Appellant Jurisdiction 2006 No. 43

BETWEEN:

ROBERT TREW

Appellant

and

ANGELA COX

Respondent

Mr. Mark Pettingill for the Appellant
Ms. Graham Allen for the Respondent

JUDGEMENT

1. This appeal was heard and allowed on 18th December 2006 and the reasons reserved.

2. On 10th March 2006 the Appellant was convicted after a trial before the Worshipful Tokumbo on a charge that he on the 3rd of February 2005, in Pembroke Parish, did unlawfully do grievous bodily harm to Williston Trott contrary to Section 306(a) of The Criminal Code.

3. On the 13th March 2006 the Appellant filed a Notice of Appeal setting out four grounds and on the 14th December 2006 he filed an amended notice setting out four grounds.

4. For the purpose of this decision all of the grounds will be treated as consolidated in ground four as argued.

5. The amended ground four stated:

> "That the Learned Magistrate erred in law in finding that self defence was warranted but then going on to find that the reaction of the Appellant was excessive and not justified in law without considering subjectively the Appellant's state of mind".

6. The facts were that the Appellant and the Complainant were two taxi drivers. On the material day an altercation took place between the two at the compound of the Hamilton Princess. There had been no eye witnesses at the beginning of the altercation, but there were two during its later development.

7. The Complainant said that he was approaching the Appellant to ask him why he was calling his woman, when the Appellant said "I "ain't" touch your woman" and called him an "old ass". The Complainant then said to the Appellant "he is nothing but a fucking rat". The Complainant denied saying anything else to the Appellant, or touching, or hitting, or shoving, or threatening or approaching him in an aggressive manner or grabbing him or doing any other thing to him. He testified that the Appellant head-butted him first and then struck him in his face in the area of his eye. That blow to the head knocked him to the knee and then the Appellant hit him again. Another witness testified that after coming to the scene on hearing there was a fight, he saw the Complainant injured to the face. The

Appellant was angry. He was held back by another driver but broke away and struck the Complainant again.

8. It is not disputed, that the Complainant suffered fractures to the right eye socket nor is the finding of the Magistrate that the injuries amounted to grievous bodily harm disputed. It is also not disputed that the Appellant struck the Complainant with his fist or that he is bigger than the Complainant.

9. The Appellant on the other hand said the Complainant did all those things and more. He said the Complainant approached him and said, he had enough of him and he was going to take him to fuck out. He threatened to kick him in the nuts, planted both hands in his chest and gave him a heavy push which off balanced him into the flower bed. The Complainant tried to hit him, and he fired back two punches in self defence. The first punched missed and the second connected. He denied he head butted the Complainant and he denied he broke away from another to "mash up the Complainant some more". He said the Complainant tried to punch him and that the Complainant "had lost his head and he was going crazy". He had never seen anything like that in his life. He could do nothing but defend himself.

10. The Learned Magistrate reasoned as follows:

> "I do not accept that point of the Complainant's evidence when he says that he did not say or do anything to cause the defendant to assault him. I find as a fact that the Complainant did something or behaved in such a manner that provoked the defendant or gave rise to the defendant to exercise some form of self defence. I also find that the defendant was provoked by the Complainant. What the defendant described of his second assault is very consistent with the evidence of both witnesses Lambert and Daniels, who speak of the defendant being restrained while the Complainant was down on his knee and the defendant breaking from the physical restraint and assaulting the complainant. I have observed each of the witnesses who testified and taken note of the relative size of the Complainant and defendant. In my judgment the defendant is much taller and larger than the Complainant. I am satisfied, that with that in mind and on the evidence of the defendant's action, the two assaults, were in fact excessive and out of proportion to the provocation given by the Complainant, or to any defense he may have been entitled to give effect to in the circumstances and those assaults were likely to cause GBH."

11. Counsel submits that this is an application of the incorrect test. That the Learned Magistrate failed to find as a fact what act or acts or things said or done by the Complainant amounted to a provocation. Further that he therefore failed to ascribe some degree to that act or acts on the part of the Complainant. Therefore the Magistrate was in no position to determine what was the degree of retaliation by the Appellant and whether such retaliation was disproportionate to the Complainant's act.

12. There is merit in this submission and I think the learned Director was correct to concede.

13. It cannot be sufficient for a finder of fact to say that the Complainant did something, failed to identify what that something is, and then say in effect whatever it was he did, the defendant responded excessively. To do so would first of all amount to a descending into the realm of speculation and secondly, it would amount to a shifting of the burden of proof to the defendant. In short if the fact finder is unable to find what the provoking act, word or assault is, then in effect if he convicts the accused on the ground of excessive response, he has in fact said that the defendant failed to prove his defence.

14. In the recent decision, *Bromby and Bromby v. Angela Cox*. Appeal 2005:29 at page 17 Bell J said the following:

"This ground covered the provocation defence, and the Magistrate's finding that the Appellants' response to the situation "was excessive, unreasonable and an over reaction out of proportion to the situation".

"In relation to the provocation defence, Mr. Horseman relied again upon the case of Richardson, where the Chief Justice said:

> "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".

15. Referring to the case of *Plant v Simmons* Criminal Appeal 1986:1, Bell J said:

"On appeal, the Chief Justice said, in a passage quoted in the Court of Appeal:"

"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 not. 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".

16. Bell J continued
"And in his judgment in the Court of Appeal. Sir Allistair Blair-Kerr P said:"

"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…"

17. Bell J then said
"The problem in relation to the provocation defence is the lack of any detailed analysis of the evidence by the learned magistrate. In relation to the assault, he said no more than that the Appellants "confronted/cornered Mr Talbot and both assaulted and threatened him as alleged"….To paraphrase Sir Allastair Blair-Kerr P. in *Plant –v-Simmons*, it was simply not good enough for the Magistrate to say that the Apellant's "both assaulted him as alledged"."

18. Upon an application of the above cited principles it is evident in the instant case, that when the Magistrate said

"I do not accept that point of the Complainant's evidence when he says that he did not say or do anything to cause the defendant to assault him. I find as a fact that the complainant did say something or behave in such a manner that provoked the defendant or gave rise to the defendant to exercise some form of self defence".

Such was not sufficient. It was necessary for the learned Magistrate to go on and to identify the particulars of those words said or acts or behavior done by the complainant which provoked the Appellant before he could affix a degree to the

Appellants response. Not to do so was fatal in this case and amounted to a reversible error.

In the circumstances the appeal was allowed.

Dated this **12th** day of **February** **2007.**

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Carlisle Greaves, Puisne Judge