IN THE SEYCHELLES COURT OF APPEAL

PATRICK BELLARD APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

Criminal Appeal No.4 of 1997

(Before: *GOBURDHUN, P., AYOOLA, VENCHARD JJ.A.)*

Mr. B. Georges for the Appellant
Mrs. A. Antao for the Respondent

JUDGMENT OF THE COURT

Patrick Bellard, the appellant, was convicted by the Supreme Court (Alleear, C.J.) on a charge of wounding with intent to resist arrest contrary to Section 219(a) of the Penal Code and of possession of firearms and ammunitions contrary to Section 4(1) of the Firearms and Ammunition Act, Cap 80. He was sentenced to seven years and 6 months' imprisonment respectively. The appellant had pleaded not guilty to the first of these offences and guilty to the second. This appeal from conviction and sentence is in regard to the offence of wounding with intent to resist arrest only.

The allegation in the Particulars of Offence, which the Chief Justice found proved beyond reasonable doubt is that the appellant "on the 27th day of July 1996 at Belvedere, Mahe, unlawfully wounded police constable Mervin Dufrene with intent to resist lawful arrest by discharging a bullet or causing a bullet to be discharged."

On 27th July 1996 several police officers among whom were Mervin Dufrene, Ange Michel and Inspector Mousbe were on mobile patrol in the

vicinity of Belvedere when they saw the appellant who had been suspected of dealing in drugs and in respect of whom there was a warrant of arrest which the police had been unable to execute. On seeing the appellant standing by the roadside the police stopped their vehicle and Mervin Dufrene and Ange Michel disembarked from it. On seeing the two police constables the appellant ran off at some speed followed by the two officers who gave chase. One of them held the appellant who let go of his body and fell off a precipice several meters deep. The officers continued their pursuit and got hold of the appellant who was struggling violently. Eventually, the appellant was overpowered and while he was lying face down, he got hold of a pistol which he had been carrying on his body and shot several rounds one of which hit Police Constable Dufrene, and another the appellant himself.

After reviewing the evidence of the prosecution witnesses and that of the appellant and his only witness, the Chief Justice with candour, acknowledge that "In this case not a single witness's testimony is entirely truthful." However, after specifying the particular facts on which he had disbelieved the evidence of the witness Michel and the appellant, the Chief Justice said:-

> "I have accepted as true that as soon as the accused saw the police jeep pull up by the road side at Belvedere, he ran in the path at high speed followed by the officers... I accept that he dropped himself through the creepers in order to escape arrest. It has been proved beyond doubt that the accused resisted arrest and became very violent and aggressive and that is why the police officers used force to overpower him. I cannot say that the force used was excessive. It has to be borne in mind

> that the accused was armed with a pistol and he has fired it several times injuring Dufrene at quite an early stage of the incident."

The learned Chief Justice accepted the evidence given in the case that the appellant suffered fractured ribs and injury to his right wrist in the course of the incident. In regard to the fractured ribs, he made rather uncertain findings that "the accused's ribs were fractured either from blows received with the planks or when he was kicked by Michel or Solin." In regard to the injury to the wrist he was of the view that: "His wrist was fractured according to his statement during the violent struggle with the officers. The fracture to the accused's left ulna was sustained by the accused's own act of firing a bullet at himself from his own pistol."

It is evident from the judgment of the Chief Justice that he found that the appellant's aggressiveness was the cause of the force used on him by the police in order to overpower him. He found that the force used by the police was not excessive. He concluded that:-

> "... the accused's arrest was lawful and that the accused's act of firing the shot which fractured the tibia of Dufrene was intentional and unlawful in all the circumstances of the case."

By finding that the appellant's act of firing a shot was unlawful, the Chief Justice had ruled out self-defence.

On this appeal against conviction the only point taken is that the Chief Justice had erred in not accepting that the appellant had used force in legitimate self defence. It was argued that he came to a wrong conclusion on

this point (I) because he had earlier found that the appellant had been assaulted by the officer Ange Michel causing him to suffer fractured ribs and a fracture to the right wrist; (ii) because of errors in the findings of fact which he made. The errors alleged are (a) that the force used by the police was not excessive in the circumstances, (b) that the appellant had fired his pistol at "quite an early stage of the incident" and © that the appellant's "subsequent aggressiveness" had brought about retaliatory acts on the part of the police. It was also complained that the Chief Justice ignored the evidence of the prosecution witness Elsa Padayachy. That complaint is not borne out by the record. Her evidence was part of the evidence considered by the Chief Justice. In spite of it, he came to the conclusion of fact he came to.

