BECKFORD V. THE QUEEN

JISCBAILII_CASE_CRIME

Privy Council Appeal No.9 of 1986

Solomon Beckford Appellant

v.

The Queen Respondent

FROM

THE COURT OF APPEAL OF JAMAICA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 13TH MAY 1987, DELIVERED THE 15TH JUNE 1987

Present at the Hearing:

LORD KEITH OF KINKEL LORD ELWYN-JONES LORD TEMPLEMAN LORD GRIFFITHS LORD OLIVER OF AYLMERTON

[Delivered by Lord Griffiths]

On 28th March 1985 the appellant was convicted of murder and sentenced to death. On 10th October 1985 the Court of Appeal of Jamaica dismissed his appeal against conviction, and gave leave to appeal certifying the following question as of exceptional public importance:-

"1. (a) Must the test to defence be based reasonably believed to be necessary to should it be what believed?

be applied for self-

on what a person on reasonable grounds resist an attack or the accused honestly

(b) Where, in the instant case, on a trial of an indictment for murder the issue of self-defence is raised is it a proper direction in law for the jury to be told by the trial judge?

A man who is attacked in circumstances where he reasonably believes his life to be in danger or that he is in danger of serious bodily injury may use such force as on reasonable grounds he thinks necessary in order to resist the attack and if in using such force he kills his assailant he is not guilty of any crime even if the killing is intentional".

At the conclusion of the hearing their Lordships indicated that they would humbly advise Her Majesty that the appeal ought to be allowed, and the conviction quashed, and that they would give their reasons later. This they now do.

The facts out of which the conviction arose present a confused pattern with many loose ends which might with advantage have been dealt with by further evidence. The appellant was a police officer who on 8th March 1983 was issued with a shot-gun and ammunition and sent with a number of other armed police officers to a house at Greenvale Park in Manchester. The prosecution called no evidence to explain the circumstances in which this armed posse was sent out that morning but according to the appellant, in a statement he made from the dock, he and other police officers, including a constable Reckord, were told by Deputy

Superintendent Wilson that a report had been received from Heather Barnes that her brother Chester Barnes was terrorising her mother with a gun and that the police must come immediately to save her life. The appellant said that they were warned that the man appeared to be a dangerous gunman and that they must take special care. Heather Barnes, however, who was the first witness called by the prosecution, denied in cross-examination that she had made a telephone call to the police or that her brother Chester Barnes was armed. It is to be regretted that the prosecution called no evidence to explain why these armed police were sent to the Barnes' house. If in fact Heather Barnes had telephoned for assistance it might have thrown grave doubt upon her testimony that her brother was unarmed; if she had not telephoned, the jury were surely entitled to know why so many armed police officers were sent to the house. The inference is obviously that the police must have believed that they were dealing with a dangerous armed man, but in a capital murder charge such matters should be dealt with by evidence not inference.

The prosecution case, based primarily on the evidence of Heather Barnes and a witness named Peart, was that the appellant armed with a shot-gun and police constable Reckord armed with a revolver had aggressively entered the house whereupon the unarmed Chester Barnes had fled from the house, run across the yard, jumped over a wall and tried to hide by a pigsty on the adjoining common. Heather Barnes said the appellant had fired at her brother in the yard and then he and police constable Reckord had pursued him over the wall on to the common from whence she heard more shots. Peart said he saw Chester Barnes jump the wall pursued by the police. Later he saw Barnes hiding by a pigsty, he put his hands in the air and both police officers fired at him. He heard Barnes say "do officer, don't shoot me, because me a cook". He said Barnes had nothing in his hands, and when he fell after the first shots the appellant shot the deceased in the belly.

The evidence of the pathologist showed that the deceased had been shot three times, once in the head by the handgun and twice by the shot-gun, once in the chest and lower neck and once on the inner side of the left forearm. There were no burn marks and this indicated that the shots were fired at more than 18" from the deceased's body.

The police evidence established that prior to the incident the accused had been issued with a shot-gun and nine cartridges and after the incident he returned the shot-gun, seven cartridges and one spent cartridge. Police constable Reckord handed in the revolver nine cartridges and three spent shells.

On the prosecution evidence therefore this was a case of two police officers shooting at and pursuing an unarmed man and finally killing him when he was pleading with them with his hands up. On this version of events both police officers were equally guilty of murder and the only reason why police constable Reckord did not also stand trial was that he had died since the incident.

