IN THE SUPREME COURT OF BERMUDA
APPELLATE JURISDICTION
CASE No. 24 of 2006

BETWEEN:

MELVIN BOWEN, Jr.

Appellant

- and -

ANGELA COX[1]
(A Police Constable)

Respondent

L. Mills for the Appellant; and
C. Clarke for the Respondent.

JUDGMENT

1. This matter came before me on an appeal against conviction by the Wor. Khamisi Tokunbo, acting as Senior Magistrate. I heard the appeal on 16th February 2007, and at the conclusion I allowed it, and quashed the conviction. I promised to give written reasons, which I now do.

2. The appellant was charged on Information 05CR00908, dated 17th November 2005. It alleged that the appellant:

> "On the 21st day of September 2005, in St. George's Parish, did unlawfully do grievous bodily harm to Wayne Campbell. CONTRARY TO SECTION 306(a) OF THE CRIMINAL CODE."

3. The matter was contested, and there was a short trial, which concluded on 22nd June 2006. The learned Magistrate then adjourned for submissions to 11th July. He then reserved judgment until 18th August, and on that date further adjourned until 28th August, when he found the appellant guilty[2]. He gave short written reasons, which read as follows:

> "I have now reviewed all the evidence in the case and considered the written and oral submissions of counsel. I have observed the demeanor of the witnesses while delivering their testimony and I am mindful that the burden and standard of proof throughout in this case rest with the prosecution.
>
> In my judgment, I am satisfied so that I feel sure that the complainant in this case was the aggressor and somewhat the author of his own misfortune. By

[1] The file shows the respondent as Lyndon Raynor, but that is an error, as Angela Cox swore out the Information.
[2] His reasons are dated 31st May 2006, but that is obviously an error.

this, I mean that I have found as a fact, on the evidence, that the Complainant was verbally offensive and abusive towards the Defendant on the morning of 21st September 2005.

I also find that he first assaulted the Defendant by pushing him. Hence there is evidence of both provocation and assault to the Defendant.

These findings raise the question as to whether the Defendant acted lawfully by way of his response, either under provocation or self defence.

In this regard, I am satisfied so that I feel sure, on the whole of the evidence adduced by the prosecution, that the Defendant's response was excessive and out of proportion to either the provocation or assault by the complainant and therefore not justified in law.

I arrive at this latter conclusion, in part, on the basis of the evidence of the assault and injury visited on the complainant versus that upon the defendant.

The complainant sustained substantial injuries, including a laceration and fracture to the nose."

4. The thrust of the appeal was that the learned Magistrate had dealt inadequately with the defences of provocation and self-defence. Insofar as it concerns provocation, the appeal can be disposed of the simple ground that the appellant's case at trial did not give rise to this defence. He gave evidence, but said nothing to suggest that he was deprived of his powers of self-control by anything that the complainant said or did.

5. As to self-defence, the learned Magistrate treated that as arising, and I think that he was right to do so, even though the appellant did not say in terms that he was defending himself. Having found as a fact that the complainant initiated the violence by assaulting the appellant by pushing him, it was then incumbent upon the learned Magistrate to analyse the transaction with a degree of care, and make findings as to who then did what to whom, and in particular in what circumstances the appellant inflicted the actual injury upon the complainant. There was a clear conflict of evidence on this. The complainant said that the appellant first hit him in the eye, then taunted him and then, when he bent down to retrieve his radio, knocked him out. The appellant, on the other hand, said that the complainant attacked him, and that they traded punches. The complainant's estranged wife then intervened, and broke up the fight, and appellant started to leave. At that point the complainant attacked him again, punching at him. The appellant then says that he parried that blow, and struck back, knocking the defendant down.

6. On the complainant's evidence, the appellant clearly went beyond self-defence. But on the appellant's evidence, he probably did not. Instead of making the necessary specific findings of fact the learned Magistrate simply came up with a general conclusion. That is, with respect, insufficient. It has been said on numerous occasions both in this court and in the Court of Appeal, that it is incumbent on a Magistrate to make detailed findings of fact in support of his overall conclusion, particularly in the context of self-defence. In Plant v Simmons (Cr. App. 1986 No. 1) the learned Chief Justice had said:

"In a case such as the instant one it was imperative for the magistrate to enter in his decision what facts he found to be true and why he found them to be true.

