EASTERN CARIBBEAN SUPREME COURT
MONTSERRAT

IN THE COURT OF APPEAL

MCRAP 2011/002

BETWEEN:

KENROY HYMAN

Appellant

and

THE COMMISSIONER OF POLICE

Respondent

Before:

The Hon. Mde. Ola Mae Edwards	Chief Justice [Ag.]
The Hon. Mr. Francis H. V. Belle	Justice of Appeal [Ag.]
The Hon. Mr. Mario Michel	Justice of Appeal [Ag.]

Appearances:

Mr. Kharl Markham of Allen Markham & Associates, for the Appellant
Ms. Kathy-Ann Pyke, Director of Public Prosecutions, with her, Mr. Oris Sullivan for the Respondent

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2011: December 6;
2012: September 17.

Criminal appeal – Self-defence – Unlawful assault – Whether magistrate applied wrong principle on the issue of self-defence – Whether the burden of proof shifted from the prosecution to the defence when self-defence was raised by the appellant

On 5th December 2010, there was a confrontation between the appellant, Kenroy Hyman, and Levon Ryan which became violent and led to Levon Ryan being injured by the appellant. The appellant was charged with assault and was subsequently convicted by the learned magistrate of that offence. The appellant appealed his conviction on the basis that the decision given cannot be supported having regard to the evidence and that the judgment was based on the wrong principle of law.

Held: dismissing the appeal and confirming the appellant's conviction, that:

1. A defendant, who has raised the defence of self-defence in a criminal case, does not bear the burden of proof and does not have to make out any case. It is the prosecution which must negative self-defence.

2. The test to be applied in self-defence is that a person may use such force as is reasonable in the circumstances if he honestly believes it to be in defence of himself or another. This principle was applied by the magistrate to the facts of the case. The magistrate considered evidence of the appellant's behaviour and demeanour before the incident and afterwards, thereafter she rejected the appellant's defence of self-defence. As the magistrate is the decider of both fact and law, she was entitled to reject the appellant's defence and render a verdict averse to the appellant.

   Solomon Beckford v The Queen 1988 AC 130 applied; Curvin Jeremiah Isaie v The Queen Saint Lucia HCRAP 2006/006 (delivered 14th July 2008) followed.

3. The magistrate had the advantage of seeing and assessing the witnesses demeanour when they gave their testimony. From this, she determined that the evidence before her proved that the appellant was the aggressor which negatived his defence. The Court of Appeal would not disturb the magistrate's finding of fact, which resulted in the appellant's conviction, as there was ample evidence disproving the appellant's defence.

JUDGMENT

[1] BELLE JA [AG.]: This is a judgment of the Court. On 5th December 2010, the appellant, Kenroy Hyman, went searching for Levon Ryan, the complainant, to confront him about assaulting his niece some days before. When Levon Ryan eventually saw Hyman he went up to him and told him he heard he was searching for him. There are conflicting stories about the exchange of words which occurred but the learned magistrate held as a fact that the complainant tried to obtain an explanation for the search from the appellant. This encounter turned violent when the appellant then assaulted and injured the complainant. This was the basis for the charge of assault against the appellant Kenroy Hyman and the subsequent finding of guilt and conviction for assault, by the learned magistrate.

[2] The learned magistrate sentenced in the following terms:

(1) Conditional discharge on entering into recognizance in the sum of $1,000.00 on surety, to be of good behaviour and to appear for sentencing when called any time during the period of one year.

(2) The appellant was required to undergo counselling for self-control provided by the Health Department of Montserrat, with attendance at such session on a monthly basis.

(3) Supervision of the appellant was to be conducted by the Probation Officer and a monthly report on attendance was to be provided by the court.

(4) The appellant was also ordered to pay compensation in the sum of EC$500.00 to the complainant for pain suffering and the injury of the loss of hair and resulting sore, to be paid within two weeks or 1 week imprisonment in default.

[3] The appellant subsequently filed this appeal against his conviction and sentence but at the hearing proceeded only against conviction. The appellant's grounds of appeal were:

> "1. That the decision is unreasonable or cannot be supported having regard to the evidence;
> 2. That the decision was erroneous in point of law;
> 3. That evidence substantially affecting the merits of the appellant's case was rejected by the Court;
> 4. That the judgement given was based on a wrong principle or was such that the court viewing the circumstances reasonably could not properly have so decided."

