Sidonie v Republic

(2010) SLR 426

Frank ALLY for the appellant
David ESPARON for the respondent

Judgment delivered on 10 December 2010

Before Hodoul, Domah, Fernando JJ

This is an appeal against a conviction for manslaughter and the sentence of 7 years imposed against the appellant.

The appellant had killed his own son HerveSidonie and the only evidence as to the circumstances under which the killing took place emanates from the appellant himself.

The main ground of appeal is to the effect that the trial judge erred in his findings that the appellant had not acted in self-defence when there was material evidence adduced by the prosecution and the defence to prove self-defence.

The appellant who is a pensioner and 68 years of age had been living with his 71 year old wife and 30 year old daughter who were both mentally ill. There were two other members of the family living with the appellant. It was the appellant who attended to all the house chores. According to the evidence of the appellant before the trial court, on the day of the incident around 5.30 pm he was getting ready to prepare dinner when he heard the deceased HerveSidone yelling and coming towards the house. He had come into the yard where the appellantwas, and started swearing at the appellant calling him "cunt of your mother". The deceased who had a pint of Guinness with him had placed it on the wall next to the appellant saying “I will fight with you today. If it is not me it will be you." Prosecution witness (called PW hereafter) S Pool had corroborated the appellant on this matter by stating that he too heard the deceased utter the words "if today is not me it would be you". The deceased had then pressed on the appellant and pushed him against the wall. When counsel for the prosecution questioned the appellant as to whether the deceased said something when he pushed the appellant against the wall the appellant's answer was to the effect: "Yes. He told me if it is not him it would be me." The appellant had suffered an injury to his left wrist as a result of it. PW 1 and 9 confirm seeing the injury on the appellant's left wrist. According to the appellant the deceased -

> was very aggressive. I tried to move but he was pushing me. He was about to jump on me. I was very afraid. I thought he was going to take the bottle of Guinness and hit me with it. I took the knife that I was using to prepare the food and pressed it against his stomach but not strongly.

The deceased had then gone in the direction of the road and fallen. The appellant

had then phoned the police. When the police arrived he had handed over the knife telling them "it was the knife I used to injure Herve with." The knife had been on a wall 2 metres away from the appellant before he took it to stab the deceased. The deceased was in the habit of creating trouble at the appellant's house when he got drunk, breaking bottles and louver blades and fighting with their mentally ill daughter. When questioned by counsel for the defence as to how he felt before he stabbed the deceased, the appellant had said "I was in a lot of pressure and I was very afraid because I could not fight him he is a lot bigger than me." The appellant had also said that he had not seen the deceased in that way before and that the deceased was really violent and aggressive on that day.

The position of the prosecution had been that the appellant was used to the aggressive behaviour of the deceased and the killing therefore was in anger and not in self-defence. Under cross-examination by counsel for theprosecution the appellant had admitted that he was angry when the deceased pressed him against the wall. When questioned whether the incident could have been avoided if he had cooled down the appellant had said "Maybe.But I was under so much pressure and I was afraid and angry." Again when questioned as to why he pointed the knife at the stomach instead of injuring him on the leg or arm the appellant had said "My mind was lost. I did not really know what I was doing. I was angry under pressure and fear." The appellant had said in answer to prosecuting counsel that the deceased would have hit him and punched him if he had a chance because he was so aggressive and could have done anything. The appellant had answered in the affirmative to the two positions put to him by counsel for prosecution, namely "And all that happened very fast" and that "your emotions were mixed." The appellant had said in answer to defence counsel that he thought that the deceased would have harmed him that day, that he had not seen the deceased that way before and it was the first time he saw him like that.

The appellant in his statement made to the police about 4 hours after the incident described the incident which led to the killing of the deceased –

> Herve started swearing at me and there was a time when he pushed me against a wall and I got a scratch on my left hand. At that time my small shining knife which I use to prepare my ingredients was there on the wall, I took the knife and stabbed Herve in his chest, I stabbed him once. After that Herve ran on the secondary road and fell further down.

Counsel for the Republic argued before us that the appellant had not mentioned in his statement made to the police that he acted in fear and therefore self-defence is not available to the appellant.We are not swayed by this argument as this was a statement made by a father concerning an incident involving the death of his son at his hands and about 4 hours after such incident.

There has been no evidence from the prosecution to contradict the appellant's testimony in court as to the factual account as to how the incident took place.

The deceased had died as a result of a wound to the right anterior side of the heart in the position of the right ventricle caused by a sharp pointed instrument. The doctor who performed the post-mortem examination on the body of the deceased had

testified that the injury could have been caused by the knife the appellant handed over to the police after the incident. She had also stated that that the knife had penetrated through the 6th and 7th ribs and could have "easily gone through the skin into internal parts of organs", thus corroborating the appellant's testimony that the knife was "pressed against the stomach but not strongly". The knife according to PW 13 was small and pointed.

