

**BARBADOS.**

**[Unreported]**

**IN THE SUPREME COURT OF JUDICATURE**

**COURT OF APPEAL**

**Criminal Appeal No. 27 of 2002**

**BETWEEN:**

**STEVE MARQUINSTON POND**

**(APPELLANT)**

**AND**

**THE QUEEN**

**(RESPONDENT)**

**BEFORE: The Honourable Frederick L. A. Waterman, The Honourable Peter D.H. Williams, Justices of Appeal and The Honourable Elliott F. Belgrave, C.H.B., Justice of Appeal (Acting)**

**2003: November 24**

**2004: March 9**

**Mr. Andrew Pilgrim and Dr. Lenda Blackman for the Appellant.**

**Miss Manilla René for the Respondent.**

**DECISION**

[1] BELGRAVE JA (Ag.) The appellant was charged on indictment with wounding Ronald Murray with intent on 8 May 1999, contrary to Section 16 of the Offences Against the Person Act, Chapter 141. There was an alternative count, which charged him with unlawfully wounding Ronald Murray, contrary to Section 17 of the said Act. The appellant was convicted on 29 July 2002, on the first count and sentenced by Greenidge J to 12 years' imprisonment. He has appealed his conviction and sentence.

[2] The case for the prosecution was that around 7 o'clock on the morning of 8 May 1999, the complainant, Ronald Murray, of Birds River Road, Deacons, St. Michael, was standing on Farnum Road in the same district with his brother Michael and two other young men.

[3] Whilst the complainant was standing on that road with his brother Michael and his friends, the appellant drove a Suzuki motorcar slowly along the said road. The appellant shouted certain abusive remarks at the complainant, who in turn shouted similar remarks at the appellant.

[4] The complainant said that the appellant drove his car about 90 to 100 yards away. The appellant then reversed the car and stopped it approximately 12 feet away from him. The appellant got out of the car and went towards the complainant with a gun in his hand, pointed the gun at him and said, "you don't know I will kill you". The complainant said that the appellant pulled the trigger, but the gun did not fire. The appellant pulled the trigger a second time and he heard the sound of a shot. The complainant then discovered that he had been shot in his right leg. The appellant then walked around the car and came back towards the complainant, fired a second shot which struck the complainant in his left leg. The appellant got back into the car and drove away.

[5] The evidence of the complainant was supported by that of his brother Michael Murray, who said that the appellant reversed his car, stopped and got out, came close to the complainant and shot the complainant in both his legs.

[6] The medical testimony showed that the complainant sustained multiple 5 cm. gunshot wounds to the calves of the right and left legs. Dr. King said that x-rays showed that there was an undiscovered fracture of the middle shaft of the right fibula and that the injuries were limb rather than life threatening.

[7] P.C. Gibson said that on 15 May 1999, he and P.C. Rouse went to the home of the appellant at Brandons, St. Michael. He saw the appellant and he told him of the report made to the police by the complainant and he cautioned him. The appellant then said, "yes I was looking for you all, I gine explain wha happen". The appellant was taken to Black Rock Police Station where he was informed of his right to consult an Attorney-at-Law of his choice, and he said that he wanted to consult Dr. Richard Cheltenham. Dr. Cheltenham came to the station and was allowed to have private discussions with the appellant. After Dr. Cheltenham left the station, P.C. Gibson resumed his investigations and the appellant was cautioned. He said, "I name Steve but some people call me Stephen. I shoot he because he bore me". When asked about the gun, he said, "I throw de gun in the sea". P.C. Gibson said that he told the appellant that he suspected him to be the person carrying the firearm, which was

used by him to shoot the complainant and the appellant said under caution, "yes I had the gun".

## THE DEFENCE

[8] The case for the appellant was that on the morning of 8 May 1999, he was driving his car along Farnum Road, Goodland, St. Michael when he saw the complainant, his brother Michael Murray and some other fellows, in the road. When his car got near this group of men, the complainant stepped into the middle of the road in front of his car and he stopped the car. He got out of the car, whereupon the complainant rushed at him with a gun. A struggle ensued between them and he was able to take away the gun from the complainant. He saw the complainant catch a pair of scissors, which was thrown to him by one of his friends. The complainant attacked him with the scissors and he shot him in self-defence. He said that the complainant had attacked him with a gun on more than one occasion before 8 May 1999. However, the only thing that he ever did to the complainant was to report him to the police.

