

IN THE SEYCHELLES COURT OF APPEAL

[Coram: S. Domah (J.A) , A. Fernando (J.A) , J. Msoffe (J.A)]

**Criminal Appeal SCA 17/2012
(Appeal from Supreme Court Decision 47/2011)**

Steve Freminot

Appellant

Versus

The Republic

Respondent

Heard: 07 April 2015

Counsel: Mr. Anthony Juliette, for Appellant

Mr. Jayaraj Chinnasamy, for Respondent

Delivered: 17 April 2015

JUDGMENT

J. Msoffe (J.A)

[1] The Appellant stood trial for the murder of YANNICK JOUBERT contrary to sections 193 and 194 of the Penal Code. It was alleged that on 9/9/2011 at Victoria, Mahe, the Appellant murdered the said YANNICK JOUBERT by stabbing him with a knife. The trial was by a jury who returned a verdict of guilty hence the Appellant's conviction for the offence charged and a sentence of life imprisonment. Aggrieved, the Appellant has preferred this appeal.

[2] The appeal is premised on five grounds but in view of the position we have taken on the appeal we will address only the first ground which reads:-

1. *The Learned trial judge erred in failing to direct the jury fully and fairly as to the evidence of PW3, which such evidence lends credibility to the Appellant's defence of self defence. The Appellant contends further that the learned trial judge's directions to the jury as regards the evidence of self defence is flawed, biased and prejudicial to the appellant.*

[3] At the trial, the following matters were not in dispute:-

1. That YANNICK JOUBERT is dead.
2. That the death was unnatural.
3. That the death was caused by the Appellant after stabbing the deceased with a knife.
4. That, as per the post mortem examination report (exh. P7), which was produced and admitted in evidence without objection, the cause of death was hypovolemic shock, bilateral hemothorax and stab wound right side of chest penetrating the heart.

[4] Briefly stated, the facts leading to the Appellant's conviction were said to be basically that on the fateful day the Appellant met with some teenagers, who were about five in number, at Victoria, Mahe. He picked a cap of one Michael and wore it. A dispute arose and there was an exchange of insults. The deceased asked the Appellant to give the cap back to the owner. He

returned the cap and went his way. The deceased called his brother on the mobile and on his arrival about five of them gave chase to the Appellant and started beating him. In the course of that struggle the Appellant pulled a knife from his backpack, stabbed the deceased and ran away. YANNICK JOUBERT succumbed to injury and died. Consequently, the Appellant was charged in court and convicted as aforesaid.

- [5] It is instructive to observe that at the trial the Appellant exercised his constitutional right to remain silent for which in law no inference of guilt or otherwise should be drawn from it.
- [6] It is also pertinent to observe that following the Appellant's choice to remain silent the Appellant's defence is discerned from the two statements he made under caution to the police. In the statements the Appellant's defence was that he acted in self-defence. That, after the incident at "Cash Plus" he retreated or removed himself away from the scene. That, he was followed by the deceased and the other teenagers who attacked him. That, in the process he exercised his legal right of self-defence which led to the death of YANNICK JOUBERT. He admitted that his action caused the death but, according to him, this was a justifiable homicide because he acted in self-defence.
- [7] The classic pronouncement on the law relating to self-defence is that of the Privy Council in **Palmer V R** [1971] AC 814, which was 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 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. 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 be recognized 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

- [8] The 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.

[9] **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.

Archbold 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.

[10] Under paragraphs 36 and 37 of the Summing-Up the Judge directed the jury as follows:-

“36. The use of force need not always be the unlawful act. The defence of the accused is that he acted in self-defence. The law permits that a person might do what is reasonably necessary to defend oneself by the use of such force as is reasonably necessary in the circumstances. However, there are limitations even in this respect

*that the force used should not be out of proportion to the necessities of the situation. In other words for you to accept that the accused acted in self-defence you must conclude that from the evidence adduced in this case, the accused was under attack, that the attack was **lethal** and was about to cost him his life and that since he was in immediate danger of losing his life, he had no alternative than to use lethal force to save his own life.*

*“37. Secondly, self-defence is **only** available where the evidence show that the accused used less force or at most equivalent force than was being used against him. In this case you must conclude that the evidence shows that the accused was being attacked with a lethal weapon or in a lethal way such as he was being strangled or suffocated to death, which left him no choice but to use lethal force to save his life. If you conclude that the evidence show that the accused was not confronted with a lethal weapon or that his life was not in immediate jeopardy, then you must conclude that by using a lethal weapon against Yannick Joubert, the accused did not act in self-defence and hence the prosecution has discharged its burden of proof in that regard.*

[Emphasis added.]

[11] With respect, the jury were wrongly directed that self-defence is **only** available where the evidence shows that the accused used less force or at most equivalent force than was being used against him. As correctly submitted by the Appellant’s attorney in his Heads of Argument:-

.... The jury should have been directed that if there was an attack against the appellant so that defence is reasonably necessary, it will be recognized that a person defending himself cannot weigh to a nicety the exact measure of his defensive action. The jury should have been directed that if in a moment of unexpected anguish, the appellant, if he was under attack had only done what he honestly and instinctively thought necessary, that would be the most potent evidence that only reasonable defensive action had been taken.

