1976 October 19

[TRIANTAFYLLIDES, P., HADJIANASTASSIOU, MALACHTOS, JJ.]

GEORGHIOS MAIFOSHIS,

Appellant,

v.

THE POLICE,

Respondents.

(*Criminal Appeal No.* 3748).

Criminal Law—Assault causing actual bodily harm—Self-defence—Plea of—Whether defeated if accused does not restrain himself to merely warding off the blow but strikes back in return.

The appellant was involved in a dispute with the complainants and as a result he was, at first, assaulted by the second complainant; and he reacted by pushing her away from him; he was, then, assaulted by the first complainant and, eventually, a fight ensued between them: It was in evidence that at some stage the appellant was holding a pair of pliers and hit the first complainant, at least twice with it. It was, also, in evidence that he was standing next to the railings of a terrace, high above the ground, and so he did not have any real possibility of retreating; so, when he got involved there in a fight with the first complainant, he did not limit himself strictly to avoiding being hit, but returned the blows using a pair of pliers.

The appellant appealed against conviction of the offences of causing actual bodily harm and common assault. On the question whether or not his plea of self-defence, which he put forward at the trial, was rightly rejected by the trial Court:

Held, allowing the appeal, (1) if somebody is attacked and is given a blow he does not automatically forfeit the advantage of the plea of self-defence if he does not restrain himself to merely warding off the blow but strikes back in return; it all depends on the circumstances of each individual case. (See *Deana*, 2 Cr. App. R. 75).

(2) Taking into account the rather special circumstances of this particular case, wes have reached the conclusion that it

was not safe for the trial Court to hold that the prosecution had discharged the burden of establishing beyond reasonable doubt that the appellant was not acting at the material time in self-defence and, therefore, we have decided to allow this appeal and to set aside the conviction of the appellant.

Appeal allowed.

Cases referred to:

Miliotis v. *The Police* (1971) 2 C.L.R. 292, at pp. 296, 297;
Christou v. *The Police* (1972) 2 C.L.R. 38 at p. 40;
R. v. *Wheeler* [1967] 3 All E.R. 829;
R. v. *Julien* [1969] 2 All E.R. 856;
R. v. *McInnes* [1971] 3 All E.R. 295 at pp. 300-301;
R. v. *Abraham* [1973] 3 All E.R. 694 at p. 696;
Palmer v. *The Queen* [1971] A.C. 814 at pp. 831-32;
Deana, 2 Cr. App. R. 75.

Appeal against conviction.

Appeal against conviction by Georghios Maifoshis who was convicted on the 8th July, 1976, at the District Court of Nicosia (Criminal Case No. 6144/76) on two counts of the offences of assault causing actual bodily harm and common assault, contrary to sections 243 and 242 of the Criminal Code, Cap. 154, respectively and was sentenced by Hji Constantinou, S.D.J. to pay £15 fine on count 1 and £6 on count 2.

Chr. Kitromilides, for the appellant.

A. M. Angelides, Counsel of the Republic, for the respondents.

Cur. adv. vult.

The facts sufficiently appear in the judgment of the Court which was delivered by:

TRIANTAFYLLIDES P.: The appellant has been convicted of the offence of committing an assault causing actual bodily harm to the first complainant, Aristodemos Ermogenous, and of the offence of committing a common assault on the second complainant, Erini Aristodemou, who is the wife of the first one; both offences were, allegedly, committed in Nicosia, on December 21, 1975.

The place where the relevant events occurred is a roof terrace on top of the block of flats where all the parties were residing at the material time.

We are not really concerned in this appeal with a dispute regarding the use of the water supply of the block of flats, which was the cause of the incident in question; but, we would, however, like to stress that, in our opinion, both the appellant and the complainants were to blame in this respect.

What we have to decide, in determining this appeal, is whether or not the plea of self-defence, which was put forward before the trial Court by the appellant, was rightly rejected by such Court.

The salient facts of the case are briefly as follows: As a result of the aforesaid dispute the appellant was, at first, assaulted by the second complainant, Erini, and he reacted by pushing her away from him; he was, then, assaulted by her husband, the first complainant, Aristodemos, and, eventually, a fight ensued between them; it is in evidence that at some stage the appellant was holding a pair of pliers and hit Aristodemos, at least, twice with it.

