J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 203/74

BEFORE: The Hon. President (Ag.)
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Robinson, J.A.

REGINA v. PASTICAL REID

Mr. Henerson Downer for the Crown.

Mr. Horace Edward, Q.C., for the appellant.

28th February, 12th & 13th May, 1975

ROBINSON, J.A.: The appellant was convicted on an indictment containing three counts; on the first count, he was charged with assaulting one Edgar Thompson; the second and third counts charged him with shooting at and wounding Arthur Clarke, with intent to do grievous bodily harm respectively. Leave to appeal against conviction was granted by a judge in Chambers.

In view of the decision at which we have arrived, it is not desirable to set out or discuss the evidence at the trial except in so far as is absolutely necessary for the purposes of this judgment.

On December 14, 1973, at about 9 p.m., there was an accident between two motor vehicles involving the appellant and Arthur Clarke. A crowd gathered; words passed between several persons as to who was right and who was wrong; a fight developed between Arthur Clarke and two or three other men.

Meanwhile the driver of a truck which had arrived on the scene earlier, and who was either in or close by the persons fighting, was seen with a gun in his hand by his side. The appellant went over to the scene of this fight. It is out of these circumstances that the charges in the indictment resulted.

Arthur Clarke is a soldier in the Jamaica Defence Force.

The appellant who is a Corporal of Police, in his evidence, denied the material allegations of the Crown and said that Clarke had a knife, that there was this other man with a gun, there was a fight between these men, it was his duty as a policeman to maintain the Queen's peace, "I figured there would be a shooting", hence he went towards the fighting men apprehending that a breach of the peace was imminent. He said that Clarke turned away from the men, attacked him with an open rachet knife in a stabbing position, slashing at him, and he pulled his revolver and fired to defend himself.

In a nutshell, the defence was that while he was carrying out his duties as a policeman, a fierce and forcible attack was made upon him and he had to defend himself.

Counsel for the appellant argued, inter alia, that the directions of the learned trial judge on the law of self-defence were inadequate; that the jury was not adequately directed on the duties of a policeman who reasonably apprehends the commission of a violent felony in his presecne; that the learned judge had failed to give adequate assistance to the jury in relating the law to the particular circumstances of the case. Counsel argued that where the appellant is acting in due execution of his duty as a policeman, there is no obligation in him to retreat, and that the judge should have so directed the jury, but he did not; and that as this line of

defence had not been left to the jury who should have decided this issue, the Court should not in the circumstances of this case uphold the conviction by applying the proviso.

Counsel for the Crown contended that in relation to count one of the indictment, the learned trial judge at page nine of the script had dealt with the question of self-defence in the appellant, "acting as a police officer in the due execution of his duty", and that having then given an adequate direction, it was unnecessary when again giving directions on self-defence for the judge to have dealt with this aspect of the defence again in relation to the shooting incident (counts 2 and 3). He submitted that since the jury, by their verdict had rejected that the appellant was acting in the course of his duty as a policeman in relation to count one, it followed that even if the judge had dealt with that issue again in relation to counts two and three, the jury would likewise have rejected it. In effect, counsel was saying that in the circumstances of the judge's first directions on self-defence there was no further need for the judge to have directed the jury that there was no obligation in the appellant to retreat (on the alleged attack) if he was "acting as a police officer" since he had dealt with that aspect of the matter relative to count one. Counsel agreed that if the appellant were so acting, there would be no duty in him to retreat. See R. v. Simmonds (1965) 9 W.I.R., p.95.

Counsel for the Crown also pointed out that the appellant had said that he did not call on anyone for assistance although he knew that citizens may be called on to assist the police to prevent the commission of a felony and that "it was a quick happening, there was not enough time to ask", and urged that in the final analysis in the circumstances of this case, the proviso could properly be applied.

The summing-up discloses that the judge dealt with the law generally as it affects self-defence including the question of retreat (at page eight of the script). He immediately went on to say this:

> "The prisoner must have committed the alleged battery merely in his own defence under the stress of the moment of attack - revenge is not self-defence - striking a man when he is not attacking you is not self-defence."

Then he continued to deal with the burden of proof relative to self-defence and went on:

> "If you honestly think that he was acting to preserve his life when he said that he pushed off Edgar Thompson whom he says was trying to take up the knife which had fallen to the ground, you will have to acquit, because he was then acting as a police officer you may think, in the due execution of his duty."

Clearly, here the judge was putting the defence as it relates to count one and, in terms, telling the jury that there is no duty in the appellant to retreat in those circumstances.

The summing-up continued with a detailed and lengthy review of all the evidence for the prosecution and the defence. In this latter regard, the judge again dealt with the law of self-defence, giving general directions on the "duty" to retreat. He did not relate this to the defence as he did in count one, and the question of retreat was left to the jury on those general directions. This situation was most confusing and, indeed, these latter directions as Counsel for the appellant contended, eroded, those given on count one. It is true to say that the judge did not direct the jury on the aspect of the defence of which complaint is made when dealing with counts two and three. He directed the jury to consider each count in the indictment and the evidence in relation thereto separately; he dealt with the law in relation to each incident separately (the assault and the shooting). The pith of the appellant's case was that he reasonably apprehended that a

breach of the peace was imminent, that this was the background which finally led him to discharge his firearm. What, if the jury disbelieved him when he said he retreated before taking defensive action? The jury should have been directed, in effect, that in the light of the defence raised there was no duty in him to retreat if they found he was acting as a police-man in the course of his duties as such to prevent any more serious breach of the peace. It cannot be said with any degree of certainty what view the jury may have formed had they been so directed.

For the above reasons we have come to the conclusion that the appeal should be allowed, the conviction quashed and sentences set aside. In the circumstances of the case we are unable to apply the proviso. In the interest of justice we order a new trial during the present term at the Trelawny Circuit Court.