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KESTY TA'AFIA

v.

REGINAM

B [COURT OF APPEAL, 1967 (Gould V.P., Marsack J.A., Bodilly J.A.), 7th, 18th July]

Criminal Jurisdiction

Criminal law—evidence and proof—previous statements by witness inconsistent with his testimony—direction to assessors.

C *Criminal law—direction to assessors—previous statements by witness inconsistent with his testimony.*

Criminal law—defence—self-defence—excessive force—appropriate verdict.

In relation to a witness aged fifteen years whose evidence was inconsistent in some respects with previous statements made by him, the trial judge directed the assessors that his evidence should be treated with reserve,

D and that where it was not corroborated against that of the accused on the same point it would be far safer and wiser to consider the case as if the facts were as stated by the accused.

Held: This was a fair and adequate direction.

The appellant was found to have struck the deceased four blows with a knife, the first of which the trial judge held to have been struck in self

E defence: the three further wounds (one of which caused the death of the deceased) the trial judge held to have been inflicted after the danger that there might have been to the life of the appellant had passed, though the appellant may well have been acting under grievous provocation. The appellant was convicted of manslaughter.

Held: 1. On the question of self defence the finding of the trial judge

F amounted to a positive finding that the force used by the appellant was in the circumstances excessive.

2. Upon such a finding, which was supported by ample evidence, the appropriate verdict was one of manslaughter.

Cases referred to: *Ram Lal v. R.* Criminal Appeal No. 3 of 1958 — unreported: *Gyan Singh v. R.* (1963) 9 F.L.R. 105: *R. v. Biggin* [1920] 1 K.B.213; 14 Cr. App.R. 87: *R. v. Howe* (1958) 100 C.L.R. 448: *Selamani v.*

G *Republic* [1963] E.A. 442.

Appeal from a conviction of manslaughter.

[Editorial note: The question of excessive force in self defence has more recently been considered by the Privy Council in *Palmer v. Reginam* [1971] 1 All E.R. 1077].

J. N. Falvey for the appellant.

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B. A. Palmer for the respondent.

The facts sufficiently appear from the judgment of the court.

Judgment of the Court (read by MARSACK J.A.): [18th July, 1967]—

This is an appeal against conviction for manslaughter entered at the Supreme Court at Suva on the 8th May, 1967. The appellant was charged with murder and the trial took place before a Judge and three assessors. Two of the assessors expressed the opinion that the appellant was not guilty of any offence. One assessor gave the opinion that the appellant was guilty of manslaughter; when asked the reason for his opinion he replied that he considered that the appellant had acted under provocation. The learned trial Judge found the appellant guilty of manslaughter, and passed sentence of three years' imprisonment. The appeal is against conviction only and not against sentence.

The facts may be shortly stated. At a dance held at Wailoku on the 14th January, 1967, a fight broke out between one Mavono and the deceased Josefa Vosawale. The deceased kicked and punched Mavono who was rendered unconscious by the blows. He was carried, still unconscious, to a dimly-lit bure nearby. The appellant was one of the three persons in the bure. The deceased entered the bure and, apparently without reason, punched the appellant violently about the face. The appellant was much slighter in build than the deceased. The deceased then grappled with the appellant, who took a penknife from his pocket, opened its single blade and stabbed the deceased four times. The deceased was taken to hospital, where he died on the 15th of January, the cause of death being haemorrhage from a penetrating incised wound of the chest. Of the four wounds, two were described in the medical evidence as "vertical incised wounds lying parallel to each other on the back of the left side of the chest". The medical witness further expressed the opinion that the fatal wound was the inner of these two wounds.

At the trial the infliction of the wounds by the appellant was not denied. It was, however, strongly urged that the appellant struck the blows justifiably in self-defence against a wanton attack by a powerful aggressor. Counsel specifically informed the Judge and the assessors that a plea of provocation formed no part of the defence.

