applicant. According to the applicant, he ran and sought refuge in a storeroom belonging to their father. The complainant at that time proceeded to chop supplies owned by the applicant who was observing this activity through holes in the building in which he was. Having destroyed the supplies, the complainant still armed with the machete, according to the applicant, raised same and threatened to kill their father who was by then outside the building. According to the applicant, out of fear for the safety of his father, he rushed outside and used a small knife that he had and

stabbed the complainant to the back. He said that out of this fear and nervousness, he might have stabbed the complainant more than once.

[4] The applicant filed grounds of appeal which alleged that the court had failed to recognize the fact that he had only acted in self defence after being attacked by the complainant. His grounds of appeal also complained that the sentence was harsh and excessive and could not be justified by the evidence as presented to the court. He also complained that the learned trial judge did not temper justice with mercy.

[5] Before us, Mr Norman Godfrey on behalf of the applicant sought and was granted leave to amend the grounds of appeal by adding the following grounds:

> "1. The Learned Trial Judge misdirected the jury when he failed to give them detailed, full and clear directions on the issue of self-defence, thereby depriving the Applicant a fair trial.
>
> 2. The Learned Trial Judge failed to aid the jury on how to assess the defence raised by the Applicant.
>
> 3. The Learned Trial Judge erred when he directed the jury to retire and deliberate at 4:18 p.m.
>
> 4. The verdict is unreasonable and cannot be supported by the evidence."

[6] Prior to today's hearing the application was considered by a single judge of this court who granted leave to the applicant to apply out of time for permission to appeal. However, the single judge refused the application for leave to appeal and in doing so indicated that the main issues in the case were that of credibility and self defence. He

formed the view that the learned trial judge had given adequate directions to the jury who by their verdict had rejected self-defence. The single judge concluded that the sentence could not be said to be manifestly excessive.

[7] This morning, Mr Godfrey has stressed that one important element of the defence of the applicant had been omitted by the learned trial judge and that is, even if the applicant was mistaken as to his belief as to the circumstances, he would still not be guilty. It was Mr Godfrey's complaint that the learned trial judge did not mention this at all to the jury. He cited passages from the well-known case of ***Beckford v The Queen*** (1987) 24 JLR 242. The passages that Mr Godfrey commended to us were those at page 248 I and 249D – F. The first passage makes reference to the case of **R *v Gladstone Williams*** (1984) 78 Cr. App. R. 276 and quotes from the headnote:

> "Held, that the jury should have been directed that, first, the prosecution had the burden of proving the unlawfulness of the appellant's actions; secondly, if the appellant might have been labouring under a mistake as to the facts, he was to be judged according to his mistaken view of the facts, whether or not that mistake was, on an objective view, reasonable or not."

And from page 249D Mr Godfrey referred specifically to the passage which reads:

> "The common law has always recognized as one of these circumstances the right of a person to protect himself from attack and to act in the defence of others and if necessary to inflict violence on another in so doing."

And it goes on at paragraph F:

> "If then a genuine belief, albeit without reasonable grounds, is a defence to rape because it negatives the necessary intention, so also must a genuine belief in

> facts which if true would justify self-defence [to] be a defence to a crime of personal violence because the belief negatives the intent to act unlawfully."

Their Lordships in ***Beckford v The Queen*** approved the passages from the judgment of Lord Lane in ***R v Gladstone Williams*** so far as they relate to mistake and reasonableness.

[8] It was Mr Godfrey's contention that the judge must direct the jury on mistaken belief although the applicant has not raised the question of mistake. It is essential, he said, that the direction be given in unequivocal terms in all cases of self-defence. He also said that this was a case where the question of mistake arose. The applicant would have had in his mind this question: "was his brother really about to chop his father?"

[9] Mrs Palmer-Hamilton for the Crown submitted in opposition to the submissions made by Mr Godfrey that in the particular circumstances of this case there need not have been any direction in relation to mistake and she cited passages from ***Regina v Peter Senior and Clayton Bryan*** SCCA No 133/2003 a judgment of this court delivered on 11 March 2005. She made particular reference to page 14 of that judgment which indicated that there was no room in the circumstances for there to have been mistaken belief. The passage that she relied on reads thus:

> "We are of the view, after a careful examination of the facts presented at the trial that the learned trial judge was not required to give directions in relation to honest belief as the evidence of the two accounts of the incident was correctly left to the jury to choose between them. On the Crown's case, the appellant was

> the attacker and on the appellant's case, he was under attack. There was no third possibility of the appellant harbouring a mistaken belief that he was under attack which would have necessitated a direction on honest belief. This ground therefore fails."

There were further references by Mrs Palmer-Hamilton to the well-known cases of ***Palmer v Reginam*** [1971] 1 All ER 1077 (and she made particular reference to page 1088 paragraph [c]) and ***Marvin Reid v R*** SCCA No 54/1999, judgment delivered on 17 July 2001. On page 4 of the latter it reads:

> "This was a case in which the evidence of the appellant, on which the issue of self-defence arose, spoke to an actual attack mounted upon him by the deceased and his friends. No issue of honest belief arose on that evidence and, therefore, no miscarriage of justice could, conceivably, have occurred as a consequence of the flawed direction of the trial judge."

[10] In the situation before us, the jury had two versions from which to choose. As the single judge of appeal said in refusing leave to appeal, there was the issue of credibility. The prosecution's case was to the effect that the applicant attacked from the rear an unarmed complainant - his brother. The applicant's case was to the effect that the complainant was attacking their father with a cutlass. Those versions are diametrically opposed. There is no grey area. The jury were directed in clear terms by the learned trial judge in respect of the issues of credibility and self-defence. There was no room in this case for any reference to the question of a mistake. A direction making reference to a mistaken belief would serve more to confuse than to clarify the minds of the jury and so we are of the view that there is no merit in that ground of appeal.

[11] Learned counsel, Mr Godfrey, complained in respect of the ground making reference to the time that the jury retired; that it seemed that the jury, because of the time they were sent into retirement may not have considered the matter or may not have the given case the serious consideration it deserved. We note that the jury were sent out at 4:18 p.m. and returned at 4:26 p.m. We note that there was no confusion in the dialogue between the registrar and the foreman of the jury. There have been cases where jurors in this country have taken as little as three minutes to return a verdict. This case was clearly a simple case. The trial commenced at 12:04 p.m. on 1 December, according to the record. The summation was quite brief. The indictment indicates that there were only two witnesses for the prosecution and the applicant called no witnesses. We see no reason to believe that the jurors did not follow the case closely and we see nothing to suggest that they did not have a fair opportunity to assess the witnesses and to make a determination as to their credibility. Once they made up their minds in relation to the credibility of the complainant and the applicant, there would have been nothing to prevent a verdict almost instantaneously. In any event, the question of the time, in the circumstances, it cannot be said that it was too late to send the jury into retirement in a matter of this brevity. We find no reason to say that the verdict is flawed in any way by this brief retirement.

[12] In the circumstances, there is no merit in that ground and indeed there is no reason for there to be any doubt cast on the proceedings and on the verdict.

[13] In respect of the sentence in a case of wounding with intent, the maximum sentence is one of imprisonment for life and so there cannot be any serious complaint that a sentence of seven years imprisonment for such an offence is manifestly excessive, given the level of violence in the society and the antecedent of the applicant. In the circumstances of the case the sentence is quite appropriate.

[14] The application for leave to appeal is refused and the sentence is to commence from 5 March 2009.