

**BARBADOS.**

**[Unreported]**

**IN THE SUPREME COURT OF JUDICATURE  
COURT OF APPEAL**

**Criminal Appeal No. 3 of 2002**

**BETWEEN:**

**JASON ANTHONY JONES**

**(Appellant)**

**AND**

**THE QUEEN**

**(Respondent)**

**Before: The Hon. Sir David Simmons K.A., B.C.H., Chief Justice, the Hon. Colin Williams, Justice of Appeal, and the Hon. Frederick Waterman, Justice of Appeal**

**2003: January 27, March 7**

**Mr. Andrew Pilgrim and Ms. Onika Stewart for the Appellant**

**Mr. D. Saddler for the Respondent**

**DECISION**

SIMMONS CJ: The Appellant was charged with murdering his wife, Ruth, on July 19, 1999. At the January Assizes of 2002 he was convicted of manslaughter and sentenced to 10 years' imprisonment on February 11, 2002. His appeal is against the conviction and sentence and 9 grounds of appeal were filed on his behalf.

[2] There were no eyewitnesses to the events which led to the death of the deceased and reliance therefore has to be placed upon the [1] unchallenged oral and written statements given by the appellant to Sgt. Anthony Carter on the very date of the death.

[3] On that date, July 19, 1999, Sgt. Carter and S/Sgt. Maynard went to the appellant's house at Drax Hall Hope, St. George. According to Sgt. Carter, he saw the appellant sitting at the front of the house and he pointed out the body of a female sitting in a crouching position with blood across her face and stomach. The appellant pointed to injuries to his face and left eye.

[4] The appellant made an oral statement to Sgt. Carter which he recorded in his official police notebook. This is what he said:

"My wife attack me with a piece of iron. She juck me in my left eye with her fingers and lash me across my face with the piece of iron. We struggle for it. I got it and lash her with it. She fell down like she dead."

[5] At 11.20 p.m. the appellant gave a written statement to whose admissibility no objection was taken. The written statement is as follows:

"Sometime around 3 o'clock Ruth I fill Jones came to my house while I was in my room resting. I had my radio on listening to Afternoon Delight on it. I heard Ruth in my house talking to herself and I heard the refrigerator door open. I heard Ruth said that if somebody don't get you by fair means they will get you by foul means. I heard Ruth talking to someone on the phone telling them about a funeral at St. Judes she had attended. I heard Ruth walk towards the back room. I got up, came outside and went towards this room. While going there Ruth shouted out for Michael, [2] "Jason gine kill me", but Michael did not answer. I turned back and I felt a blow up against my left side of my mouth and I saw blood coming from it. As I was on my way to my bedroom I saw Ruth with a piece of iron in her hand. I went behind Ruth who ran into the room attempted to jump through a closed window there. We catch hold of each other, I took away the piece of iron from her and I lashed her with it. While we were scuffling Ruth had her finger in my left eye and she bite me on my upper left hand. When I hit Ruth she fell down in the same room near the window; she break this same window when she was trying to get outside. I dropped this iron in the same room. I got afraid after Ruth fell down and I telephoned the police at District "B" where I tell them what happened. When the police got to me I showed them where everything happened. I showed them Ruth sitting in the room and I gave them the piece of iron I hit her with. This is all I could to say."

[6] At the trial the appellant made an unsworn statement from the dock in which he gave this version of the events.

"My name is Jason Anthony Jones. On the 19th July 1999, I was at home sleeping and there was a truck outside which I didn't know because the

fumes ---

The Court: There was – what was outside?

ACCUSED: A truck was on and the fumes caused me to be awake. When I awake my spouse was on the phone. Then I heard her speaking, talking about a funeral at St. Jude's. Then that's how I know that she was present. Then I heard she say if she can't get him by fair means she will get him by foul means. Then I hear a gentleman outside speaking which in we had a conversation the day before. When I went to speak to him, I but up to Ruth in the room. I was startled. I was shocked. Then she said to me, "You Jason Jones want killing." She say that twice. While I was there standing all the time she holler then, "Michael, Jason gine kill me." That's when then she take up the object and struck me. That's all I know. That's my submission."<sup>[3]</sup>

[7] Evidence of the forensic pathologist revealed that the deceased suffered multiple injuries including 5 lacerations about her face, a punctured wound on the back of her left forearm, subdural haemorrhage on the left half of the brain and a dislocated fracture between the third and fourth cervical vertebrae. Death was attributed to shock and haemorrhage as a result of the injuries and, in the expert opinion of the forensic pathologist, the fatal injuries were the subdural haemorrhage and the fracture between the cervical vertebrae.