PW 9, a police officer had stated that that he got a call around 5.44 pm from the appellant to the effect that "his son was making trouble with him and that he had stabbed him and he doesn't know if he has died or not". PW 9 had then visited the scene with a police party where he met the appellant who handed over a knife to him. On being questioned by defence counsel PW 9 had said that the appellant when he approached him had not given him any idea that he was aware by that time that the deceased was dead.

PW 11 had been a neighbour of the appellant for about 36 years and had known the deceased for about 20-25 years and had seen him grow up. According to him the deceased was always drunk and liked disturbing and "when he is drunk he becomes aggressive towards his father, a lot of, people know that." As mentioned earlier he had heard the deceased utter the words "if today is not me it would be you". He had seen the deceased coming out of the appellant's house and falling on the road but not witnessed what happened between the appellant and the deceased prior to that, other than hearing them arguing with each other.

PW 12, another neighbour of the appellant had seen the deceased come out of the appellant'shouse and falling on the road. He too had not seen what happened between the appellant andthe deceased prior to that. After the deceased had fallen he had seen the appellant cometowards the deceased and said "next time when you come to my house you will respect me". According to PW 12 the deceased was a very aggressive person when drunk and would react violently by throwing bottles and rocks and said "if you passed in front, you will be hit."

PW 13, a police officer and the wife of the deceased had said that she had come on the scene with a police party once the incident had been reported to the police. When she was beside the body of the deceased she had heard the appellant say *"Monnbezoulikioumanman, l ava les don mongren".* PW 13 had admitted that the deceased created problems with his father and she had even had the deceased arrested.

The trial Judge had convicted the appellant for the following reasons:

a)

> The deceased who had been under the influence of alcohol..... uttered abusive words and has admittedly pushed the defendant using his hands in the heat of the moment. In fact the deceased had no weapons on him nor had any lethal object or instruments in his possession to cause any physical harm – let alone grievous harm – to the deceased at the relevant time. Hence, as I see it, there was no attack by the deceased to the degree of putting the defendant in imminent peril..... at the material time so as to necessitate the defendant use such lethal

> force as he did, to defend himself. There was no justification for the defendant to use such a lethal force, in the name of self defence alleging a farfetched fear arising from an outstretched imagination of the defendant over the presence of a bottle of Guinnesss, which remained intact on a wall in the vicinity and so I find.

The trial judge had also stated:

> No reasonable person in good sense would overreact and use such a lethal force against another, who simply embarks on an aggressive argument, pushes especially, with bare hands and that too, whilst under the influence of alcohol. Hence, as a man of the world, not necessarily as a judge, I find that the defendant had acted unreasonably and unnecessarily .....

It is clear that the trial judge had used a purely objective test in making this determination and placed himself in the position of the reasonable man.

The fact that the deceased was under the influence of alcohol, had acted in the heat of the moment and had no weapons appear to be, in the mind of the judge, factors that denied the right of self-defence to the appellant. Intoxication, insanity or young age of the aggressor or that the aggressor was acting in the heat of the moment or that he is a member of the family of the defendant are not factors that will take away from a person who honestly believes he is in imminent peril, his right to defend himself. The law does not state that it is only when the aggressor is armed with a weapon or lethal object that the one put in peril becomes entitled to the right of self-defence. This may have a bearing on one's apprehension of grievous harm to himself and in regard to the question whether the force used was reasonably necessary. A fear of being pushed or manhandled by a person younger and physically stronger than oneself may result in apprehension of grievous harm. Taking a small knife that is lying close to you, and not that one goes looking for, and pressing it against a person who is manhandling him cannot be said to be use of “such lethal force” as the trial Judge had termed it. The trial Court ought to have taken into consideration the doctor’s evidence that the knife had penetrated through the 6th and 7th ribs and could have “easily gone through the skin into internal parts of organs.”

The trial Judge appears to have ignored the following uncontradicted items of evidence in arriving at a determination of this matter:

(i) The utterance of the deceased "I will fight with you today. If it is not me it will be you";

(ii) The appellant's evidence that the deceased had been very aggressive and violent that day, that he had not seen the deceased in that way before and that the appellant was very afraid because he could not fight him as he is a lot bigger than the accused;

(iii) The appellant's evidence that he thought that the deceased was

going to take the bottle of Guinness and hit him with it.

b) The trial Judge had gone on to state:

> I conclude that what the defendant did in the circumstances was not by way of self defence. He has committed the act in question undoubtedly, out of uncontrolled anger which had accumulated over the years against his son, the deceased. As an angry man he has turned his back on reason due to a kind of pain and inner convulsion. This is evident from what he stated to his daughter-in law Jamila (PW 13) at the scene of crime.