After an inevitably unsuccessful submission of no case to answer the appellant presented his defence in a statement from the dock which was summarised thus in the judgment of the Court of Appeal:-

"The appellant made a statement from the dock, the gist of which was, that he and other men from Mandeville Police Station were ordered to a house in Greenvale Park where, he was told, a gunman was menacing the occupant. He was informed, he said, that Heather Barnes had reported that her brother Chester Barnes who had arrived from Kingston that morning armed with a firearm, was terrorising her. He said further that the Deputy Superintendent who had despatched them, cautioned that Barnes was a dangerous gunman. On arrival at the house, they took up positions as instructed. The appellant said he saw a man run from the

back door with an object which appeared to be a firearm. This man first hid behind a wall and took aim as if to fire. The appellant fired in his direction, whereupon the man ran off, jumped a wall and went into a common where the appellant lost sight of him. The police party went in the direction the man had taken. He heard gunshots and as he neared the location from which the shots were being fired, he saw the same man firing at the police. He returned the fire as did other police officers. The man ran off and was pursued. He continued by saying:

'We went in trace of him and still hear shots coming from a tree root in the common. Other policemen went in that direction, and I saw when Constable Reckord discharged three rounds at the man that morning, and he fell. We were looking around for the gun that we saw the man with in the bushes - searching and looking for the gun but we didn't find it. I went and searched the man and took from his pockets a kerchief and two live rounds of .38 cartridges was wrapped into a kerchief.'

Finally the appellant said that later that day when other policemen and himself returned to the scene, they were informed that relatives of the slain man recovered the gun but had thrown it away.

On the Crown's case, this amounted to a callous killing, an execution of Barnes by the appellant and another police officer, for the slain man had his hands raised in surrender but was nevertheless cut down. On the defence side, this was a plain case of self-defence. Policemen who were instructed to investigate a report of a dangerous gunman in their neighbourhood allegedly committing a breach of the Peace, were fired upon and had returned the fire resulting in his death."

At the conclusion of the defence case the only live issue for the jury was whether the prosecution had proved that the appellant had not killed in self-defence. The first ground of appeal before the Court of Appeal in Jamaica, and the only ground with which their Lordships are concerned, was that the trial judge had misdirected the jury on the issue of self-defence. No criticism can be made of the trial judge; his direction to the jury was in accordance with a recent decision of the Court of Appeal in Jamaica. The Court of Appeal likewise considered themselves bound by their previous decision and dealt succinctly with the appellant's submission:-

"A ground of appeal which may be dealt with shortly, challenged the learned trial judge's directions to the jury with respect to self-defence. Mr. Phipps submitted that the learned trial judge's direction that -

'A man who is attacked in circumstances where he reasonably believes his life to be in danger or that is in danger of serious bodily injury may use such force as on reasonable grounds he thinks necessary in order to resist the attack and if in using such force he kills his assailant he is not guilty of any crime even if the killing is intentional.'

was wrong in law as being against the weight of current authorities in the United Kingdom. The test suggested in the extract was the reasonable man's assessment of circumstances that would make defensive action necessary. He submitted that the true principle of law is that the test is the appellant's assessment of all the circumstances and the question of what is reasonable is merely to be used in determining whether the appellant's assertion as to the belief he holds is honest or not.

We accept that there appears to be two schools - the 'reasonable belief' on the one hand and the 'honest belief' on the other. Be that as it may, in our judgment this point is concluded by a recent decision of the Court R. v. Arthur Barrett (unreported) **SCCA 133**/84 delivered on 31st May, 1985, in which the same point was canvassed by the same counsel. We can see no

warrant whatever to depart from that decision or to amplify or alter the reasons on which it is based. We are content to say that the directions of the learned trial judge on this aspect of the case are in keeping with the law as we conceive it to be in this jurisdiction. This ground of appeal therefore fails."

It is accepted by the prosecution that there is no difference on the law of self-defence between the law of Jamaica and the English common law and it therefore falls to be decided whether it was correctly decided by the Court of Appeal in R. v. Gladstone Williams (**1984) 78 Cr App R 276** that the defence of self-defence depends upon what the accused 'honestly' believed the circumstances to be and not upon the reasonableness of that belief - what the Court of Appeal in Jamaica referred to as the 'honest belief' and 'reasonable belief' schools of thought.

