GOPAL alias SUKURU

v.

REGINAM

[SUPREME COURT, 1965 (Hammett P.J.), 12th November, 3rd December]

Appellate Jurisdiction

Criminal law—judgment—apparent misdirection on question of self defence—no evidence of self defence before court—Penal Code (Cap. 8) s.271—Criminal Procedure Code (Cap. 9) s.155.

The appellant was convicted in the Magistrates Court of the offence of assault causing actual bodily harm. In a statement to the police he said that the complainant attacked him but in his evidence at the trial he refuted any question of self defence and relied upon a defence of accident in the course of a struggle. The magistrate, in his judgment, used the words "The defence relied upon provocation as a defence and self-defence. Neither of these can be defences".

Held: 1. Taken out of context this was a serious misdirection in law, as self defence can afford a complete defence to a charge of assault causing actual bodily harm.

2. At the end of the case there was no evidence from which the court would have been entitled to find an issue of self defence in favour of the appellant and in the light of the evidence there was no misdirection.

3. It was in any event a case in which there was no possibility that the misdirection, if any, turned the scale against the appellant.

Cases referred to: *R. v. Cunningham* [1959] 1 Q.B. 288; [1959] 2 W.L.R. 63: *R. v. Lobell* [1957] 1 Q.B. 547; [1957] 1 All E.R. 734: *Chan Kau v. the Queen* [1955] A.C. 206; [1955] 2 W.L.R. 192.

Appeal from conviction by Magistrates Court.

K. C. Ramrakha for the appellant.

B. A. Palmer for the Crown.

HAMMETT P.J. : [3rd December, 1965]—

The appellant was convicted of the offence of Causing Actual Bodily Harm, contrary to section 271 of the Penal Code by the Magistrate's Court of the First Class sitting at Taveuni.

The particulars of offence read as follows:

"GOPAL alias Sukuru son of Ram Khelawan (M/I) on the 9th day of July, 1965 at Nalovo Taveuni in the Northern Division assaulted Ram Rau son of Narayan Sami Reddy thereby occasioning him actual bodily harm."

There are three grounds of appeal of which the first reads:

"1. That having regard to all the circumstances of the case, the learned trial Magistrate erred in law in excluding the defence of self-defence."

The case for the prosecution was that Rama Rau, who has been a sirdar for 18 years, was in charge of a number of labourers cutting grass. The appellant was a member of this gang and spent over 15 minutes sharpening his cane knife. Rama Rau told him to hurry up because it was getting late. The appellant told his sirdar not to talk much to him because he was in a bad mood and Rama Rau told him if this was so, to go home. The appellant thereupon attacked Rama Rau with his sharpened cane knife. Rama Rau was not armed in any way and he retreated and then turned round to run away. The appellant thereupon struck him once, across his back, with his cane knife. This blow caused a severe wound on the back of Rama Rau running obliquely from the back of his shoulder down across the ribs on his back, which was 6 inches long, $1\frac{1}{2}$ inches deep and $1\frac{3}{4}$ inches wide at the centre. It was a very severe wound and Rama Rau was taken to hospital where he was treated as an in-patient for ten days and then as an out-patient for some time afterwards.

The evidence of Rama Rau was corroborated, *inter alia*, by the testimony of two eye-witnesses who were only a few paces away at the time he was attacked. When the appellant was arrested he made a statement to the police that Rama Rau first abused him and then attacked him by throwing a punch. He said he merely put his knife in front of him to avoid the punch. The accused did not, and did not make any attempt, to account for the severe wound on Rama Rau's back.

At his trial the appellant gave evidence but called no witnesses. He said that Rama Rau first abused him and then came up to him and held him and that they then grappled. In examination-in-chief he said he did not want to hit Rama Rau with his knife and in cross-examination he said he did not in fact hit him and he reiterated this.

It is quite clear that at his trial the appellant did not adopt or repeat his explanation made in his first statement to the Police that he did no more than hold his knife in front of him to avoid a punch aimed at him by Rama Rau. That explanation amounted to a plea of self-defence, but did of course fail entirely to account for the wound on the back of Rama Rau. The appellant made no reference in his evidence to his statement to the Police and not only did not adopt it, but gave an entirely different version of the incident.