[8] The prosecution case was based upon the oral and written statements and Counsel for the prosecution, in his opening speech, contended that there was an altercation between the parties as a result of which the deceased ran away from the appellant into a bedroom and tried to go through a closed window. Then, said the prosecution, the appellant pursued her and struck her with the piece of iron causing the fatal injuries.

[9] The appellant's case was that he was acting in self-defence. Self-defence was a live issue at the trial and was dealt with at length by the trial judge in his summation.<sup>[4]</sup>

The Grounds of Appeal

[10] Of the 9 grounds of appeal filed it is only necessary for us to deal with two. First, it is submitted by Mr. Andrew Pilgrim that the trial judge misdirected the jury on the issue of self-defence. Secondly, he pleaded that the defence of accident was not properly left to the jury. We consider the issue of self-defence first.

Self-Defence

[11] Early in his directions, the trial judge told the jury that "it is the duty of the prosecution to prove beyond reasonable doubt, or to put it another way, so that the jury is sure that the killing was not done in self-defence. Self-defence must be negated by the prosecution. There is no duty on the accused man to prove that he was acting in his own necessary self-defence. If the jury is satisfied that the killing was done by the accused in defence of himself, the accused is entitled to be acquitted."

[12] The trial judge then went on to direct the jury that the force used by a defendant must be proportionate to the attack and he cited part of the well-known passage on self-defence given by Lord Morris of Borth-y-Gest in *Palmer v R* 16 W.L.R. 499 at 510 where his Lordship had said, *inter alia*:<sup>[5]</sup>

"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. 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 and may be pure aggression. There may be no longer any link with a necessity of defence. All these matters the good sense of the jury will be the arbiter."

[13] Notwithstanding his earlier directions, the trial judge then directed the jury in these terms at pages 87 and 88 of the record:

"And you must nevertheless consider the evidence to see if you are satisfied so that you are sure that the accused acted in self-defence. If you are sure he did, you must acquit him. If you are not sure you will look at all the evidence to see if you are satisfied so that you are sure what other defences might be open to the accused."

Now you may think also whether it's been shown on the evidence or not, the accused has at no time said that he honestly believed that his life was in danger from attack on him by the deceased. I believe he used the word shock but I will deal with that when I come to the statement. But it is not my recollection of the evidence that he at any time said that he honestly believed that his life was in danger from attack on him by the deceased. You must decide from the facts you find if you can <sup>[6]</sup> properly and honestly as well as logically make such an inference that he honestly and reasonably believed that his life was in danger on that day in question."

[14] Shortly before the jury retired the trial judge directed them in this way: (see p. 114 of the record)

"Mr. Foreman and your members, my direction to you is that when you retire you should seek to determine, first of all, whether the defence of self-defence has been successfully raised. If you find that the defence of self-defence has been successfully raised, if you find on the evidence that that has been established your verdict should be not guilty of any offence. If you are in doubt your verdict should be not guilty of any offence. If you are satisfied that the accused honestly and reasonably believed that his life was in danger and he took certain actions to protect himself you will acquit. If you are in doubt as to whether he was acting in his own necessary self-defence your verdict will be not guilty".

[15] Mr. Pilgrim's submission is that although the summation contained correct statements of the law in some parts, when they were viewed as a whole, the directions on self-defence (italicized above) were confusing or could have led the jury to believe that an onus was placed on the appellant to establish and prove self-defence. Reading the entire summation carefully and, in particular, the directions on self-defence we are of opinion that there is merit in Mr. Pilgrim's submissions.<sup>[7]</sup>

[16] We desire to offer guidance to trial judges in directing juries on the issue of self-defence and we shall set out that guidance shortly in point form.

