Criminal Appeal No. 1 of 1971

Chou Yuen v. The Republic

5th March, 1971.

Self-defence - section 271 of Criminal Code of Queensland - introduction of dangerous weapon into unarmed fight - only minor injury caused by it - meaning of "such force".

Appeal against conviction for unlawful wounding. The appellant intervened in a quarrel between two other men in order to prevent the one of them who was physically stronger striking the other. The stronger man resented his interference and got hold of him tightly round the body. The appellant had difficulty breathing and struggled to free himself and in the course of that struggle took from his pocket a flick knife with a long, firm, dagger-like blade and drew it across the back of the man's hands, cutting them. He was then released. The appellant and the man who seized hold of him were of approximately equal physical strength. The incident occurred in a crowded place. The appellant had no reasonable cause to fear death or grievous bodily harm resulting from his unarmed struggle with the other man.

Held: The force which section 271 of the Criminal Code of Queensland authorises to be used in self-defence must be reasonable not only in respect of its quantum but also in respect of its nature and particulary its potential for causing death or grievous bodily harm.

P.H. MacSporran for the appellant
B. Dowiyogo for the respondent

Thompson C.J.:

The respondent was charged in the District Court with unlawful wounding contrary to section 323 of the Criminal Code of Queensland, which is adopted as part of the laws of Nauru by section 12 of the Laws Repeal and Adopting Ordinance 1921-1967. He was tried, put onto his defence and acquitted. The Republic

has given special leave to appeal in order to argue a point of law relating to the construction of section 323.

The witnesses called at the trial for the prosecution gave versions of the incident which differed on a number of important points. After hearing the respondent and his witness give evidence the learned trial magistrate decided that he must give him the benefit of the doubt which existed in his mind as to the details of the incident. For the purpose of this appeal, therefore, the account given to the District Court by the respondent and his witness must be accepted as fact.

The incident happened in the Nauru Phosphate Corporation's Location, at a place where a large crowd of Chinese and Gilbertese were present and gamblimg was taking place. A burly Gilbertese man had a argument with an elderly Chinese man; he chased him and wanted to strike him. The respondent, who is Chinese, intervened and asked the Gilbertese man twice "What for you fight?". The Gilbertese man said something in a language which the respondent could not understand and the respondent turned at an angle from him and asked the elderly Chinese man why he was being chased. Before he received a reply, the Gilbertese man got hold of him round his body with both hands and held him very tightly. He told the Gilbertese man twice in Chinese "Hands off" but the man continued to embrace him tightly, so that he had difficulty breathing. He struggled to break free and put his hand into the pocket of his trousers from which he pulled out a flick knife with a long, firm, dagger-like blade. He opened the knife and slashed and cut the back of the man's hand with it with the intention of making him let go. The man did let go and that was the end of the incident. The respondent gave evidence that it occurred to him that, if he did not get free, he might die of suffocation and that he shook his body but without success. He agreed that it all happened quickly.

Mr. Dowiyogo, who represented the respondent during the latter part of the trial and during the hearing of this appeal, submitted to the District Court that the respondent acted reasonably in his necessary self-defence. The learned trial magistrate decided that, on the facts now taken as correct for the purpose of this appeal,

"his action might not be unlawful". Accordingly he acquitted him. Mr. MacSporran, who presented this appeal for the Republic, has argued that even on those facts the introduction of such a dangerous weapon by the respondent into the struggle, in which previously neither man had been armed, constituted the use of such force as could not be justified as reasonably necessary for his self-defence.

Although the Gilbertese man was burly, the respondent himself is young and reasonably well-built. They were in a crowded place with many people of both races near at hand. There is, therefore, no proper foundation, in spite of his assertion that it occurred to him that he might die of suffocation, for finding that the nature of the assault upon him was such as to cause reasonable apprehension of death or grievous bodily harm. The degree of force which he was entitled to use in his self-defence was, therefore, restricted to that provided for in the first half of section 271.

Mr. Dowiyogo in his address in the District Court, and again in this Court, stressed the fact that the wound inflicted by the respondent with the knife was not serious. The learned trial magistrate commented in his judgment that the wound was quite trivial but did not state whether and, if so, to what extent that fact contributed to his forming the view that "the respondent's action might not be illegal". Mr. MacSporran has submitted that the learned trial magistrate must have given that fact undue weight in order to have reached the conclusion he did and that on the facts the introduction of the dagger-like flick-knife into the struggle amounted to the use of force of a degree which could not properly be regarded as reasonably necessary to the respondent's self-defence.

I have no doubt that the expression "such force" in the third line of section 271 relates not only to the quantum of the force but to its nature and particularly to its potential for causing death or grievous bodily harm. The knife was an exhibit in the District Court and has been available for inspection by this Court. It is potentially a very dangerous, indeed lethal, weapon.

From the nature of the injury caused it would appear that it was not wielded with any great power, even though the respondent admitted "slashing" with it. It may be noted that the expression "slash" was used at one place to contrast the respondent's action with the action of stabbing or thrusting. As he spoke in Chinese, it is possible that the word which he used did not have the overtones of violence attaching to the English word "slash". Nonetheless, the least serious meaning it can have is that the respondent swept the cutting-edge across the hands of the Gilbertese man.

I think that it may safely be stated as a general principle that only in exceptional circumstances can the introduction of a dangerous weapon such as a dagger into a fight between two unarmed men, where there is no great physical disparity between them, be regarded as being "such force as is reasonably necessary to make effectual defence", so as to bring it within the scope of the first half of section 271. Are there such exceptional circumstances in this case? In my view the minor nature of the injury inflicted and the apparently small amount of power put into the stroke which cut the Gilbertese man's hands do not constitute such exceptional circumstances. The circumstances of the assault certainly do not. The knife was inherently such a dangerous weapon that in the absence of exceptional circumstances its mere use in the fight amounted to the use of such force as was not reasonably necessary to make effectual defence.

The issue of provocation has not been argued in this Court, be either party, although it was touched on briefly in the District Court by Mr. Dowiyogo. A person who would otherwise be guilty of assault may be found not guilty on the ground of provocation only if his retaliation was reasonably proportioned, to the provocation in nature and degree. In this case the respondent's use of such a dangerous weapon, if it is to be regarded as retaliation to provocation, was grossly out of proportion to the provocation which the respondent suffered.

Accordingly the appeal must be allowed; the case will be remitted to the District Court with a direction that a conviction must be recorded. The minor nature of the injury is a factor which

the District Court may take into account in determining sentence. Possibly, even though in most cases in which such a dangerous weapon is unlawfully introduced into a fight the only sentence appropriate is one of imprisonment, the trivial nature of the injury caused in this case may justify the imposition of only a fine. The appropriate sentence will, however, be a matter for the District Court to decide, with a possible right of appeal lying to this Court.