On the facts, it is not difficult to locate the firing of shots in the sequence of events that make up the incident. According to Michel, it was after the appellant had fallen down the precipice and the police officer had followed him down the drop to prevent his escape. There was struggling. It was after the appellant had been subdued and brought on the ground and efforts made to handcuff him that the shooting took place. According to the appellant when cross examined he was already on the ground when the shots were fired. The evidence of the appellant in the course of his evidence in chief is that he had fallen down and he could not run away because one was in front of him and one behind him. He said "when I fell to the ground the only thing that I could do, there was a revolver with me and I fired to defend myself." "I pulled the trigger." The evidence does not point to the fact as held by the Chief Justice that the appellant shot at "quite an early stage of the incident." In regard to the Chief Justice's finding of "appellant's aggressiveness" bringing about "retaliatory acts on the part of the police", this apparently was borne out by the evidence of police officer Michel who gave evidence of the sequence of events. His description of the events showed that the appellant's violent resistance of arrest induced the force used to

subdue him. This was so found by the Chief Justice in the passage earlier quoted.

In the final analysis, the question that is decisive of this appeal is whether there was any circumstance of self defence that had to be negatived The law in relation to self defence has been stated by Lord Morris of Borth-of-Gest delivering the judgment of the Privy Council in Palmer v R (1971) 55 Cr. App. R. 223 At p. 242 he 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.. But everything will depend upon the particular facts and circumstances."

As to the need of immediacy in the defensive action he said:-

> "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."

In this case the substance of the offence of which the appellant had been convicted is that he committed the act of inflicting grievous harm with intent to resist or prevent the lawful arrest of himself. The lawfulness of the

arrest is no more in issue on this appeal. What is therefore left is the intent with which the act was done. The predominating finding of fact made by the Chief Justice is that the appellant resisted arrest. The whole incident consisting of the appellant running away, struggling with the police and shooting at them upon his being subdued was one single episode of resistance of lawful arrest. The intent which pervaded the appellant's act in all the phases of the episode, including the unlawful wounding of Police Constable Dufrene, was to resist lawful arrest. The circumstances were not such in which the question of self defence as stated above arose. The circumstances must be very rare indeed when a suspect resisting lawful arrest by using force against the police will be held to be acting in self defence. From the evidence accepted by the Chief Justice, it is manifest that such rare circumstances did not exist in this case. In the result, notwithstanding the inconsequential misdirection of fact made by the Chief Justice in regard to the stage which the appellant fired the shot that wounded Dufrene, the conclusion arrived at by the Chief Justice was correct and the appellant's conviction would be upheld.

In regard to the appeal against sentence, it is clear that the offence of which the appellant had been convicted is a felony viewed with sufficient seriousness by society by the prescription of liability of the offender to imprisonment for life. The Chief Justice adverted to the seriousness of the offence and the need to deter other persons from using force against officers maintaining law and order in the country. He also took into account the plea of mitigation by counsel on behalf of the appellant. On this appeal it has not been suggested that the Chief Justice expressly erred in the principle he applied. However, it is argued that the sentence was manifestly excessive. In a finding that a sentence passed by the trial judge is excessive is an implied finding that there had been an error in principle. In this case we find nothing manifestly excessive in the sentence imposed. The jurisdiction of

this court to interfere with the discretion of the trial judge is not exercised by substitution of our discretion for that of the trial judge but on defined principles.

In the circumstances of this case we do not see any cause to intervene in the sentence imposed by the Chief Justice.

In the result, this appeal fails in its entirety and it is hereby dismissed

H. GOBURDHUN
PRESIDENT

E. O. AYOOLA
JUSTICE OF APPEAL

L.E VENCHARD
JUSTICE OF APPEAL

Dated this 2nd day of April 1997.