(i) It is preferable in directing juries that judges refrain from describing self-defence as a "defence". It would be better to refer to it as an "issue." In *R v Wheeler*, 52 Cr. App. R. 28 at p.30, Winn LJ said:

"The Court desires to say, and this is a convenient moment to say it for general application, that wherever there has been a killing, or indeed the infliction of violence not proving fatal, in circumstances where the defendant puts forward a justification such as self-defence, such as provocation, such as resistance to a violent felony, it is very important and indeed quite essential that the jury should understand, and that the matter should be so put before them that there is no danger of their failing to understand, that none of those issues of justification are properly to be regarded as defences: unfortunately, there is sometimes a regrettable habit of referring, for example, to the defence of self-defence. In particular, where a judge does slip into the error or quasi-error of referring to such explanations as defences, it is particularly important that he should use language which suffices to make it clear to the jury that they are not defences in respect of which any onus rests upon the accused, but are matters which the prosecution must disprove as an essential part of their case before a verdict of Guilty is justified. But, of course, there are many cases where the facts and circumstances of the case itself and the framework of the summing-up to the jury by the learned judge suffice perfectly adequately to make it certain that the matter has been understood by the jury in the true light which I have endeavoured to define. [8] It may be quite unnecessary repeatedly and separately to refer to onus in respect of those issues."

That passage received the approval of Edmund Davies L.J. and the English Court of Appeal in 1973 in *R v Alan Abraham*, 57 Cr. App. R. 799.

(ii) Before the issue of self-defence is left to the jury, there must be evidence, whether from the prosecution or defence, which, if accepted, could raise a prima facie case of self-defence. If there is such evidence, the issue must be left to the jury irrespective of whether the defence relies on it or not – *D.P.P. v Michael Bailey* (1986) 44 W.L.R. 327 where Lord Slynn, rendering the opinion of the Judicial Committee of the Privy Council said at p. 331:

"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."

(iii) The question as to the sufficiency of evidence to raise an issue of self-defence is one for the trial judge to answer by applying common sense to the evidence in the particular case – *R v Bonnick* (1977) 66 Cr. App. R. 266.<sup>[9]</sup>

(iv) Where the issue of self-defence is raised, the trial judge must give a clear direction that the burden of negating it rests upon the prosecution. This is a consequence of the rule in *Woolmington v D.P.P.* [1935] A.C. 462. Care should be taken not to use language which could suggest that an accused person has a burden of establishing a defence. No burden of proof rests upon an accused where the issue of self-defence is raised.

1. The judge must also make it clear to the jury that if they are in doubt, after considering the whole of the evidence, that the accused was acting in necessary self-defence, they should acquit - per Lord Goddard L.C.J. in *R v Lobell* [1957] 1QB 547 at p.551.

(vi) The jury should be reminded that the test to be applied for self-defence is that a person may use such force as is reasonable in the circumstances as he honestly believes them to be in the defence of himself or another - per Lord Griffiths in *Beckford v R* (1987) 36 W.L.R. 300 at 310.

(vii) In explaining the law on self-defence, it would, we think, be helpful to read to the jury the entire passage of Lord Morris' speech in the Privy Council in *Palmer v R.* from say, Archbold, and relate relevant parts of the speech to the facts in the particular case. Such [10] an approach would assist the jury in identifying the issues and in evaluating the evidence.

(viii) Where both self-defence and provocation are in issue in the same case, it is the duty of the trial judge, after dealing with self-defence, to direct the jury that if they reject self-defence they may still find manslaughter on the ground of provocation and that they must do so, unless they are satisfied beyond reasonable doubt that provocation should be rejected – *Bullard v R* [1957] A.C. 635; *R v Porritt* [1961] 3 All E.R. 463.

[17] The foregoing summary is not meant to be construed as a rigid formula. A summation is not a set piece. Individual judges will bring to their directions their own style, structure and language. In whatever manner a jury is directed, it is our opinion that the foregoing summary of the essential elements of self-defence should be clearly enunciated. There is much of value in the observations of Edmund Davies L.J. in *R v Alan Abraham* (supra). At page 801 the learned Lord Justice said:

"What accordingly is the drill, if that term may be used, which a trial judge should faithfully follow in dealing with such special pleas as self-defence? Surely it is this: give a clear, positive and unmistakable general direction as to the onus and standard of proof: then immediately follow it with a direction that in the circumstances of the particular case there is a special reason for having in [11] mind how the onus and standard of proof apply and go on to deal in, for example, the present case with the issue of self-defence by telling the jury something along these lines: 'Members of the jury, the general direction which I have just given to you in relation to the onus and standard of proof has a particularly important operation in the circumstances of the present case. Here the accused has raised the issue that he acted in self-defence. A person who acts reasonably in his self-defence commits no unlawful act. By his plea of self-defence the accused is raising in a special form the plea of Not Guilty. Since it is for the Crown to show that the plea of Not Guilty is unacceptable, so the Crown must convince you beyond reasonable doubt that self-defence has no basis in the present case.' Having done that the trial judge can then proceed to deal with the facts of the particular case."