There can be no doubt that prior to the decision of the House of Lords in D.P.P. v. Morgan [**1976] AC 182** the whole weight of authority supported the view that it was an essential element of self-defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds. No elaborate citation of authority is necessary but counsel for the respondent rightly drew attention to such 19th century authorities as Foster's Case (1825) 1 Lewin 187, R. v. Weston (1879) 14 Cox, CC. 346 and R. v. Rose (1884) 15 Cox, CC. in which the judges charged the jury that self-defence provided a defence to a charge of murder if the accused honestly and on reasonable grounds believed that his or another's life was in peril. It is however to be remembered that it was not until 1898 that an accused was able to give evidence in his own defence and it is natural that the judges in the absence of any direct statement of his belief from the accused should have focused attention upon the inference that could be drawn from the surrounding circumstances. Nevertheless, even after 1898 the law of self-defence continued to be stated as propounded by the judges in the 19th century: see R. v. Chisam (1963) 47 Cr. App. R. 130 in which 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."

In R. v. Fennell (1970) 54 Cr. App. R. 4S0 Widgery L.J., who was soon to succeed Lord Parker as Lord Chief Justice, said:-

"Where a person honestly and reasonably believes that he or his child is in imminent danger of injury, it would be unjust if he were deprived of the right to use reasonable force by way of defence merely because he had made some genuine mistake of fact."

The question then is whether the present Lord Chief Justice, Lord Lane, in Gladstone Williams was right to depart from the law as declared by his predecessors in the light of the decision of the House of Lords in D.P.P. v. Morgan.

Morgan was a case of rape and counsel for the prosecution has submitted that the decision of the majority turns solely upon their view of the specific intention required for the commission of that crime and accordingly had no relevance to the law of self-defence. It was further submitted that the question now before their Lordships was settled by an earlier decision of the Privy Council in R. v. Palmer [**1971] AC 814**. This submission is founded upon the fact that Lord Morris in giving the judgment of the Board set out a very lengthy passage from the summing up of the judge and commented:-

"Their Lordships conclude that there is no room for criticism of the summing up or of the conduct of the trial unless there is a rule that in every case where the issue of self-defence is left to the jury they must be directed that if they consider that excessive force was used in defence then they should return a verdict of guilty of manslaughter. For the reasons which they will set out their Lordships consider there is no such rule."

The only question raised for the determination of the Board was that stated by Lord Morris. It is true that, in the passage quoted from the summing up the judge had stated the ingredients of self-defence in the then conventional form of reasonable belief; but it was not this part of his summing up that was under attack nor did it receive any particular consideration by the Board. Their Lordships are unable to attach greater weight to the approval of the summing up than as indicating that it was in conformity with the practice of directing juries that the accused must have reasonable grounds for believing that self-defence was necessary.

In D.P.P. v. Morgan each member of the House of Lords held that the mens rea required to commit rape is the knowledge that the woman is not consenting or recklessness as to whether she is consenting or not. From this premise the majority held that unless the prosecution proved that the man did not believe the woman was consenting or was at least reckless as to her consent they had failed to prove the necessary mens rea which is an essential ingredient of the crime. Lord Edmund Davies in his dissent referred to the large body of distinguished academic support for the view that it is morally indefensible to convict a person of a crime when owing to a genuine mistake as to the facts he believes that he is acting lawfully and has no intention to commit the crime and therefore has no guilty mind. He expressed his preference for this moral approach but felt constrained by the weight of authority, including the cases on self-defence, to hold that the law required the accused's belief should not only be genuine but also based upon reasonable grounds.

In R. v. Kimber (**1983) 77 Cr. App. R. 225** the Court of Appeal applied the decision in Morgan to a case of indecent assault and held that a failure to direct the jury that the prosecution had to make them sure that the accused had never believed that the woman was consenting was a misdirection. Lawton L.J. in the course of his judgment rejected the submission that the decision in Morgan was confined to rape and clearly regarded it as of far wider significance. Commenting upon an obiter dictum in Phekoo [**1981] 1 W.L.R. 1117** he said:-

"... The court went on, after referring to Morgan's case to say, clearly obiter, 'it seems clear to us that this decision was confined and intended to be confined to rape': per Hollings J. at p. 1127. We do not accept that this was the intention of their Lordships in Morgan's case. Lord Hailsham started his speech by saying that the issue of belief was a question of great academic importance in the theory of English criminal law."

In R. v. Gladstone Williams (supra) the decision in Morgan was carried a step further and in their Lordships' view to its logical conclusion. The facts and the grounds of the decision are adequately summarised in the headnote:-

"One M. saw a black youth rob a woman in a street. He caught the youth and held him, but the latter broke from M.' s grasp. M. caught the youth again and knocked him to the ground. The appellant, who had only seen the later stages of the incident, was told by M. that he, M. was arresting the youth for mugging a woman. M. said that he was a police officer, which was untrue, so when asked by the appellant for his warrant card, he could not produce one. A struggle followed and the appellant assaulted M. by punching him in the face and was charged with assault occasioning actual bodily harm contrary to section 47 of the Offences against the Person Act 1861. His defence was that he honestly believed that the youth was

being unlawfully assaulted by M. The jury were directed that, on the assumption that M. was acting lawfully, the appellant's state of mind on the issue of defence of another was to be determined by whether the appellant had an honest belief based on reasonable grounds that reasonable force was necessary to prevent a crime. The appellant was convicted and appealed on the ground that the judge had misdirected the jury.