> Only after he had accomplished this exercise would he be able to say if he rejected the defence of provocation in law, or the defence of self-defence. Not having done so, this court is unable to say if his decision was correct or nor. The learned magistrate had evidence before him which, if properly assessed, would give rise to the defence raised by the appellant. Since the magistrate has not resolved these issues, the conviction is not safe and cannot stand. The magistrate has, therefore, erred in law in coming to his decision."

That approach was approved by the Court of Appeal:

> "But, in my view, the learned Chief Justice did not err in allowing Simmons' appeal. The central issue in this case was whether Simmons was provoked by Fisher. Having regard to the evidence given by the four eye witnesses to the incident, it was incumbent upon the magistrate to make a detailed analysis of the evidence and make specific findings on crucial facts…."

7. Plant v Simmons has been applied recently in two cases - Bromby & Bromby v Angela Cox (App. 2005 No. 29, per Bell J, 10th March 2006) [2006] Bda LR 16, and Robert Trew v Angela Cox (App. 2006 No. 43, per Greaves J, 12th February 2007). For an earlier application of similar principles, see Richardson v Commissioner of Police (App. 1997 No. 69, per Ward CJ, 18th December 1998) [1998] Bda LR 75:

> "It was also argued that the learned acting magistrate did not observe the dictates of section 21 of The Summary Jurisdiction Act 1930 which requires a magistrate to state in his judgment the point or points for determination, the decision therein and the reasons for the decision.
>
> It was argued that the judgment did not show an awareness of the salient issues nor an appreciation of the relevant law.
>
> Suffice it to say that the issue of self defence was not dealt with adequately or at all in the judgment. The question was not merely whether the defendant wounded Astwood, but whether he did so in circumstances which were necessary in order to resist or defend himself against an attack or a threatened attack and whether the amount of force used was reasonable. The fact of a wound in the back of Astwood might indicate that at some point the appellant became the aggressor. But as has been stated in relation to the defence of self defence, a person defending himself cannot be expected to weigh precisely the exact amount of defensive action which is necessary, Palmer –v- R (1971) 55 Cr App R 223.
>
> I am unable to say that if the learned acting magistrate had made a proper evaluation of the character of Harvey and had considered adequately the issue of self defence, he would inevitably have come to the same conclusion."

8. The learned Magistrate also said that part of the reason for his coming to the conclusion that the Defendant's response was excessive was "the evidence of the assault and injury visited on the complainant versus that upon the defendant." In other words, because the complainant got hurt more than the appellant, the appellant must have used excessive force. There may be cases where the injury sustained by the victim is such as of itself to demonstrate that a defendant's response was excessive, but a broken nose from a punch is unlikely to be a safe guide when the context is a brawl between two men, particularly bearing in mind that it is trite law that a person who is defending himself

cannot be expected, in the heat of the moment, to judge the exact amount of defensive action which is necessary.

9. The prosecution invited me to consider the application of the qualification to section 257(1) of the Criminal Code, namely that it is only lawful to use force which is not intended and is not such as is likely to cause death or grievous bodily harm. Force which is intended or likely to cause serious harm may only be used where the attack defended against is itself such as to cause reasonable apprehension of death or serious harm, and that was plainly not the case here. The argument appears to be that, because it is implicit in the learned Magistrate's finding of guilt that the harm inflicted was grievous, the act of inflicting it was necessarily unlawful. There are two points to make on that. The first is that the fact of an outcome is not decisive of either its probability or its forseeability. Thus, the fact that the complainant suffered grievous bodily harm (if the injury which he sustained truly amounted to that) is not conclusive of the questions whether the appellant intended such harm or whether the force used was likely to cause it. The second point is that the learned Magistrate said nothing to indicate that he was thinking along those lines, and if he was to do so it was incumbent upon him to first find that the act of punching someone in the face was either intended or likely to cause grievous bodily harm. I simply observe that if it was, the ambit of self defence would, in practice, be somewhat curtailed.

10. In summary, I considered that the learned Magistrate had dealt inadequately with the question of self-defence, in that he failed to make the necessary findings of fact to support his conclusion that the force used by the appellant was excessive. I therefore allowed the appeal and quashed the conviction.

Dated this 22nd day of February 2007,

Richard Ground
Chief Justice