## GROUND OF APPEAL

[9] Five grounds of appeal were filed and these will be dealt with separately.

### GROUND 1

[10] It was submitted that the Learned Trial Judge's directions to the jury on how to treat oral statements were confusing and inadequate.

[11] In support of this ground, Mr. Pilgrim drew the Court's attention to page 67 from line 17 of the record where the Trial Judge directed the jury as follows:

"I should tell you about how you deal with oral statements. A number of oral statements have been made in this case. The statements have not been challenged. The statements have been accepted by the defence as I said not challenged... You should view such statements with care. Such statements are usually given in evidence by police officers investigating a report. They are said to be made in the presence of another officer who is considered a back up witness and they were usually recorded in the official notebook by the investigator... P.C. Gibson recorded certain statements from the accused and P.C. Rouse who was present initialled those statements... so that he confirmed that those statements were made and recorded. There is no indication that the accused was invited to initial them but then the book has not been produced. It was merely used as a tool to refresh the memory of the investigator... In considering these oral statements, you have still to look at them and determine if you accept that the statements were in fact made. Then you must look and ask yourselves what the statements mean and then if you accept that they were truly made by the accused, in other words, were they made, what do they mean, and do you accept the fact that they were made by the accused. So I am bound to warn you of the need for caution in weighing the value of such statements because in certain circumstances, especially where statements are challenged, the statements may be unreliable or may not have been obtained voluntarily or may have been obtained through fear or oppression".

[12] Mr. Pilgrim did not complain about the above direction, but drew our attention to page 79 of the record at line 11, where the Learned Judge directed the jury as follows:-

"If you accept Madam Foreman and your members, the virtual complainant's evidence that the accused man told him that morning". You don't know I will kill you or don't you know you want killing. If you accept that the words were said and I told you how you can deal with these oral statements, then you may think that there was a deliberate intention on the part of the accused man that might suggest that the defence of self defence is not maintainable."

[13] Mr. Pilgrim submitted that the directions of the Learned Trial Judge as to how they should deal with the oral statements attributed to the appellant by the complainant were inadequate and/or confusing. He said that these oral statements were challenged by the defence and that the directions of the judge given to the jury at page 67 lines 17 - 35 and page 68 lines 9 - 24 dealt with oral statements attributed to the appellant by the police which were not challenged by the defence. Mr. Pilgrim said that direction would not be appropriate when dealing with oral statements which were challenged. However, as set out in paragraph [11] the judge did give the jury an appropriate warning. It follows that there is no merit in this ground of appeal.

### GROUND 2

[14] It was submitted that the Learned Trial Judge erred in law when he failed to put the defence of the appellant adequately or at all.

[15] The Court's attention was directed to the record at page 64 lines 12 - 35, page 65 lines 1 - 2 and page 72 lines 1 - 29 where the following directions were given:-

"This is a simple case, Madam Foreman and your members, you may think, because the accused man does not deny that he shot Ronald Murray, what he does say is that he shot him in self-defence. So from that standpoint it is not a complicated case. I will give you some more directions that will assist you in determining whether you consider that a successful defence of self-defence has been raised or whether you think on the evidence, the prosecution has negated the claim to self-defence. The prosecution does not have to bring evidence specifically to rebut that, in other words, they don't have to bring evidence in chief but you would have seen from the evidence of the witnesses and you will be able to determine whether in your finding of the facts, the defence of self-defence has been negated and you will also bear in mind when I come to deal with the defence.

You will recall that in his sworn statement from the dock, which you must give very careful consideration to and treat in the same manner as you have heard the sworn evidence from the stand, the accused man indicated that Ronald Murray came at him with a scissors and then he corrected himself and said a gun. He said a gun again, so you must determine whether this was really the case that he came at him with a scissors or he made a slip of the tongue and said a gun, but I will deal with the defence when I come to deal with the evidence."