Held, that the jury should have been directed that, first, the prosecution had the burden of proving the unlawfulness of the appellant's actions; secondly, if the appellant might have been labouring under a mistake as to the facts, he was to be judged according to his mistaken view of the facts, whether or not that mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellant's belief was material to the question whether the belief was held by him at all. If the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant. Accordingly, the appeal must be allowed and the conviction quashed."

In the course of his judgment the Lord Chief Justice, Lord Lane, discussing the offence of assault said:-

"The mental element necessary to constitute guilt is the intent to apply unlawful force to the victim. We do not believe that the mental element can be substantiated by simply showing an intent to apply force and no more."

And later in the judgment he expressly disapproved the decision of the Divisional Court in Albert: v. Lavin (1981) 72 Cr. App. R. 178 in which it was said that the word "unlawful" was tautologous and not part of the definitional element of assaulting a police officer in the course of his duty. In so doing Lord Lane was expressing the same view of Albert: v. Lavin that had been previously expressed by Lawton L.J. in R. v. Kimber.

The common law recognises that there are many circumstances in which one person may inflict violence upon another without committing a crime, as for instance, in sporting contests, surgical operations or in the most extreme example judica1 execution. The common law has always recognised as one of these circumstances the right of a person to protect himself from attack and to act in the defence of others and if necessary to inflict violence on another in so doing. If no more force is used than is reasonable to repel the attack such force is not unlawful and no crime is committed. Furthermore a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike.

It is because it is an essential element of all crimes of violence that the violence or the threat of violence should be unlawful that self-defence, if raised as an issue in a criminal trial, must be disproved by the prosecution. If the prosecution fail to do so the accused is entitled to be acquitted because the prosecution will have failed to prove an essential element of the crime namely that the violence used by the accused was unlawful.

If then a genuine belief, albeit without reasonable grounds, is a defence to rape because it negatives the necessary intention, so also must a genuine belief in facts which if true would justify self-defence be a defence to a crime of personal violence because the belief negatives the intent to act unlawfully. Their Lordships therefore approve the following passage from the judgment of Lord Lane in Gladstone Williams at p. 281 as correctly stating the law of se1f-defence:-

"The reasonableness or unreasonableness of the defendant's belief is material to the question of whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, is neither here nor there. It is

irrelevant. Were it otherwise, the defendant would be convicted because he was negligent in failing to recognise that the victim was not consenting or that a crime was not being committed and so on. In other words the jury should be directed first of all that the prosecution have the burden or duty of proving the unlawfulness of the defendant's actions; secondly, if the defendant may have been labouring under a mistake as to the facts, he must be judged according to his mistaken view of the facts; thirdly, that is so whether the mistake was, on an objective view, a reasonable mistake or not.

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 powerful 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."

Looking back, Morgan can now be seen as a landmark decision in the development of the common law returning the law to the path upon which it might have developed but for the inability of an accused to give evidence on his own behalf. Their Lordships note that not only has this development the approval of such distinguished criminal lawyers as Professor Glanville Williams and Professor Smith: see Textbook of Criminal Law (2nd Ed.) at pp. 137-138 and Smith and Hogan, Criminal Law (5th Ed.) at pp. 329-330; but it also has the support of the Criminal Law Revision Committee: see 14th Report on Offences against the Person (1980) Cmnd. 7844; and of the Law Commission: see The Law Commission Report (1985) No. 143, Codification of the Criminal law.

There may be a fear that the abandonment of the objective standard demanded by the existence of reasonable grounds for belief will result in the success of too many spurious claims of self-defence. The English experience has not shown this to be the case. The Judicial Studies Board with the approval of the Lord Chief Justice has produced a model direction on self-defence which is now widely used by judges when summing up to juries. The direction contains the following guidance:-

"Whether the plea is self-defence or defence of another, if the defendant may have been labouring under a mistake as to the facts, he must be judged according to his mistaken belief of the facts: that is so whether the mistake was, on an objective view, a reasonable mistake or not."