The defence raised by the appellant at his trial was not that of self-defence, but that the wound was caused accidentally in the course of a struggle. In fact, the appellant expressly refuted at his trial any question of having struck the blow in self-defence. He repeatedly insisted that he did not hit Rama Rau with his knife at all.

In the light of that evidence it is not easy to understand the words used by the learned trial Magistrate in his brief Judgment when he said:

"The defence relied on provocation as a defence and self-defence. Neither of these can be defences."

It is of this part of the Judgment that the appellant complains in his first ground of appeal, as a fatal misdirection in law "having regard to all the circumstances of the case". Taken out of its context in the Judgment and read entirely on its own, there can be no doubt, and the Crown concedes this, this did amount to a serious misdirection in law. It is true that provocation cannot be relied on as a defence in law to a charge of Assault Causing Actual Bodily Harm — see *R. v. Cunningham* [1959] 2 W.L.R. 63 — "provocation" only goes to mitigation of sentence. "Self-defence" however can of course afford a complete defence to such a charge. It is a complete misdirection to say that self-defence cannot be a defence to such a charge. The question of whether the facts in any particular case do amount to self-defence is, however, an entirely different matter.

The Crown submit that what was meant by the learned trial Magistrate by his use of these words, in these circumstances, is that the evidence in this case does not, and cannot, amount to a defence of self-defence. To a certain extent this is conceded by the appellant on this appeal since the ground is phrased not simply as a complaint of a straight-out misdirection on a point of law, but that — and I quote — "having regard to all the circumstances of the case" the learned trial Magistrate erred in law in excluding the defence of self-defence.

As I have already indicated, the defence of self-defence originally set up by the appellant in his statement to the Police did not and could not possibly account for the fact that Rama Rau was wounded across his back. He could not possibly have suffered that wound if the appellant merely raised his knife to ward off a punch from Rama Rau's fist.

At his trial the appellant did not raise the issue of self-defence in his evidence. He expressly rejected it. He insisted on asserting that he did not hit Rama Rau at all and that Rama Rau's wound was caused accidentally in a struggle.

In *R. v. Lobell* (1957) 1 Q.B. at p.551 Lord Goddard C.J. said:

> "If an issue relating to self-defence is to be left to the jury there must be some evidence from which a jury would be entitled to find that issue in favour of the accused."

Applying that principle to this case, it is abundantly clear that at the end of the cases both for the prosecution and the defence there was no evidence from which the Court would have been entitled to find that issue, i.e. of self-defence, in favour of the accused. It was a clear question of either accepting the case for the prosecution that the appellant made a deliberate attack with his knife on Rama Rau when his back was turned — or else not being satisfied that that case had been proved beyond reasonable doubt and being left in some doubt as to whether or not the wound was caused by accident in a struggle, in which event the appellant was entitled to an acquittal.

In the final paragraph of his Judgment the learned trial Magistrate said:

> "I find the facts proved beyond reasonable doubt. I find accused guilty and convict him as charged."

It is abundantly clear from this that he held that the case for the prosecution had been proved beyond reasonable doubt, and that he believed the evidence given by the witnesses for the prosecution and did not accept the accused's testimony as the truth.

A In these circumstances, when the Judgment is studied as a whole — as it should be — the unfortunate way in which it was expressed, whilst it appears to have been a misdirection, was in fact not so in the particular circumstances of this case and in the light of the evidence. I would add that if I had come to the contrary view, I would, on the authority of *Chan Kau v. The Queen* [1955] 2 W.L.R. at B p.197, have applied the test of whether, on a fair consideration of the whole proceedings, it must be held that there was a probability that this misdirection turned the scale against the appellant. On that test I would have no hesitation whatsoever in answering the question posed in the negative.

The second and third grounds of appeal are as follows:

C "2. That the learned trial Magistrate failed to adequately consider the defence raised by the appellant.

3. The learned trial Magistrate failed to comply with the provisions of section 155 of the Criminal Procedure Code in as much as he did not give reasons for his judgment."

There are no merits in these grounds. The brief Judgment recorded D by the learned trial Magistrate, whilst it may well be, and has been, open to certain objections, was sufficient compliance, in a summary trial, with the requirements of section 155 of the Criminal Procedure Code. From that Judgment it is clear that adequate consideration was given to both the case for the prosecution and the case for the defence.

E The appeal is therefore dismissed.

Appeal dismissed.