The Judge proceeded to find that only the first wound was inflicted in lawful self-defence, and the last three, including the wound which caused death, were inflicted after the danger that there might have been to the life of the appellant had passed. He further found that the accused may well have been acting under grievous provocation when he struck the additional blows. For that reason he entered a verdict of manslaughter.

The notice of appeal set out four grounds upon which the appeal is based. These read:

(i) *THAT* the learned trial Judge in his summing up and in his judgment drew assumptions of fact which were not supported by any credible evidence;

(ii) THAT the learned trial Judge misdirected himself as to the weight to be attached to the evidence of the prosecution witness *GEORGE MASAKE;*

(iii) *THAT* the finding of the learned trial Judge in the circumstances of this trial an act or acts done in lawful self-defence was or were immediately followed by other acts done under provocation (the latter never having been asserted by the appellant (involved a conception which was not supported by the evidence and is not sustainable in law;

(iv) THAT the learned trial Judge in rejecting the opinions of the majority of the assessors attributed to that majority a view of the facts which could not be deduced from their answers to the questions upon which their advice was sought.

In the course of his judgment the learned trial Judge says:

> " I have come to the conclusion that there is some material in this case to support the view that the Crown has failed to prove beyond reasonable doubt that the initial use of a penknife by the accused in self-defence, in the particular circumstances of this case, was unjustified.
>
> In so far as the initial use of the penknife in self-defence by the accused was concerned I do not consider there are sufficient grounds for me to decline to accept the opinion of the Assessors.
>
> But I use the term "the initial use of the penknife" advisedly, because in my view, on the evidence before me, entirely different considerations arise in respect of the second, third and fourth stab wounds inflicted by the accused.'

In the result the Judge found himself unable to accept the majority opinion of the assessors; and in accordance with the principles set out in the decision of this Court in *Ram Lal v. R.* (Cr. App. 3/58) explained what he regarded as the very good reasons, reflected in the evidence, for differing from their opinion on a matter of fact.

The first ground argued before us was that concerned with the evidence of the witness George Masake. Counsel contended that the evidence of this witness, who was a boy of 15, should have been ignored, as it was inconsistent on material points with previous statements made by him, and it was not corroborated by the evidence of any other witness. In the course of his summing up the learned trial Judge directed the assessors most carefully that George Masake's evidence should be treated with reserve, and referred to the discrepancies between his evidence at the trial and that given at the preliminary hearing before the magistrate. He then proceeded:

> " . . . . . where it is a question of deciding whether to accept the evidence of George Masake on a point where his evidence is not corroborated against that of the accused on the same point it would be far safer and wiser to consider the case as if the facts on that particular point were as stated by the accused. This has particular importance when considering the evidence before us of how the wounds were actually inflicted on the deceased."

This, in our opinion, was a fair and adequate direction. The law on this point was carefully considered by this Court in *Gyan Singh v. Reginam* (1963) 9 F.L.R. 105 where it was stated, at p.107: —

> "It is the duty of the trial Judge to warn the Assessors, and to keep in mind himself, that it is dangerous to accept sworn evidence which is in conflict with statements previously made by the same witness; or, at least, that such evidence should be submitted to the closest scrutiny before acceptance. It is, however, still the duty of the Assessors, and of the Judge himself, after full attention has been paid to this warning, to determine whether or not the evidence given before them in Court at the trial is worthy of credence and, if so, what weight should be attached to it."