The last thing I seek to do is to lend support to the misconception that any prescribed words have to be used in giving the direction (see *Palmer v R.* (1971) 55 Cr. App.R. 223, P.C.)."

[18] Some of the language used by the trial judge was capable, in our view, of suggesting to the jury that the appellant had to establish and prove the issue of self-defence. It is trite law that a defendant does not assume any burden of proving self-defence; it is for the prosecution to negative the issue. We therefore are not satisfied that the directions of the trial judge to the jury were sufficiently clear as to avoid confusion in their minds and, in our view, there were material misdirections on the issue of self-defence.

This ground of appeal succeeds.[12]

#### Accident

[19] On the evidence adduced in the case, the defence of accident was not a live issue but the trial judge gave the jury a direction on accident which we set out below. Mr. Pilgrim complains that the direction was deficient and he contends that if the trial judge felt that he had to leave accident to the jury then he ought to have given them a full direction.

[20] This is the direction on accident appearing at page 82 of the record:

"No claim has been made by the Defence to the defence of accident but it is necessary to address it because even if the Defence does not put forward any particular defence it is my duty to draw to your attention possible defences which are open to the accused whether counsel for the defence canvasses those defences or not. And clearly accident is something, some act that occurs without the intention to bring about the effect. So there has been no suggestion of accident there. It has been claimed by the Defence and you may think that it is something for you still to consider since you have to review all the evidence to see whether a defence of accident would avail the accused. In other words, an act did occur but the accused man was saying that he had no intention to bring about that effect, it was entirely an accident. That is a matter for you to address. So there was no conscious act on his part to bring about that effect."

[21] If a trial judge determines that he ought to leave a defence even if it is not urged by Defence Counsel, it is the duty of the trial judge to direct the jury properly and adequately. To give a partial direction is inappropriate and, again, could possibly confuse the jury.[13]

[22] For example, no attempt was made by the trial judge, having referred to the defence of accident, to direct the jury that it was the duty of the prosecution to negative that defence or to tell them that if they were in doubt as to whether the death was caused accidentally they should give the benefit of that doubt to the appellant.

[23] This Court has recently provided guidance to trial judges in respect of the defence of accident and we deem it unnecessary to repeat that guidance here. Reference may be made to *Andre Orlando Best v R.* (Criminal Appeal No.18 of 2001 decided March 27, 2002).

[24] In the circumstances we are constrained to hold that there was a misdirection in regard to the defence of accident.

#### Conclusion

[25] Provocation was properly left for the jury's consideration and it is possible to argue, as Mr. Saddler did, that the jury rejected self-defence and returned a verdict of manslaughter owing to their finding of provocation.[14]

However, this was a capital case and the appellant was entitled to receive the most favourable verdict of the jury after proper directions. We cannot be sure that he was not deprived of a complete acquittal by reason of the misdirection on the issue of self-defence. We cannot feel with that complete certainty that is required in a capital case that the jury would necessarily have returned the same verdict if they had been fully and properly directed on the issue of self-defence. The inadequate direction on accident may also have confused them in their deliberations.

#### Disposal

[26] In the result the appeal is allowed. This is not a fit case for the application of the proviso. There was no evidence other than that of the accused on which the jury could have relied for a conviction. In the opinion of this Court, it is in the interests of justice that the appellant be retried on a charge of manslaughter in so far as the jury at the original trial acquitted him of murder and convicted of manslaughter.[15]

[27] Thus, pursuant to section 4 of the Criminal Procedure Act, Cap. 127, the Director of Public Prosecutions is hereby directed to prepare, and the Registrar to sign, a bill of indictment charging the appellant with the offence of manslaughter in respect of the death of Ruth Jones on July 19, 1999.[16]

#### Chief Justice

Justice of Appeal Justice of Appeal