IN THE SOLOMON ISLANDS COURT OF APPEAL

NATURE OF JURISDICTION:	**Appeal from Judgment of the High Court of Solomon Islands (Apaniai J.)**
COURT FILE NUMBER:	**Criminal Appeal Case No. 16 of 2014 (On Appeal from High Court Criminal Case No. 296 of 2013)**
DATE OF HEARING:	**TUESDAY 14 APRIL 2015**
DATE OF JUDGMENT:	**FRIDAY 24 APRIL 2015**
THE COURT:	**GOLDSBROUGH P, WARD JA, WILSON JA**
PARTIES:	**Michael Waidia** Appellant **-V-** **Regina** Respondent
Advocates: **Appellants:** **Respondent:**	**Mr. Holara with Mr. Valenitabua – P/Solicitor** Appellant **Mr. Dhita with Naigulevu, - DPP** Respondent
Key words	**SELF DEFENCE**
EX TEMPORE/RESERVED :	**RESERVED**
ALLOWED/DISMISSD	**ALLOWED**
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JUDGMENT OF THE COURT

1. This appeal is brought with leave granted on 18 August 2014 against conviction for murder. Leave was sought and obtained based on the appeal grounds raising questions of mixed fact and law. The conviction was entered on 2 April 2014 at the same time that sentence was imposed. The Appellant was sentenced to life imprisonment.

2. There are two grounds of appeal both of which raise the question of self-defence. The first ground suggests that the verdict is unsafe or unsatisfactory and occasioned a miscarriage of justice by reason of the failure of the learned trial judge to take into account the totality of all the circumstances or evidence and relevant inferences open thereto pertaining to self-defence. The second suggests error in law and/or in fact on the part of the learned trial judge "in ruling out self-defence by failing to direct himself and give any weight to whether the defendant is entitled to use some force at all to repel his assailant in self-defence but for the use of excessive force and failed to consider that in such circumstances a conviction for manslaughter pursuant to section 204 (b) of the Penal Code [Cap 26] is open rather than murder".

3. Given the decision of this court on the appeal we do not propose to offer any opinion on the evidence or how the trial judge should determine the evidence but simply to express our view as to how any trial judge might begin to approach the questions raised within this trial.

4. Although no findings are expressed within the judgment to that effect, it seems to be common ground that an altercation took place involving the Appellant and the deceased together with others which may not have been started by the Appellant. The learned judge sets out the prosecution case, the defence case and, without proceeding to make any findings on either, continues with discussion of the defence of self-defence. He arrives at the conclusion, at least as it appears, that the Appellant was not entitled to defend himself at all against whatever it may have been that was happening to him.

5. It may well be that we have not understood the learned trial judge when he discusses self-defence and arrives at his conclusion that he is not satisfied "that the act of the accused Michael Waidia as an act of self-defence and is dismissed." It could be that this

is meant to express a finding that the force used by the Appellant was excessive in all of the circumstances and that because of that the prosecution have been able to negate the defence properly raised by the Appellant.

6. That avenue of misunderstanding is available because the learned judge does not express any finding as to what took place between the various players involved in the altercation, what threat that the Appellant faced and what his actions were other than to note that there was no dispute that the accused caused the injury which resulted in the death of the deceased.

7. It is the same lack of findings in the judgment that precludes this court coming to any conclusion on whether the evidence supported a finding of the use by the Appellant of excessive force in the circumstances because the nature and extent of the threat has not been set out in the judgment.

8. Apparent from the judgment is the understanding, purportedly from *R v Zamagita & Others* 1985-96 SILR 223, that the learned trial judge had that the defence of self-defence might only be raised when the accused faced the "most extreme circumstances of clear and very serious danger". Elsewhere the learned judge sets out a more realistic test for raising self-defence which suggests that the use of any force must be reasonably necessary in order to defend oneself or one's property or any other person.

9. It is that expressed understanding and the lack of any facts found as to the threat and the force used in response to that threat which leads this court to the conclusion the trial may have miscarried. We cannot from the record ascertain what the test applied was nor the facts on which the application of the test was based. In those circumstances we have formed the view the verdict is unsafe and unsatisfactory and must be overturned.

10. In the absence of any possibility of considering the application of the correct test in relation to self-defence given that there exist no findings in the court below as to what actually happened there appears to us to be no alternative other than to order a new trial before a differently constituted court.

SELF DEFENCE

11. If at that trial the Appellant raises the question of self-defence then it will be incumbent on the Crown to prove beyond reasonable doubt that the accused was not acting in self-defence if the Crown is to succeed.

12. Self-defence is available as a 'defence' to crimes committed by use of force. The basic principles of self-defence are set out in *Palmer v R, [1971] AC 814*: approved in *R v McInnes*, 55 Cr App R 551:

> *"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 only do, what is reasonably necessary."*

13. The burden of proof remains with the prosecution when the issue of self-defence is raised. The prosecution must adduce sufficient evidence to satisfy the court beyond reasonable doubt that the defendant was either:

- not acting to defend himself/herself or another; or
- not acting to defend property; or not acting to prevent a crime or to apprehend an offender; or
- if he was so acting, the force used was excessive.

14. Failure to retreat when attacked and when it is possible and safe to do so, is not conclusive evidence that a person was not acting in self-defence. It is simply a factor to be taken into account rather than as giving rise to a duty to retreat when deciding whether the degree of force was reasonable in the circumstances. It is not necessary that the defendant demonstrates by walking away that he does not want to engage in physical violence: *R v Bird 81 Cr App R 110.*

15. In assessing the reasonableness of the force used, the court should consider, *inter alia*, two questions:

- was the use of force necessary in the circumstances, i.e. was there a need for any force at all?, and
- was the force used reasonable in the circumstances?

Both questions are to be answered on the basis of the facts as the accused honestly believed them to be *R v Williams (G) 78 Cr App R 276, R. v Oatbridge, 94 Cr App R 367.*

To that extent it is a subjective test. There is, however, an objective element to the test. The court must then go on to ask whether, on the basis of the facts as the accused believed them to be, a reasonable person would regard the force used as reasonable or excessive.

16. It is important to bear in mind when assessing whether the force used was reasonable the words of Lord Morris in *Palmer v R [1971] AC 814*;

> *"If there has been an attack so that self- defence is reasonably necessary, it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his defensive action. If the jury thought that that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought necessary, that would be the most potent evidence that only reasonable defensive action had been taken ..."*

The fact that an act was considered necessary does not mean that the resulting action was reasonable: R v Clegg [1995] 1 AC 482 HL. Where it is alleged that a person acted to defend himself/herself from violence, the extent to which the action taken was necessary will, of course, be integral to the reasonableness of the force used.

17. For the above principles to be applied it is necessary as a preliminary step to identify that which the trial judge finds took place of the evidence having determined which evidence can be relied upon and which evidence cannot be relied upon or must be rejected. After that step has been concluded, and those findings set out in the judgment, the trial judge can proceed to apply the test and reach a conclusion as to whether the prosecution have discharged the burden which rest on it beyond reasonable doubt.

ORDER

18. This appeal is allowed, the conviction and sentence set aside and an order made that the matter be remitted to the High Court for re-trial.

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Goldsbrough P

President of the Court of Appeal

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Ward JA

Member of the Court of Appeal

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Wilson JA

Member of the Court of Appeal