And also page 72 lines 1 - 29 the Learned Judge told the jury:-

"The doctor said that there were multiple injuries on both legs which seems to suggest that there was an entry wound and an exit wound. Now, you saw the doctor demonstrate where the virtual complainant's injury was on his leg, on both legs in fact. What you have to bear in mind, Madam Foreman and your members is this, that if as indicated by the doctor the virtual complainant was shot on the side of the right leg by the calf, and the bullet exited the calf and then he showed you virtually the same position on the left leg where there was an entry wound and an exit wound, what you have to weigh in mind is whether as suggested by counsel for the defence, to the virtual complainant, that when the accused man pulled the trigger for the third time... sorry, for the second time, the bullet exited and injured him in his right leg. Counsel for the defence and the defence's case is that two shots came very quickly, he pressed once and two shots came almost instantaneously. What you must ask yourselves is this, if he was shot on the side or I believe the lateral aspect of the right leg, how is it that two bullets coming out of the gun, pax, pax, one after the other like that could injure him in the left leg in virtually the same position as the right leg. Remember the issue here is, did the accused man after he fired the shot that wounded the virtual complainant in the right leg go around the front of the car and come back and shoot him in the left leg or he remained in one position and fired off two shots that would injure him in the right leg and the left leg at the same time. That is what you have to consider."

[16] The appellant's defence is contained in his unsworn statement from the dock and is to be found at page 57 of the record:

"That morning when I leave the gym. I go to the gym, right, I go to exercise. I leave the gym... I go in the gym at 4 o'clock come out at 6 o'clock okay. When I drive 'round Farnum Road, Ronald Murray brother tell him the Ponds coming 'round de. He fly in the road in the middle of the road with a scissor in his hand, with a gun in his hand, right, with a gun in his hand. So I come... I stop... When I approached Farnum Road driving his brother saw me and tell him, told Ronald Murray, Ponds coming 'round de. So it was a group of fellows in the road. He step from in the group off fellows in the middle of the road. I drive and stop, open my car door, stand up in the door with the door open. I ask the fellas that was de, none you all can't speak with Mr. Murray. The fellas turn and say, he is his own man. From the time I say so he approach me with this gun. I step from in my car door and position myself. He still coming up with the gun. So I had to scuffle with the gun. I had to scuffle with him to get the gun from him. I end up getting the gun. When I get the gun I got the gun in my hand, Alfay pelt a scissor to me, to Ronald Murray. He get the scissor and I step off him. He approach me with the scissor in his right hand so, right - (witness indicated) - I step off so when he approach me with the scissor I had to use the gun. So from the time I use the gun, I stun him. So I get back into my car and drive with the gun and carry it in the sea because I say if I carry it in the sea it would be better for me which I ain't know it would be worse for me 'cause I defending myself 'cause he attack me with a gun more than once. I never do him nutten yet. Never. All I do I complain to the police. When this thing happen I went and report it. That was the end, sir."

[17] It was clear from the unsworn statement of the appellant that he was saying that he had shot the complainant in self-defence after the complainant had renewed his attack upon him with a scissor having lost possession of his gun to the appellant.

[18] The issue of self-defence was dealt with by the Learned Trial Judge at page 71 lines 4 to page 72 line 1.

"Now, in this case the defence has raised the issue that the accused acted in self-defence and that is an issue as I see it in this case. And I will now direct you on the law relating to self-defence. I will read to you from Archbold 2001 Edition at paragraph 19-40, in the celebrated case of Palmer and The Queen. There the Judicial Committee of the Privy Council said:

'It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary.'

So you will appreciate, Madam Foreman and members of the jury that the idea of proportionality is coming through:

'But everything will depend upon the particular facts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence.'

You will recall and I will come back to it when I deal with the evidence that the accused man said that he wrestled with the virtual complainant and got the gun from him. And then he saw the accused... sorry, the virtual complainant with a scissor in his right hand. You may think from that that he had cause to fear imminent danger and he shot him in the leg as the doctor indicated.

I think it has sometimes been put that in those circumstances if the blood has been allowed to cool so that the danger is no longer imminent then the defence of self-defence cannot avail.

'Of all these matters the good sense of the jury will be the arbiter. There are no prescribed words which must be employed or adopted in a summing up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the concept of necessary self-defence. If there has been an attack so that the defence is reasonably necessary, it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his defensive action.'

