

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA (Crim) 24/12

Ind 69/10

C#06393/2009

**The Right Hon Sir John Chadwick, President
The Hon Elliott Mottley, Justice of Appeal
The Right Hon Sir Anthony Campbell, Justice of Appeal**

ON APPEAL FROM THE GRAND COURT

BETWEEN

HM THE QUEEN

Respondent

-and-

RABE WELCOME

Appellant

Mr Thomas Lowe QC and Mr John Furniss appeared for the Appellant, Rabe Welcome
Mr Michael Snape instructed by the Director of Public Prosecutions appeared for the Crown

Hearing: 12 November 2013
Judgment: 21 November 2013

JUDGMENT

Revised from transcript and Approved

Released: 26 November 2013

Sir John Chadwick, President:

1. On 28 June 2012 the applicant, Rabe Welcome, was convicted before Justice Henderson and a jury on a charge of unlawful and malicious wounding contrary to section 204 of the Penal Code (2007 revision). On 19 October 2012 he was sentenced to six months' imprisonment. He has not yet served that sentence

because, on 25 October 2012, without objection from the Crown, he was granted bail pending his application and appeal to this Court against conviction and sentence.

2. The incident which gave rise to the offence with which the applicant was charged took place on 17 June 2009 at about one o'clock in the morning at a filling station known as "On the Run" on the Shamrock Road. The complainant, Adolphus Myrie, testified that he had stopped his car at that filling station in order to purchase some food, cigarettes and a lighter. He stayed in his car while his girlfriend went inside the shop to purchase those items. She returned, after about five minutes, but without the lighter. She was reluctant to go back into the shop to purchase that item because, as she said, she had been harassed by three men who were in the shop. One of those men was the applicant, Mr Welcome, an off-duty police officer. The other two were his colleagues.
3. The complainant and his girlfriend went back into the shop together. The complainant testified that the three men began to make offensive remarks. There was a heated verbal exchange between the complainant and the applicant. The complainant's girlfriend managed to get the complainant out of the shop and back into his car. The three men came out of the shop. The appellant pulled on the car door in order to open it; while the other two men stood behind the car to prevent it from leaving. While opening the car door the applicant said he was an undercover police officer and he needed to search the car.
4. The complainant got out of the car, armed himself with a machete which had been on the back seat, and pointed it at the three men saying "back off". He was persuaded to put the machete down and his girlfriend sensibly removed it. At that stage, the complainant said that the applicant addressed him in these terms: "Since you put the machete down let's talk like a man". After that, as the complainant asserted, the applicant grasped his neck, threw him to the ground, pounded his head on the cement and broke his hand. The medical evidence established that the complainant had suffered a broken arm and some lacerations.
5. The judge directed the jury that there were two issues of substance for them to determine. First, whether the applicant was acting, as he contended, in

self-defence; and, second, whether he was using reasonable and not excessive force in the course of making an arrest.

6. In the course of his sentencing remarks the judge said this:

“I instructed the jury that Myrie had been guilty of two arrestable offences on the evening in question and Mr. Welcome did indeed, as a serving police officer, have jurisdiction to make an arrest. I also instructed them that he could nevertheless be convicted of wounding if the jury were satisfied that Mr. Welcome had used excessive force beyond that which was reasonable in the circumstances in making the arrest. The jury found Mr. Welcome guilty. Of course it is not possible to determine upon which of those two heads of criminal liability they were convinced.”

7. The judge, quite properly, had directed the jury in the course of his summing up that it was for them to decide whether the applicant was intending to make an arrest or whether, as the Crown submitted, he simply intended to take his revenge on the complainant. He further directed the jury, again quite properly, that if they were not sure that the applicant was not intending to make an arrest, then they must go on to consider whether the applicant was permitted by law to effect the arrest he was intending to make. He went on to say this:

“Now this second question, if he was intending to make an arrest, was he entitled to use force? Rabe Welcome was entitled to use force to arrest Adolphus Myrie if Mr. Myrie was himself forcibly resisting arrest. That is the second question you must decide on this aspect. If you are sure that Mr. Myrie was not himself using force to resist the arrest then you need not consider the unlawful arrest offence further. If you are not sure, you must go on to consider the third question; whether the degree of force used by Mr. Welcome to make the arrest was reasonable. So if you conclude that Mr. Welcome was intending to make an arrest and that Mr. Myrie was forcibly resisting, you then must consider whether the force used by Mr. Welcome to make the arrest was reasonable. In considering whether the degree of force used by Mr. Welcome was reasonable, you must consider all the circumstances including in particular these things:

First, the degree of force being used by Mr. Myrie to resist the arrest. You have to measure the degree of force used by Mr. Welcome to make the arrest against the degree of force used to resist the arrest.

Second, whether the force used by Mr. Welcome was necessary to overcome that resistance.

Third, the gravity of the two offences for which Mr. Myrie was being arrested.

You must examine these circumstances from the point of view of this defendant, from the point of view of Mr. Welcome at the time, taking into account any such facts as would have been known to him at the time of the

arrest. Put yourself in his shoes. If you are sure that the degree of force used by Mr. Welcome was unnecessary to the making of the arrest, or sure that the degree of force was unreasonable in the circumstances, you should reject the lawful arrest offence. If you are not sure, you must find Mr. Welcome not guilty”.

8. The short point raised on behalf of the applicant is that his conviction is unsafe because, as a matter of law, that was not a sufficient direction to enable the jury to understand their task in relation to the issue whether the use of force in effecting arrest was unlawful.

9. Section 204 of the Penal Code 2010 revision is in these terms.

“204. A person who unlawfully and maliciously wounds or inflicts any grievous bodily harm upon any other person either with or without any weapon or instrument is guilty of an offence and liable on conviction to imprisonment for seven years”.