Their Lordships have heard no suggestion that this form of summing up has resulted in a disquieting number of acquittals. This is hardly surprising for no jury is going to accept a man's assertion that he believed that he was about to be attacked without testing it against all the surrounding circumstances. In assisting the jury to determine whether or not the accused had a genuine belief the judge will of course direct their attention to those features of the evidence that make such a belief more or less probable. Where there are no reasonable grounds to hold a belief it will surely only be in exceptional circumstances that a jury will conclude that such a belief was or might have been held.

Their Lordships therefore conclude that the summing up in this case contained a material misdirection and answer question l(a) by saying 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.

It follows from this that their Lordships answer the second part of the question l(b) in the negative.

Their Lordships received a powerful submission from the prosecution that notwithstanding the misdirection they should nevertheless apply the proviso to **section 14(1) of the Judicature (Appellate Jurisdiction) Act** and dismiss the appeal on the ground that no substantial miscarriage of justice had actually occurred. It was submitted that the jury must have accepted the evidence of Peart that the deceased had been shot down in the act of surrender and rejected the accused's account that he was killed in a gun battle, which the judge had clearly directed them would amount to self-defence. Their Lordships have given anxious consideration to this submission for there is much force in it. If on the facts as they appear from the summing up the judge had left the matter to the jury on the basis of a choice between the two accounts then any misdirection as to the reasonableness or otherwise of the appellant's belief would have been of only academic interest.

However the judge did not leave it to the jury as a choice between the two accounts, for he clearly thought that there was a further possibility, namely that the appellant mistakenly believed that the deceased was armed and would shoot him if he did not shoot first. It is not readily apparent why the judge regarded this as a possible view of the facts, but their Lordships have no transcript of the evidence and must accept the view of the judge that the facts were open to such an interpretation. Directing the jury on this alternative the judge said:-

"The other situation is this, if you say you don' t find that he had a gun, but we are satisfied that the accused reasonably believed that the man had a gun and that he reasonably apprehended danger to himself because of the belief which he held, and if in those circumstances he used reasonable force to prevent that danger which he reasonably apprehended, in those circumstances he would also be entitled to acquittal. And if you are in doubt about that as well, he must also be acquitted. If you are in doubt about whether or not he reasonably believed that the man had a gun, you must acquit him as well. I don't think I can put it any plainer.

So then, what are the verdicts which are open to you on this case? There are only two, namely, guilty of murder as charged, or not guilty of murder. Those are the only two verdicts that I leave to you on these facts.

One other thing before I ask you to retire, when you come to consider - remember I told you that you must consider all circumstances of the case, all the circumstances of the case includes all the circumstances that exist in the Jamaica of today, you cannot divorce that from your mind, because when you come to consider the question of reasonableness, that is a factor to be considered; the Jamaica today that we live in. But when I tell you that, you must consider that, it doesn't mean that a man is entitled to say that because the Jamaica in which we live today many people are armed with guns and many people are out there with guns, a man can just come and say I believe because we live in Jamaica today and so many guns are around and firing willy-nilly, he must reasonably, that is the test, reasonably believe and he must believe that he had reasonable cause to act as he did. So it is not just a matter of saying to yourselves, plenty men have gun in Jamaica today, so when I see a man running I believe him have a gun and shoot him down. That is not the test, the test is reasonableness, but of course, you consider it, the situation in the country today when you come to consider the reasonableness of his belief."

In this passage the judge is emphasising time and again that the appellant's belief had to be held on reasonable grounds, and it was the final passage of his summing up before the jury retired. As counsel for the appellant said the jury retired with the test of reasonable belief ringing in their ears. In these circumstances their Lordships cannot feel with that utter certainty that is required in a case of capital murder that the jury would necessarily have returned the same verdict if they had been directed in terms of 'honest' as opposed to 'reasonable' belief.

Before parting with this appeal there is one further matter upon which their Lordships wish to comment. The appellant chose not to give evidence but to make a statement from the dock which, because it cannot be tested by cross-examination, is acknowledged not to carry the weight of sworn or affirmed testimony. Their Lordships were informed, to their surprise, by counsel for the prosecution, that it is now the practice, rather than the exception, in Jamaica for an accused to decline to give evidence in his own defence and to rely upon a statement from the dock; a privilege abolished in this country by **section 72 of the Criminal Justice Act 1982.** Now that it has been established that self-defence depends upon a subjective test their Lordships trust that those who are responsible for conducting the defence will bear in mind that there is an obvious danger that a jury may be unwilling to accept that an accused held an 'honest' belief if he is not prepared to assert it in the witness box and subject it to the test of cross-examination.