IN THE SOLOMON ISLANDS

COURT OF APPEAL

Criminal Appeal Case No. 3 of 1991

Criminal Jurisdiction

Connolly P

Savage JA

Goldsbrough JA

BETWEEN: **JIMMY KWAI**

Appellant

AND: **REGINAM**

Respondent

JUDGMENT OF THE COURT

Delivered the day of 1991.

On 22nd February, 1991 the applicant was convicted before the High Court of the murder of John Faeni in Kobito 2 on 28th September, 1990. On 27th February, 1991 he applied for leave to appeal against conviction. His argument is, essentially, that the law relating to self-defence was not correctly applied.

Faeni died of single stab wound in the back and there is no doubt that this wound was inflicted by the applicant. The circumstances may be shortly stated. A singing group had been performing at Kobito 2 that day and many people had attended. At one stage the deceased and his brother Alick were asked to move from an area being used by women and children. After this a fight broke out and the deceased's wife saw that he was about to get involved and sent his sister to get him. The circumstances of the fight and of the moving of the deceased and his brother from the women and children's area are obscure but at that stage they do not appear to have involved the applicant. He himself gave

evidence that he was involved with others in pushing the deceased and Alick away and this seems to have been at a later stage. However, on his account, critical events occurred when he was pushed by someone whom he did not identify and then by the deceased. He says that they fought and fell and rolled down the slope which led up to where the singing group was performing. His evidence was that where the deceased and he finished up was well down the slope and in a dark area. Ward C.J. who tried the case viewed the scene and found as a fact that if the lights were on the top of the hill the areas low down the slope would receive very little light and that the position where the stabbing occurred is well down the slope and, depending on the height at which the lights were mounted, would receive no or very little light.

There was one eyewitness of the stabbing, one Kalo. Kalo said that the deceased's wife, who also gave evidence was standing nearby and in assessing Kalo's evidence the learned Chief Justice was strongly influenced by the fact that the deceased's wife said that she could not see clearly and that the place was dark. Kalo however described the stabbing as having occurred when the deceased struck the applicant, after which they struggled and eventually the appellant drew a knife from his belt and stabbed the deceased once in the back with an underarm blow and while the latter was standing. His Lordship rejected the evidence of Kalo. He said that he had given a firm account of the incident but had varied the details more than once. Above all however there was the fact of the poor visibility as had been sworn to by the deceased's wife.

The applicant's version is that when the deceased and he fell down the slope they finished in a position in which the deceased was on top of him and squeezing his throat. He swore that it was dark and that he could not cry out, that he was scared he would be killed and remembering the knife pulled it from his trousers and swung one fatal blow at the deceased's back. He said,

> *"I meant to save myself and so I swung it at him ..... I used the knife to 'off him'. I did not mean to kill him only to release me. The dead man was a tall man, taller than me. He was too strong for me to push him off. If I had not I would have died because he held my neck and I couldn't shout. I heard John Kalo's evidence. He was lying when he said I stabbed him as I stood up. When man was on top of me I shouted but he pressed my neck and I made no sound".*

He also said that people were around but they were in the light and the facts as set out by the learned Chief Justice indicates that the area of light was well up the hill from where the fatal stabbing occurred.

The learned Chief Justice correctly directed himself that when self-defence is raised the burden is on the prosecution to disprove it beyond reasonable doubt. He went on to say that he was not satisfied that the prosecution witnesses had disproved the evidence of the first accused, the applicant, that he was lying on the ground at the time and acted in self-defence. Indeed at a later stage His Lordship observed -

> *"I accept the accused's account that he was on the ground being attacked by a larger man. The other man had him by the throat and the accused feared he might be killed."*

His Lordship gave himself two further directions which are critical in this case. The first one was that even on the applicant's account, the court must decide if the force used in self-defence was reasonable in the circumstances. The second was that the test of whether what the applicant did was reasonable is not, as his Lordship put it, entirely objective.

Mr Radclyffe submitted that both these directions were erroneous in point of law relying on the decision of the Court of Appeal, Criminal Division in *R. -v- Williams* [1987] 3 All E.R. 411; 78 Cr. App. R. 276 approved by the Privy Council in *Beckford -v- R.* [1988] A.C. 130; [1987] 3 All E.R. 425.