In coming to this conclusion the trial Judge gives the impression that the appellant's conduct on the day of the killing was without cause, thus ignoring the deceased's aggressive and violent behaviour towards the appellant. His statement that the appellant "has committed the act in question undoubtedly, out of uncontrolled anger which had accumulated over the years against his son" is only an assumption and not based on evidence before him.The issue in this case is not whether the appellant was angry but whether he was also afraid of being in imminent peril? Anger, jealousy, love and fear are emotions that can be so mixed up in certain circumstances that it is difficult to separate one from another. As long as the evidence suggests that the appellant had also acted out of apprehension of grievous harm to himself, the appellant's conduct can be justified on the basis of self-defence. The prosecuting counsel had understood this very well when he suggested to the appellant in cross-examination that "And all that happened very fast and that his emotions were mixed." The appellant had answered in the affirmative to these two suggestions made to him by the prosecuting counsel.

The trial Judge appears to have been weighed down by the fact the appellant had killed his own son. Even in his order on sentence the trial Judge makes reference to the fact "a father has killed his own son". In the law relating to self-defence no exceptions are made to the relationship between the aggressor and defender, although it may have a bearing on theissue of whether the accused had reason to apprehend grievous harm from a close family member and should have reacted in the way he or she did. Just as much as the prosecution can argue that the appellant should not have acted in the way he did because the deceased was his son and the appellant was accustomed to his behaviour, the appellant is entitled to argue and as he has done in this case, that he would not have done what he did on the day of the incident unless the deceased had behaved in a more violent and aggressive manner than on earlier occasions, putting him in immediate peril. In the case of *Re A (conjoined twins: surgical separation)* [2001] Fam147 (Court of Appeal, Civil Division) 'Jodie' and 'Mary' were conjoined twins. Leaving them joined would result in the death of both of them within six months. A separation operation would certainly result in the death of Mary who was not capable of separate survival but would give Jodie a good prospect of normal life. The issue was whether such an operation would be lawful despite the fact that it would result in the death of Mary under circumstances making the surgeons prima facie liable for murder. Ward LJ said:

> The reality here as it is to state it, and unnatural as it is that it should be happening- is that Mary is killing Jodie*How can it be that Jodie should*

> *be required to tolerate that state of affairs?*One does not need to label Mary with the American terminology which would paint her to be 'an unjust aggressor', which I feel is wholly inappropriate language for the sad and helpless position in which Mary finds herself. I have no difficulty in agreeing that this cannot be said to be unlawful. But it does not have to be unlawful. The six year old boy indiscriminately shooting all and sundry in the school playgroundis not acting unlawfully for he is too young for his acts to be so classified. …….What I am,however, competent to say is that in law killing that six year old boy in self-defence of others would be fully justified and the killing would not be unlawful.

This case illustrates that in situations like the one the appellant was placed in, the court must focus attention on the appellant's normative position and whether he had sufficient reasons for his defensive actions, bearing in mind that he was not required to tolerate the deceased's behaviour towards him because he was his son.

The classic pronouncement upon the law relating to self-defence is that of the Privy Council in *Palmer v R* [1971] AC 814, approved and followed by the Court of Appeal in *R v McInnes* (1971) 55 Cr App R 551:

> 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 on the particular facts and circumstances ….. 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 instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be by way of revenge orpunishment 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. Of all these matters the good sense of the jury will be the arbiter ……. If there has been an attack so that defence is reasonably necessary, it will berecognized that a person defending himself cannot weigh to a nicety the exact measure of his defensive action. If the Jury thought that in a moment of unexpected anguish a person attacked had only done what he had honestly and instinctively thought necessary, that would be the most potent evidence that only reasonable defensive action had been taken .....

This approach in Palmer was described in *Shannon* (1980) 71 Cr App R 192 as:

> a bridge between what is sometimes referred to as 'the objective test' that is what is reasonable from the viewpoint of an outsider looking at a

> situation quite dispassionately, and the 'subjective test' that is the viewpoint of the accused himself with the intellectual capabilities of which he may in fact be possessed and with all the emotional strains and stresses to which at the moment he may be subjected.

The Court of Appeal in *Shannon* quashed the conviction because the judge had ignored the subjective aspect of the question and put the question to the jury as: “Did the appellant use more force than was necessary in the circumstances?”Whereas the real question, according to OrmrodLJ was:

> Was this stabbing within the conception of necessary self-defence judged by the standards of common sense, bearing in mind the position of the Appellant at the moment of the stabbing, or was it a case of angry retaliation or pure aggression on his part?

Archbold 2009 at 19-42 states:

> The old rule of law that a man attacked must retreat as far as he can has disappeared. Whether the accused did retreat is only one element for the jury to consider on the question of whether the force was reasonably necessary.