We can find nothing either in the summing up or in the judgment which offends against this principle. Accordingly we consider that there is no merit in this ground of appeal. A

The first and third grounds were argued together and formed the basis of the greater part of the submissions made in support of the appeal. Counsel urged that as the initial use of the penknife by the appellant to beat off the unprovoked attack made on him was justified as self-defence, then all the blows were similarly justified. The evidence of the appellant himself — and the learned trial Judge found that in general, he was a truthful witness — was to the effect that he had desisted from using the penknife as soon as he realised that the danger to him had passed. The appellant said he had stopped stabbing when the deceased let him go. Counsel criticised the finding of the learned trial Judge that "after the first stab wound was inflicted the deceased half turned and moved a little away from the accused". He contended that there was no evidence to support such a finding. It would appear, however, that in the course of his evidence the appellant gave a demonstration as to how the wounds had been inflicted, and this demonstration would no doubt have been in the Judge's mind when he made his findings of fact. B C

Moreover in his own evidence the appellant said:

> "He was still pushing me down and I stabbed him here — like this — (Witness shows a stabbing wound under his assailant's left armpit in the side of his chest) — and as I pushed him away like this and he turned like this I stabbed him again like this in his back." D

There is, in our view, no significant variation between the appellant's own account and the Judge's finding of fact as to what took place.

In his summing up the learned trial Judge set out, in our opinion correctly, three conditions which must be present in order to justify the killing of a person in self-defence. The first of these is that the accused person used no greater force than was reasonably necessary in the circumstances. It is quite clear from his judgment in the Court below that the learned trial Judge held against the appellant on this point. He found that, though there was justification for the striking of the first blow, there was none for the infliction of the two stab wounds in the back of the deceased. The medical evidence makes it clear that it was one of these two wounds at the back of the chest which resulted in the death of the deceased. Though the learned trial Judge brought in, unnecessarily we think, the question of provocation, we regard this as a positive finding that the force used by the appellant was in the circumstances excessive. E F

In our opinion there was ample evidence justifying this finding. It is not incumbent on us in this appeal to consider the question of whether a person is entitled to use a knife to repel an attack made by an unarmed person, as in the circumstances of this case the trial Judge has held that the initial use of the weapon was justified. But a person who has recourse to the use of such a weapon must be careful to restrict its use to the removal of the immediate danger to life and limb. It is in appellant's favour that he thought, on reasonable grounds, that the deceased had already killed Mavono and that he had occasion to fear for his own life. It may well be that due allowance for that fact was made by the learned trial Judge in his finding that the first blow of the knife was justified in self-defence. However, considering the whole of the evidence, and in G H

particular that of the appellant himself, we are of the opinion that there was ample evidence to support a finding that the degree of force used by
A the appellant was excessive and beyond that which he was justified in using in self-defence.

Upon this finding the correct verdict in our view, was that entered by the learned trial Judge, manslaughter. In *R. v. Biggin* 14 Cr.App.R. 87 at p.92, the Lord Chief Justice quoted with approval the summing up of the Judge at the trial in the Court below, to the effect that if the appellant
B exceeded the necessities of the occasion in resisting violence that would justify a verdict of manslaughter.

In *R. v. Howe* (1958) 100 C.L.R. 448, the High Court of Australia considered the question of what crime is committed by an accused person who used forceful violence against his assailant, which went beyond what was needed for his protection, or what the circumstances could cause him
C reasonably to believe to be necessary for his protection. At p.461 Dixon C.J. says:

> "There is no clear and definite judicial decision providing an answer to this question. But it seems reasonable in principle to regard such a homicide as reduced to manslaughter, and that view has the support or not a few judicial statements to be found in the reports."

D This view received the approval of four of the five judge, who comprised the Court.

In *Selamani v. Republic* [1963] E.A. 442, the Court of Appeal for Eastern Africa held, following Biggin and Howe, that:

> "If the force used is excessive but if the other elements of self-defence
E are present there may be a conviction of manslaughter."

We respectfully adopt the reasoning upon which these judgments are based and consider it applicable to this present appeal.

The fourth ground of appeal does not require detailed consideration, as it has been substantially covered by what we have said regarding the cogency of the reasons which the learned trial Judge found reflected in
F the evidence for differing from the opinion of the majority of the assessors.

For these reasons the appeal is dismissed.

Appeal Dismissed.