- [12] Furthermore, the judge erred in that there is no jurisprudence to state that the attack needed to be lethal. Self-defence is not restricted to the use of a lethal weapon. In the English Court of Appeal, in the Judgment of the Lord Chief Justice Lane in **R v Gladstone Williams** [2002] EWCA Crim. 483 the Court held that:-

*In a case of self-defence, where self-defence or the prevention of crime is concerned, **if the jury came to the conclusion that the defendant believed or may have believed** that he was being attacked or that a crime was being committed, **and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case.** If however the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a peaceful reason for coming to the conclusion that the belief was not honestly held and should be rejected.*

Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely upon it.

[Emphasis added.]

[13] The Lord Chief Justice also stated:-

*... where the defendant is acting in self-defence: the exercise of **any necessary and reasonable force to protect himself from unlawful violence is not unlawful ...***

[Emphasis added.]

[14] In **R v Chisam** [1953] 47 Crim. App. R. 130 the Lord Chief Justice, Lord Parker, approved the following statement of the law in Halsbury's Laws of England [3rd ed.] Vol. 10 [Criminal Law] p.721 para. 1382:-

*Where a forcible and violent felony is attempted upon the person of another the party assaulted, or his servant, or any other person present, is entitled **to repel force by force, and, if necessary to kill the aggressor.** There must be a reasonable necessity for the killing, **or at least an honest belief based upon reasonable grounds that there is such a necessity.***

[Emphasis added.]

[15] In this ground the Appellant further argues that the Judge did not direct the jury that the burden of proving that the Appellant was not acting in self defence should be on the prosecution.

[16] We have looked at the Judge's Summing-Up to the jury. Having done so, we are satisfied that this complaint has merit.

[17] It is a general principle of law that where an accused person charged with a criminal assault of one kind or another raises a plea of self-defence it is incumbent upon the trial Judge, having given a clear, positive and unmistakable direction as to the onus and standard of proof in criminal cases, in his direction to the jury to make it perfectly clear that it is for the prosecution to destroy that plea and not for the accused to establish it. See, for instance, the English decisions in **R v Hall, Court of Appeal (Criminal Division)** dated 21/1/1992 and **R v Abraham** [1973] 3 All ER 694.

[18] The last complaint in this ground alleges that the Judge erred when he directed the jury to deny the Appellant the plea of self-defence if they reached the conclusion that the Appellant planned to incite the deceased to follow him and then surprised him by a quick knife attack in the car park.

[19] The above complaint arises from that direction in the Summing-Up where the Judge stated:-

..... If you reach the conclusion that the accused planned to incite Yannick to follow him and then surprised him by a quick knife attack in the car park then the defence of self-defence would be available to him.

[20] With respect, the Judge erred in giving the above direction because there is no evidence to support the said direction.

[21] In this appeal both parties are agreed that Mervin Daniel Labonte (PW3) was an independent witness. He testified *inter alia* that he was standing

outside his car about 5 – 6 metres away from the spot the incident happened. He stated that the teenagers fought with the Appellant for about 5 minutes and they were hitting him while he was pinned against a shop. He went on to state that as soon as he freed himself from the teenagers' grasp the Appellant pulled out a knife and stabbed one. He believed that the Appellant was trying to defend himself. The evidence of PW3 essentially tallies with the Appellant's version that there was an attack on him and he had to defend himself.

[22] When the prosecution and the defence cases are put together in context and considered, the emerging scenario is that the Appellant felt that he was under the imminent attack by the deceased and the teenagers. A person about to be attacked does not have to wait for the assailant to strike the first blow. Circumstances may justify a pre-emptive strike in self-defence — **Beckford v R** [1988] AC 130, [1987] All ER 425.

[23] The Appellant did not have the wicked intention to kill the deceased. There had been an altercation between him and the deceased. He was therefore aware that there was likelihood of violence between him and the deceased. He had walked away from the deceased after the altercation. When the deceased tried to run and catch up with him, the Appellant also ran, apparently to avoid the fight. Several people had joined the deceased in running after the Appellant. He obviously and reasonably have felt threatened. The action of the Appellant to walk away from the deceased, to run away when he sensed danger of a fight shows that he had no intention to kill the deceased. He was running away from the deceased.

[24] In **R v Lobell** [1957] 1 QB 547 it 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, jury should acquit. As already stated, the burden of negating self-defence rests on the prosecution. 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 entertain a serious doubt regarding the guilt of the appellant and take the view that had the jury been properly directed, it would not have returned a finding of guilt but one of acquittal.

[25] In the event, we allow the appeal and acquit the appellant forthwith.

J. Msoffe (J.A)

I concur:.

S. Domah (J.A)

I concur:.

A. Fernando (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 17 April 2015