Beckford was a case in which, at the conclusion of the evidence, the only live issue for the jury was whether the prosecution had proved that the appellant had not killed in self-defence (see All E.R. at p. 428 c). The trial judge directed the jury that a man who is attacked in circumstances where he reasonably believes his life is 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 that, if in using such force he kills his assailant, he is not guilty of any crime even if the killing is intentional. Their Lordships said that prior to the decision of the House of Lords in *Morgan* [1975] 2 All E.R. 347, [1976] A.C. 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 had been attacked or in

imminent danger of being attacked but also that such belief was based on reasonable grounds.

The injustice of convicting 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 had become apparent. In *Morgan* the majority of the House of Lords held that the prosecution must prove that the man did not believe, on a charge of rape, that the woman was consenting or was at least reckless as to her consent and in *Kimber* [1983] 3 All E.R. 316, [1983] 1 W.L.R. 1118 the Court of Appeal applied the decision in *Morgan* to a case of indecent assault and held that the jury must be directed that they must be satisfied that the accused had never believed that the woman was consenting. Finally in *Williams* (supra) the jury had been directed that for a defence of honest belief that reasonable force was necessary to prevent an assault on another, that belief must be based on reasonable grounds. It was held by the Court of Appeal that if the prisoner 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. It was further held that the reasonableness or unreasonableness of the prisoner'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. These propositions, which derive from the judgment of Lord Lane C.J., were expressly approved by the Privy Council in *Beckford* at All E.R. P. 431f. In that passage Lord Lane had said that in a case of self-defence, if the jury comes to the conclusion that the defendant believed, or may have believed that he was being attacked and that force was necessary to protect himself, then the prosecution has not proved their case. It is apparent that Ward C.J. came to the conclusion that the applicant believed, or may have believed that he was in a life threatening situation. As is set out above he finds in terms that the accused feared that he might be killed. Later in the same paragraph his Lordship said -

> *"I accept that he may have been frightened".*

It is possible that His Lordship's earlier reference to the accused's fear that he might be killed was rather a statement of his evidence than a finding of fact but the lesser finding

that he may have been frightened is sufficient fairly to raise self-defence bearing in mind the burden of proof which was upon the Crown.

His Lordship then went on to consider whether the applicant's response in terms of the force he used was reasonable. Honest belief in a case of self-defence may be relevant at two points at least. In many cases it may be apparent, on a calm appraisal of the facts after the event that the accused was not being attacked at all. The circumstances may be such that the jury entertains a reasonable doubt as to whether he genuinely believed that to be the case, or to put it another way concludes that he may well have entertained such a genuine belief. But, as Ward C.J. correctly points out, the force used must not be disproportionate to the situation as the accused saw it. In *Williams* at All E.R. p. 415h the court regarded the following passage from the Criminal Law Revision Committee's 14th report (Cmnd 7844 (1980) as a correct statement of law:

> *"The common law defence of self-defence should be replaced by a statutory defence providing that a person may use such force as is reasonable in the circumstances as he believes them to be in the defence of himself or any other person."*

The Privy Council in *Beckford* at All E.R. p. 432a would seem to have taken the same view.

It is at this point that we find ourselves in respectful disagreement with the learned Chief Justice. The circumstances in which the applicant found himself were, as he swears, that he was in imminent danger of being choked to death by a larger man who was sitting on him and who had such a grip of his throat that he was unable to utter a sound. He was in darkness well down the hill from the other people and his knowledge, to which the Chief Justice refers, that there were many people around was small comfort to him unless he was heard or seen and that in a very short space of time. In *Palmer -v- The Queen*]1971] A.C. 814, 832A; [1971] 2 W.L.R. 831, 844A Lord Morris of Borth-y-Gest delivering the opinion of the Privy Council said:-

> *"If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the*

> *exact measure of this necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self-defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence."*

In our judgement, it is not sufficient to say that the force used was not reasonable. It is impossible to conclude, beyond a reasonable doubt, that it was not reasonable in the circumstances as the applicant believed them to be. And it is impossible to say, on the learned Chief Justice's findings that what the accused did was not by way of self-defence.

With all respect and after carefully re-reading the reasons for judgment of the learned Chief Justice we are unable to come to the conclusion. We would therefore grant leave to appeal, allow the appeal, set aside the conviction and enter a verdict of not guilty. The court therefore grants leave to appeal, allows the appeal, sets aside the conviction and orders that a verdict of not guilty be entered.

The decision in which we have referred makes it clear that the reasonableness of the belief which a prisoner sets up in raising self-defence may prove a potent factor in determining whether in truth he entertained any such belief at all. That however is not this case for, as has been seen, the Crown failed, in the judgment of his Lordship, to exclude the critical belief.

By the Court

Goldsbrough JA.