It further states:

> There is no rule of law that a man must wait until he is struck before striking in self defence. If another strikes at him he is entitled to get his blow in first if it is reasonably necessary so to do in self defence.

The trial Judge in this case has not taken into consideration the subjective element essentially interwoven into the objective test in determining whether the appellant had acted in self-defence, namely whether in the circumstances the appellant was placed in, the appellant had done what he honestly and instinctively thought what was necessary. The issue of possible retreat does not arise as the evidence indicates that the appellant had been pushed against the wall and the appellant was unable to move. It is to be noted that the evidence in this case does not indicate that the appellant had attacked the deceased with the intention of killing him. The words uttered by the appellant in the hearing of PW 13, referred to at paragraph 12 above and quoted by the trial Judge in support of his findings does not necessarily indicate this. This has to be understood in the light of the evidence of PW 12 referred at paragraph 11 above. Evidence of PW 9, the police officer, referred to at paragraph 16 above, of the appellant's lack of knowledge of the death of the deceased at around 5.44 pm when the appellant called himand when the police visited the scene, indicates that the attack was merely an instant reaction to avert the imminent danger the appellant was placed in.

In *R v Owino* (1996) 2 Cr App R 128 (Court of Appeal Criminal Division)the defendant was charged with assault occasioning actual bodily harm upon his wife, a case somewhat similar to the case before us so far as the close relationship between the parties are concerned. He claimed that the injuries had been caused when he had acted defensively to stop her assaulting him. He was convicted and

appealed on the ground (inter alia) that the jury had not been properly directed on the issue of self-defence. Collins J said:

> The essential elements of self defence are clear enough. The jury have to decide whether a defendant honestly believed that the circumstances were such as required him to use force to defend himself from an attack or threatened attack. In this respect a defendant must be judged in accordance with his honest belief, even though that belief may have been mistaken. But the jury must then decide whether the force used was reasonable in the circumstances he believed them to be.

Pressing on a small knife with which the appellant was cooking in the region of the chest of the deceased, when the deceased cornered the appellant on a wall certainly cannot be termed as the use of "lethal force" as the trial Judge had termed it.

Even if the appellant had genuinely believed, although mistaken, that he was about to be attacked he does not lose his right to self-defence if such mistake was a reasonable one.In *Williams (Gladstone)* (1984) 78 Cr App R 276 however it was held by the Court of Appeal that the defendant's mistake need not be reasonable. Instead he has to be judged according to his view of the facts. This was confirmed in *Beckford* [1988] 1 AC 130. In *R v Oatridge* (1992) Crim LR 205 the Court of Appeal concluded that the defendant, who had been abused by her partner on previous occasions, was entitled to have her mistaken view of the incident, which led to her fatally stabbing him, considered by the jury:

> the possibility of the appellant honestly believing that on this occasion the victim really was going to do what he had previously threatened — even if this was not in fact what he was going to do — was not so fanciful as to require its exclusion.

The facts of this case before us are similar to that of *R v Oatridge* on the issue of the appellant's belief.

As to what amount of force is 'reasonable in the circumstances' in the exercise of the right of self-defence is, in our view, always a question of fact and never a 'point of law.' A court has to necessarily consider the circumstances in which the appellant had to make the decision whether or not to use the knife and the shortness of the time available for reflection. The hypothesized balancing of risk against risk, harm against harm, by a person in immediate peril of danger is not undertaken in the calm analytical atmosphere of the courtroom after counsel with the benefit of retrospection have expounded at length the reasons for and against the kind of degree of force that was used by the appellant, but in the brief second or two which the appellant had to decide whether to use the knife or not under all the stresses to which he wasexposed. This was a case where a 68 year old man had to act on the spur of the moment with his emotions of anger and fear all mixed up and when his son who was much younger and stronger than him was aggressively and violently cornering him on to a wall with the threat of: “I will fight with you today. If it is not me it will be you.”

In *R v Lobell* [1957]1 QB 547it was held that if on a consideration of the whole of the

evidence, the jury are either convinced of the innocence of the prisoner or are left in doubt whether he was acting in necessary self-defence, they should acquit. The burden of negativing self-defence rests on the prosecution. The trial Judge has referred to the authority of *Miller v Minister of Pensions* [1947] 2 All ER 372in regard to the standard of proof necessary in a criminal case. The case before us in our view does not carry a high degree of probability as regards the guilt of the appellant. We are unable to state that the evidence in this case is so strong against the appellant as to leave only a remote possibility in his favour, which can be dismissed with the sentence “of course it is possible but not in the least probable". We certainly are in doubt as regards the guilt of the appellant.

We therefore allow the appeal and acquit the appellant forthwith.

Record: Court of Appeal (Civil No 14 of 2010)