Coming back to the suggestion by the defence that when the trigger was pulled and two shots came out immediately after the other, you may think, well in that sort of emergency situation he couldn't consider with any nicety the placing of a shot first in the right calf and then in the left calf. But it is for you to determine whether from the situation that he found himself in, he could shoot him in the right leg and the left leg in virtually the same position as was indicated by the doctor from the position he was then standing in when he discharged the gun. So Madam Foreman and your members, the defence of self-defence either succeeds so as to result in an acquittal or it is disproved in which case as a defence it is

rejected.

Now, Madam Foreman and your members, where the defence of self-defence is raised, the burden of negating it rests on the prosecution. As I said earlier the prosecution is not obliged to give evidence in chief to rebut the suggestion of self-defence before that issue is raised or indeed, give any evidence of that issue at all. If on consideration of the whole of the evidence the jury are convinced ... the jury are either convinced of the innocence of the prisoner or are left in doubt whether he was acting in self-defence they should acquit. As I mentioned, Madam Foreman and your members, the issue of reasonableness and proportionality is something you have to consider. You must also consider that if the danger from the assailant has passed then any later retaliation by the accused might be considered by way of revenge and there will be no justification for the defence of self-defence. So as is stated at the outset it is both good law and common sense that you must look at when weighing the evidence to determine whether the defence of self-defence succeeds."

[19] At page 89 line 26 of the record the Trial Judge directed the jury as follows:

"And the question you have to decide is whether this was a deliberate intention on the part of the accused man to shoot the virtual complainant in such a manner as to maim, disfigure or disable him ... or whether if you do not think it was a deliberate act of shooting, whether it was unjustifiable and unlawful, unjustifiable act without lawful excuse where the accused man shot the virtual complainant. And if it is, as I said if it is justifiable, if you accept the defence of self-defence that is a justifiable shooting and therefore there is no criminal offence. The accused must be acquitted if you accept the defence of self-defence."

[20] At page 97 line 33 to page 98 line 10 the Judge directed the Jury as follows:

"So Madam Foreman and your members, I have explained to you the defence of self-defence and I have told you that it is a good defence, if you accept that it was the appropriate action taken in the face of imminent danger. There is really no requirement that a person retreat before taking such action. If you feel you are in imminent danger, to turn your back on the assailant might only invite him to strike, so there is no requirement to retreat. So you have to look at the circumstances, assess the danger and react in a manner which is reasonable and proportionate to the circumstances. So what you must examine is whether the shooting, which he does not deny, was reasonable and proportionate in the circumstances."

[21] It is our opinion that the appellant's defence was adequately put to the jury and this ground of appeal accordingly fails.

### GROUND 3

[22] That the Learned Trial Judge erred in law as the directions on self-defence were inadequate and confusing.

[23] Learned Counsel for the appellant drew the courts' attention to page 67 lines 6 - 8 where the following extract appears:

"Self-defence is a defence, a complete defence and I will explain the local concept in self-defence to you in the course of this summation."  
(Emphasis added).

[24] We have perused the record with a view to determine whether the Learned Trial Judge did explain any "local" or Barbadian concept of self-defence to the jury and have found that the judge explained the legal concept of self-defence, as was adumbrated by the Privy Council in the case of Palmer to which reference has already been made under Ground 2. The word "local" was an obvious court reporting error for the word "legal".

[25] The offence for which the appellant was convicted was for wounding the complainant with intent on 8 May 1999. The record at page 23 line 29 shows that the complaint under cross-examination was asked:

"Q. You remember attacking Pond before on the 7th with a shot-gun?

A. No, Sir.

Q. And he belly dropped out?

A. No, Sir."

[26] The record at page 56 line 15 shows that P.C. David Rouse under cross-examination was asked the following questions:

"O. Now, before that you also recall Mr. Rouse, that the accused man spoke to you, complained to you about the virtual complainant threatening him with a gun?

A. I don't recall the exact date but I recall such a conversation.

Q. Right. And asking that he be warned, not so?

A. Yes. Your Lordship."

[27] These extracts clearly demonstrate that Learned Counsel for the appellant wished to make the point to the jury that there was bad blood between the complainant and the appellant and that there was an incident between them on a date prior to 8 May 1999.

[28] At page 85 lines 8 - 18 the Learned Trial Judge said to the jury:

"So we are left to conclude, you may think, that this attacking with a gun happened at a previous time. But whether that is the case or not we are here dealing with a particular incident on the 8th of May 1999. And in any event, you may think, if you come to the conclusion that the virtual complainant attacked the accused man with a handgun on a previous day, you may think, well, on the next day is the accused man seeking revenge. These are the things which you have to consider. Those are entirely within your province. That is for you alone."

