In the Privy Council.

No. 23 of 1949.

ON APPEAL FROM THE COURT OF APPEAL, JAMAICA

BETWEEN

CYRIL WAUGH ... ... APPELLANT.

AND

THE KING ... ... RESPONDENT.

CASE FOR THE RESPONDENT

RECORD

1.—This is an Appeal against the conviction of the Appellant and the sentence of death thereupon passed upon him by the Supreme Court of Jamaica on the 1st March, 1949, for the murder on the 26th October, 1948, of Philip Newby, and from the Judgment of the Court of Appeal refusing the Appellant leave to appeal against such conviction and sentence. p. 66, l. 13, p. 67, l. 14; p. 10, ll. 1–15 p. 74, ll. 13–41

2.—It is common ground that the Appellant, a ranger on the Richmond Estates, on the afternoon of the 25th October, 1948, encountered Newby trespassing on the estate and that the Appellant shot him with a shotgun, inflicting injuries from which Newby died early in the morning of the 26th October, 1948. The real issue at the trial was whether the Appellant killed Newby in self-defence or murdered him.

3.—The Appellant was defended as a poor person, without the intervention of a Solicitor, by Counsel (L. T. Moody, Esq.) assigned by the Crown. Mr. Moody was called to the Bar in June, 1945, and, after a civil service appointment as Clerk of the Resident Magistrates Courts, began to practice in January, 1949. Mr. Moody took a statement from the Appellant. At the close of the case for the prosecution, Mr. Moody was of opinion, for reasons which he has set out, that the Appellant should not give evidence. The Appellant was ready and willing to give evidence but on Mr. Moody's advice did not do so. Appendix to Appellant's Case, p. 3 p. 1, l. 32—p. 2, l. 37

RECORD

p. 13, ll. 12–29
p. 30, ll. 21–32

4.—It was clear from a trail of blood that the shooting took place at or near a spot which was 254 feet from the place where the injured man was later found. The police sergeant noticed the first blood about half

p. 47, ll. 17–35; p. 52, ll. 2–17; p. 17, ll. 13–21; p. 23

a chain (33 feet) from where the Appellant said he fired the gun. Evidence showed also that immediately after the firing the Appellant called for help, and that those first on the scene were shown a bag of coconuts, which the Appellant alleged that Newby had been carrying, and an iron capable of being used for husking coconuts, which the Appellant alleged that Newby had thrown at him. The Appellant also alleged to those first on the scene and to the police that Newby had advanced on him with a long cutlass or machete and that the Appellant had then shot at Newby's foot. Newby was injured in the left lower abdomen, and the muzzle of the gun was between two and three feet away when the shot was fired. The statements made by the Appellant to the police on the 25th October, 1948, and the 9th November, 1948, were put in evidence by the prosecution.

p. 37, l. 27
p. 34, ll. 15–23
p. 67, l. 21; p. 68, l. 33; p. 21, l. 22—p. 22, l. 27

5.—Newby was taken to hospital. On arrival he was unconscious and was operated upon with local anæsthetics. During the operation he regained consciousness, and, knowing that he was dying, said he would like to give his story to the police. The surgeon summoned the police (who were waiting outside the room) and Newby made a statement which was admitted in evidence as a dying declaration. Before the statement was finished Newby sank into a coma and died without regaining consciousness.

p. 37, ll. 20–41; p. 38, ll. 20–21; p. 39, ll. 7–46
p. 44, ll. 17–31

6.—Newby's statement appears concerned to deny that he was stealing coconuts. It states that Newby was not carrying any bag with coconuts or any iron. No specific mention is made of a cutlass or machete. The statement alleges that Newby saw a man approach with a gun who said he was going to shoot anybody he saw there because they are stealing coconuts there. The part of the statement admitted in evidence ended "When he fire the shot he missed the other man."

p. 71, ll. 25–34

7.—Search was made by the police and others for the cutlass or machete mentioned by the Appellant, but no cutlass or machete was found. At the time of the search a crowd of about 150 people was on the scene. Before the crowd arrived Ridley, the first to arrive on the scene, saw no cutlass.

p. 18, ll. 30–32; p. 20, l. 38; p. 21, l. 8; p. 28, ll. 34–40; p. 29, ll. 26–31
p. 49, ll. 7–36

8.—In his summing-up MacGregor J. carefully examined the evidence. Directly or inferentially he referred on ten occasions to the fact that the Appellant had not given evidence. He also suggested a possible explanation of how Newby's statment came to mention a bag of coconuts and an iron. In the Respondent's submission, MacGregor J. properly directed the jury on the law, and properly left it to the jury to decide what inferences should be drawn from the evidence. The Judge described the case as an extremely difficult one.

p. 53, l. 19 p. 66, l. 10
p. 64, ll. 7–15
p. 65, l. 48

9.—The jury retired and in 22 minutes returned but were not agreed upon their verdict. After further deliberation for 27 minutes the jury

p. 66, l. 13; p. 67, l. 13

found the Appellant "guilty with mercy." The Appellant was thereupon sentenced to death. RECORD

10.—The Appellant applied to the Court of Appeal for leave to appeal against his conviction and sentence, but the Court refused leave on the ground that none of the submissions made by the Appellant had any substance. pp. 72–74 p. 74, ll. 14–41

11.—The Court of Appeal under Section 16 of Chapter 431 of the Laws of Jamaica, 1938, as amended by Law No. 59 of 1941, has power, if the interests of justice so require, to order a new trial at such time and place as the Court of Appeal may think fit.

12.—The Respondent submits that the Appellant was clearly shown to have murdered Newby unless there was sufficient evidence to warrant inferences that the Appellant was attacked by Newby; that he was in imminent peril, and that there was no way in which the Appellant could reasonably have avoided that peril except by firing his gun. That Newby may have been stealing coconuts would not in any way justify the use of a firearm. The Respondent submits that on the evidence the jury properly refused to draw such inferences.

13.—The Respondent submits that even if it is possible that the Appellant was gravely prejudiced by not giving evidence on the advice of his Counsel, it should not be assumed that his account of an attack upon him would have been accepted by the jury. The Respondent submits that, if there were any prejudice to the Appellant, a new trial should be ordered at which he can give evidence and at which his story can be tested in cross-examination.

14.—The Respondent therefore submits that this appeal should be dismissed for the following amongst other

REASONS

1. BECAUSE the summing-up was proper and adequate.
2. BECAUSE the jury were entitled on the evidence to draw the inference that the Appellant had not acted in self-defence.
3. BECAUSE the facts established that unless he acted in self-defence the Appellant was guilty of murder.
4. BECAUSE if acting on his Counsel's advice prejudiced the Appellant, justice would be done by an Order for a new trial rather than by quashing the Appellant's conviction.

FRANK GAHAN.

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