IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

CRIMINAL APPEAL NO. 5 OF 1987

BETWEEN: RAM NARESH s/o Jag Deo — APPELLANT

AND

REGINAM — RESPONDENT

Mr S. Shankar for the Appellant
Mr K. Taylor for the Respondent

Date of Hearing: 18th September 1987
Delivery of Judgment: 24th September, 1987

JUDGMENT OF THE COURT

MISHRA, J.A.

The appellant was convicted by the Supreme Court Lautoka of causing grievous harm contrary to Section 224(a) of the Penal Code and sentenced to 3 years' imprisonment.

He appeals against conviction and sentence.

The incident in question occurred at a country store in Sigatoka owned by the appellant's father Jag Deo. Mohan Raj, the complainant, drove his tractor to the store to remonstrate with Jag Deo over the appellant's conduct in some minor assault by him on his, Mohan Raj's son. Words were exchanged between him and Jag Deo's younger brother Bisun Deo and a scuffle developed near the tractor involving Mohan Raj on the one hand and the two brothers on the other. The appellant came out of the store with a cane knife and Mohan Raj's left hand was completely severed at the wrist with a blow from that knife. There were, however, three conflicting

versions as to the events leading to that blow. According to Mohan Raj, Bisun Deo had rushed at him and stuck a blow with an iron bar making him fall off the tractor. Jag Deo had then held him from behind while Bisun Deo continued to strike him. Mohan Raj managed to catch hold of the bar with his left hand and Bisun Deo's other arm with his right hand. He then saw the appellant approach from behind and aim a blow at him with the knife. He raised his left arm to stop the knife from landing on his neck. It landed on his wrist.

In his unsworn statement the appellant gave a completely different account. He had come out of the kitchen with a cane knife to cut cane when he saw his father and his uncle covered with blood walking towards the store. He then saw Mohan Raj rush at him with an iron bar with which he tried several times to hit him on the head. He concluded, "I was protecting myself by swinging the cane knife thinking it will hit the iron bar. As a result Mohan Raj's hand got cut off".

Another witness, Suruj Narayan, called by the prosecution, gave yet another version. He was present at the store with several canecutters when the incident occurred. After the initial exchange of words Bisun Deo had rushed out with an iron bar and struck two blows at Mohan Raj whereupon the latter had got off the tractor, picked a similar iron bar from his trailer and struck back causing a gash on Bisun Deo's forehead. Jag Deo tried to stop the fight. It was at this point that the appellant emerged from the store and advanced towards Mohan Raj who left the two brothers and rushed at him with his iron bar raised as if to strike. The appellant struck first, the first blow landing on the iron bar and the second on the wrist.

The learned judge invited the assessors to accept the evidence of this witness who was related to none of the parties.

The appeal against conviction alleges inadequacy of directions firstly on intent and secondly on self-defence.

On intent the learned judge said:-

" It is not possible to see into a man's mind to determine what his intentions are, but one can draw inferences or conclusions from what he does. And a man must be presumed to intend the probable and likely results of his actions. So that if a man deliberately strikes at another with a weapon such as a cane knife, particularly at a spot such as the neck, some where - or anywhere - where serious injury is almost certain to result is it not a proper conclusion that this is what he intended all the time.

So if you are satisfied that A1 deliberately struck with the cane knife at Mohan Raj is it not a proper conclusion that he intended to cause him grievous harm."

We are satisfied that the directions were clear and adequate, and the assessors could have been left in no doubt that the fact of the complete severance of the hand at the wrist indicated the nature of the weapon and the force that necessarily went into the blow. The fact itself in this case proclaimed the intent.

On self-defence the learned judge's directions were:-

" Now the essence of the defence of self defence is that you should seek any reasonable opportunity to retreat, and if you are obliged, or feel obliged to use force to defend yourself or your property or your near relatives you should not use more force than is necessary - and the force used should not be disproportionate to the threat.

Did A1 have any real opportunity to retreat and even if he did so, should he have retreated and left his father and uncle to their apparent fate?

And then if Mohan Raj was advancing on him and about to strike him with the iron bar was it so unreasonable and excessive to get in first with a blow of his own with the weapon he happened to have in his hand.

> In situations such as this it is not always possible to think clearly and deliberately and work out with precision exactly how much force should be used in the particular circumstances. In the heat of the moment people tend to react instinctively and Courts will not condemn people for possible errors of judgment in such circumstances."

Again we find no misdirection which could have in any way confused or misled the assessors. If we were asked to approve of the proposition recited early in the above extract that before an accused person can claim to have acted in self defence he must first have retreated, we would be obliged to say that that is not an absolute requirement. Failure to retreat when opportunity offered may be one circumstance to be taken into account when considering reasonableness. However we do not think that the assessors would have been misled for the paragraph read as a whole put the matter fairly. As was said by the Privy Council in Palmer v The Queen (1971 A.C. 814 at 831):-

> " The defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide. "

The facts of this case were dealt with at very great length by the learned judge and counsel for the appellant concedes that the summing-up taken in its totality was, if anything, too favourable to the appellant. He, however, submits that, if the summing-up reflects the judge's own view, he should have overruled the assessors' opinion. We are unable to agree. Whether the appellant was acting in self-defence was essentially an issue of fact and the learned

judge was correct in seeking the assessors' advice after drawing their attention to every aspect of the case that to him appeared favourable to the appellant. If on such directions the assessors still gave their unanimous opinion against the availability of the defence of self-defence it would, in our view, have been wrong to reject such opinion.

The appeal against conviction is dismissed.

Sentence, however, was entirely a matter for the judge alone. It is clear from the facts outlined in the summing-up that he found Mohan Raj's conduct aggressive and highly provocative. This, we think, should have been reflected in the sentence despite the fact that a weapon like a cane knife had been used.

There is another feature that does not seem to have been taken into consideration. This was a retrial ordered by the Supreme Court in its appellate jurisdiction and of the sentence imposed at the earlier trial the appellant had already served nearly five months in prison.

For these reasons we set aside the sentence and, in its place, substitute a sentence of fifteen months' imprisonment.

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VICE-PRESIDENT

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JUDGE OF APPEAL

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JUDGE OF APPEAL