On a charge under that section, it is for the prosecution to satisfy the jury so that they are sure that the accused, in wounding or inflicting grievous bodily harm upon another person, acted unlawfully and maliciously; that is the necessary ingredient in the offence. As Lord Lane, Chief Justice, observed in the *Queen against Gladstone Williams* [1984] Crim LR 163; 78 Crim App Rep 276 at 279:

“There are circumstances in which force may be applied to another lawfully. Taking a few examples: first where the victim consents, as in lawful sports, the application of force to another will, generally speaking, not be unlawful; secondly, 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; thirdly, by virtue of s.3 of the Criminal Law Act 1967, a person may use such force as is reasonable in the circumstances in the prevention of crime or in effecting or assisting in the lawful arrest of an offender or suspected offender or persons unlawfully at large. In each of these cases the defendant will be guilty if the jury are first of all sure he applied force to the person of another and secondly, that he had the necessary mental element to constitute guilt. The necessary mental element to constitute guilt is the intent to apply unlawful force to the victim. We do not believe that the mental element could be substantiated by simply showing an intent to apply force and no more.

What then is the situation if the defendant is labouring under a mistake of fact as to the circumstances? What if he believes, but believes mistakenly, that the victim is consenting or that it is necessary to defend himself or that a crime is being committed which he intends to prevent. He must then be judged against the mistaken facts as he believes them to be. If judged against those facts or circumstances, the prosecution failed to establish his guilt, then he is entitled to be acquitted.

The next question is does it make any difference if the mistake of the defendant was one which viewed objectively by a reasonable onlooker was an

unreasonable mistake; in other words, should the jury be directed as follows: 'Even if the defendant may have genuinely believed that what he was doing to the victim was either with the victim's consent or in reasonable self-defence or to prevent the commission of a crime, as the case may be, nevertheless if you the jury come to the conclusion the mistaken belief was unreasonable; that is to say, the defendant as a reasonable man should have realised his mistake, then you should convict him'".

After referring to the judgment of the Court of Appeal in England and Wales in *The Queen v Kimber* (1983), 77 Crim App R 225, [1983], 1 WLR 1118. The Chief Justice went on to say this, (1983) Crim App R 271, 281:

"We respectfully agree with what Lawton LJ said there with regard both to the way in which the defence should have been put and also with regard to his remarks as to the nature of the 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 as 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 a 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 that mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and it should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may have genuinely have been labouring under it, he is entitled to rely upon it."

10. Those observations were approved by the Privy Council in *Beckford v The Queen* [1987] UKPC 1; [1988] AC 130. In delivering the opinion of the Board, Lord Griffiths said this, at page 144 D:

"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 disapproved by the prosecution. If the prosecution fail to do so the accused is entitled to be acquitted because the prosecution would 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.”

11. The question for this Court therefore is whether, in directing the jury that in considering whether the degree of force which the appellant used to effect the arrest of Mr. Myrie was reasonable, he failed to draw their attention sufficiently for the need to be satisfied that the applicant, himself, did not hold an honest belief that the force used was reasonable in the circumstances as they appeared to him. It was not enough for the jury to be satisfied that, viewed objectively, the degree of force was unreasonable: as it was put in *Gladstone Williams*, even if the jury came to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under that mistake he is entitled to rely upon it.

12. The judge set out the circumstances which, as he told the jury, they must consider in deciding whether the degree of force used was reasonable. I have referred, earlier in this judgment, to the three matters which he told them they should take into account. He then directed the jury that they must examine those circumstances from the point of view of this defendant; from the point of view of Mr. Welcome at the time, taking into account only such facts as would have been known to him at the time of the arrest. He told them to put themselves in his shoes. But immediately after that passage he went on to say, as I have already indicated:

“If you are sure that the degree of force used by Mr. Welcome was unnecessary to the making of an arrest or are sure that the degree of force was unreasonable in the circumstances, you should reject the lawful arrest defence”.

That direction, as it seems to us, gives rise to a real doubt whether the jury would have appreciated that, before convicting the applicant, they must feel sure that he, himself, did not have an honest (albeit mistaken) belief that the degree of force used was not unreasonable in the circumstances.

13. It is because we are left with a real doubt whether the direction given to the jury, in the passage to which I have just referred, would have failed to bring home to them the necessity to ask themselves the question “did the defendant honestly believe that the degree of force was necessary?” rather than the question “did they think the degree of force was necessary?” that we are satisfied that the conviction in this case was unsafe.

14. We were taken by counsel for the Crown to section 15 of the Penal Code, which is in these terms:

“Where any person is charged with a criminal offence arising out of the lawful arrest or attempted arrest by him of a person who forcibly resists such arrest or attempts to evade being arrested, the Court shall, in considering whether the means were necessary, or the degree of force used was reasonable for the apprehension of such person, have regard to the gravity of the offence which had been or was being committed by such person and the circumstances in which such offence had been or was being committed by such person”.

We are not persuaded by the submission, advanced on behalf of the Crown, that section 15 in some way abrogates the common law requirement that the prosecution must show the necessary mental element in an offence charged under section 204 of the Penal Code; or that the effect of section 15 is that the prosecution does not need to establish that the defendant himself did not have a reasonable belief that the degree of force used was reasonable.

15. For those reasons we give leave to appeal. We allow the appeal. We set aside the conviction. We direct that a verdict of “Not Guilty” be entered. We set aside the sentence.

16. We should add that, had we been persuaded that the conviction should stand, we would not have taken the view that a sentence of six months in this case was harsh or excessive; but, in the circumstances that we have allowed the appeal against conviction, that is not a point that arises for determination.

Chadwick P

Mottley JA

Campbell JA