[4] The approach taken by counsel for the appellant was to group all of these grounds of appeal in what was essentially one ground of appeal with regard to the finding of guilt. That ground was that the learned magistrate applied the wrong principle on the issue of self-defence by placing the burden of proof on the defendant.

[5] In making out this argument, counsel complained about the magistrate's use of the following words in her reasons for decision, "on the evidence the defence of self-defence is not made out in this case".[1]

[6] We are of the view that the learned magistrate's language in this regard was unfortunate. Clearly the defendant in a criminal case does not have to make out any case. It is the prosecution which must negative self-defence. See cases such as Solomon Beckford v The Queen[2] where the Privy Council laid down that the test to be applied in self-defence is that a person may use such force as is reasonable in the circumstances if he honestly believes it to be in defence of himself or another. Indeed this test was later applied by our Court of Appeal in the case Curvin Jeremiah Isaie v The Queen.[3]

[7] However, though the learned magistrate misspoke, it seems quite clear from her Reasons for Decision that she applied the principles in Beckford v The Queen. The learned magistrate stated clearly that she appreciated that a man when attacked did not have to wait but could take a pre-emptive strike. She then followed this statement by setting out her analysis of the facts in the terms stated above.

[8] The issue to be decided is whether the Court of Appeal will interfere with a finding of fact by a magistrate who had the advantage of seeing the witnesses as they gave their evidence, assessed their demeanour and credibility and made a decision in accordance with the law.

[9] Counsel for the appellant argued that there was no evidence on which the learned magistrate could rely to found a conviction of assault. He contended that the

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[1] See p. 50 of the record of appeal.
[2] 1988 AC 130.
[3] Saint Lucia High Court Criminal Appeal No. 6 of 2006 (delivered 14th July 2008).

magistrate simply concluded that his client was the aggressor and therefore was guilty of the offence.

[10] It is trite law that a determination of an individual's intent is based on their actions and words before during and after the incident which constitutes the *actus reus*. The magistrate quite correctly, in our view, considered evidence of the appellant's behaviour and demeanour before the incident and afterwards in arriving at her conclusions which were adverse to the appellant.

[11] This was not a case involving a jury which could be misled by the learned magistrate's misstatement of the law.

[12] The learned magistrate had before her evidence which negatived self-defence and this evidence has to be taken into account in determining the impact of the learned magistrate's error on the conviction of the appellant.

[13] The learned magistrate obviously rejected the evidence of the defendant that he was attacked by the complainant. The learned magistrate accepted that at some point the complainant had a bottle but found that he had disposed of it at the time of the attack.

[14] She also concluded that she believed the evidence of Levon Ryan that he was attacked from the back and expressed the view that this was supported by the medical evidence.

[15] In resolving the credibility issues raised by the evidence of the witnesses the learned magistrate focused on the inconsistency in the appellant's evidence. She pointed out that according to the appellant Levon Ryan had a bottle and was the attacker, but Levon Ryan never used the bottle as a weapon during the physical encounter.

[16] In deciding who to believe, the learned magistrate had the advantage of seeing and hearing the testimony of the witnesses, including the evidence from the police

officer that the appellant's shirt was wet and smelling of beer. This evidence from the police officer supported the appellant's evidence that the complainant had attacked him and thrown beer on him. However, the learned magistrate did not consider this evidence from the police officer to be reliable evidence of an attack which warranted a retaliation in self-defence. She was entitled to accept the evidence that the appellant seized the complainant from behind and pulled his hair until it broke. It was also reasonable for the learned magistrate to find that the appellant was the aggressor, and that this evidence supports the medical evidence on the injury suffered by the complainant.

[17] In the Court's view, there was ample evidence on which the learned magistrate could conclude that the complainant was telling the truth and that he was assaulted by the appellant in the manner which the complainant described.

[18] There was no argument that the learned magistrate had ignored any evidence that would lead to the conclusion that the complainant was lying about what took place. And there was no evidence to refute the allegation that the appellant left the scene and returned looking for the victim.

[19] We find that the conclusion that the appellant was the aggressor was therefore a reasonable one, based on the evidence.

[20] In our view, there was ample evidence on which the learned magistrate could conclude that the complainant was telling the truth and that he was assaulted by the appellant in the manner which he described. We would not disturb the appellant's conviction.

[21] We would therefore dismiss the appeal.