[29] Learned Counsel for the appellant said that the above remarks by the Judge were prejudicial to the appellant in that they tended to undermine the defence of self-defence.

[30] The remarks of the Judge must be viewed in light of all the circumstances. Here there was evidence that the appellant drove by slowly in his car and made certain remarks to the complainant. They used abusive words to each other. The appellant drove on for some distance, and then reversed his car to the spot where he had left the complainant. The appellant got out of his car with a gun in his hand and shot the complainant in his right leg. He then walked around his car and returned to the complainant and shot him a second time in his left leg. If that evidence was true, the manner of the shooting was clearly deliberate and must have been calculated to send some sort of message to the complainant; it clearly was capable of showing that there was bad blood between them. In addition to the circumstances of the shooting as indicated earlier, Counsel for the appellant in the court below did introduce positive evidence to show that there was bad blood between the parties.

[31] The remarks made by the Learned Trial Judge were comments which he was entitled to make. He told the jury that it was a matter for them to determine. He did not seek to usurp their function in any way. The case for the prosecution was strong and was strengthened by the medical testimony. In our view there is no merit in this ground of appeal and it accordingly fails.

#### GROUND 5

[32] That the verdict is unsafe and unsatisfactory.

[33] The case for the prosecution was a robust one. The complainant and his brother were subjected to close scrutiny by counsel for the appellant and their testimony remained unshaken to the end. The medical testimony was unchallenged: it was evidence given on oath against the unsworn statement of the appellant. We do not entertain any doubts about the soundness of the conviction.

#### GROUND 4

[34] That the sentence is excessive.

[35] Before passing sentence the Learned Trial Judge told the appellant:

"Mr. Pond the offence for which the jury has convicted you, namely, shooting the virtual complainant with intent to maim, disfigure or disable him or to cause him some serious bodily harm is a very serious offence and is punishable by life imprisonment. I don't propose to send you up for life but I do propose to send you up. If only for the reason that there is too much prevalence of guns in this society and the unlawful use of guns. Possession is unlawful when you don't have a valid licence and it is worse when not having a licence you go and use them in this manner to cause injury to people.

There is a lot of disquiet in this society because of the prevalence of guns. Everyday you pick up the paper somebody got shot. It has to stop. The jury clearly rejected your defence of self-defence. It was clearly an excessive forceful reaction by you .... You shot the man deliberately. First on the right leg and then on the left leg. According to your own words you stunned him. You had an opportunity to go, to leave, there was no indication that there was a scuffle. You said so. But the jury evidently didn't accept that. You overreacted. I am sorry but I have to send you up and the term is 12 years."

[36] We agree with the judge that this was a serious offence requiring an immediate custodial sentence and that the circumstances of the offence justified the imposition of a substantial term of imprisonment. However, although the appellant was indicted for possession of a firearm and for possession of ammunition under the Firearms Act, Cap. 179, the Crown offered no evidence in respect of those indictments. The appellant was not therefore convicted of an offence of shooting or possession of a firearm. Nevertheless the wounding was caused by gunshot and as stated by the judge a person convicted under Section 16 is liable on conviction to imprisonment for life.

[37] The appellant was at the time of sentence a 41 year old craftsman, earning his living in Temple Yard. He had two previous convictions for possession of cannabis, which resulted in fines, but both were many years before the offence for which he was convicted. Although his conviction was three years after the offence took place, he was on bail pending trial.

[38] As stated above the appellant inflicted multiple wounds to both legs of the complainant and the complainant's right leg was fractured. The appellant has shown no remorse, but he has maintained his innocence at the trial and appealed his conviction. We have given careful consideration to the submissions made by Counsel on behalf of the appellant for a reduction in sentence, but we are constrained from interfering with the sentence unless it was wrong in principle or manifestly excessive. Taking into account all the circumstances, we do not think that there should be any alteration of the sentence passed.

[39] The appeal against conviction and sentence is dismissed, the conviction is affirmed and the sentence of 12 years' imprisonment is to run 6 weeks from the date of conviction on 29 July 2002.

Justice of Appeal

Justice of Appeal Justice of Appeal (Ag.)