It is not disputed that the trial Judge has set out correctly in his judgment the law regarding self-defence; what is in issue is the application by him of the law to the facts of this case.

Self-defence is not mentioned specifically in our Criminal Code, Cap. 154; it seems to come, however, within the ambit of the provisions of section 17 of Cap. 154, which renders "necessity" a defence, and, also, it has never been doubted that it is a basic principle which forms part of our criminal law.

As recently as in 1971 our Supreme Court has dealt in *Miliotis* v. *The Police*, (1971) 2 C.L.R. 292, 296, 297, with self-defence as being cognizable for the purposes of our criminal law; and that case was referred to in the later case of *Christou* v. *The Police*, (1972) 2 C.L.R. 38, 40.

The principles applicable as regards the burden of proof, when self-defence is raised as part of a general plea of not guilty, are, according to the *Miliotis* case, the same both in Cyprus and in England; and a recent statement of such principles is to be found in Halsbury's Laws of England, 4th ed., vol. 11, p. 173, para. 298, and p. 630, para. 1180.

The relevant English case-law, such as *R.* v. *Wheeler*, [1967] 3 All E.R. 829, *R.* v. *Julien*, [1969] 2 All E.R. 856 and *R.* v.

McInnes, [1971] 3 All E.R. 295, was referred to, and adopted with approval, in the *Miliotis* case, *supra*.

In the *McInnes* case Edmund Davies L.J. stated the following (at pp. 300–301):-

> " The first criticism of the learned Judge's treatment of self-defence is that he misdirected the jury in relation to the question of whether an attacked person must do all he reasonably can to retreat before he turns on his attacker. The direction given was in these terms:
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> > ' In our law if two men fight and one of them after a while endeavours to avoid any further struggle and retreats as far as he can, and then when he can go no further turns and kills his assailant to avoid being killed himself, that homicide is excusable, but notice that to show that homicide arising from a fight was committed in self-defence it must be shown that the party killing had retreated as far as he could, or as far as the fierceness of the assault would permit him.'
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> One does not have to seek far for the source of this direction. It was clearly quoted from Archbold,[1] which is in turn based on a passage in Hale's Pleas of the Crown.[2] In our judgment, the direction was expressed in too inflexible terms and might, in certain circumstances, be regarded as significantly misleading. We prefer the view expressed by the High Court of Australia[3] that a failure to retreat is only an element in the considerations on which the reasonableness of an accused's conduct is to be judged (see *Palmer* v. *Reginam*[4]), or, as it is put in Smith and Hogan's Criminal Law[5],
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> > '..... simply a factor to be taken into account in deciding whether it was necessary to use force, and whether the force used was reasonable.'

1 Archbold's Criminal Pleading, Evidence and Practice, 1969, 37th Edn., para. 2495.

2 (1800) vol. 1, pp. 481, 483.

3 In *R. v. Howe* (1958) 100 C.L.R. 448 at 462, 464, 469.

4 [1971] 1 All E.R. 1077 at 1085.

5 1969, 2nd Edn., p. 231.

The modern law on the topic was, in our respectful view, accurately set out in *R.* v. *Julien*[1] by Widgery L.J. in the following terms:

> 'It is not, as we understand it, the law that a person threatened must take to his heels and run in the dramatic way suggested by counsel for the appellant; but what is necessary is that he should demonstrate by his actions that he does not want to fight. He must demonstrate that he is prepared to temporise and disengage and perhaps to make some physical withdrawal; and to the extent that that is necessary as a feature of the justification of self-defence, it is true, in our opinion, whether the charge is homicide charge or something less serious.' ".

Also, in the later case of *R.* v. *Abraham*, [1973] 3 All E.R. 694, Edmund Davies L.J. said (at p. 696):-

> " We regard it as a matter for the greatest regret that the procedure recommended by Winn L.J. in *R.* v. *Wheeler*[2] is so frequently departed from. Its simplicity is one of its main attractions. It is clear, easy to comply with and can leave a reasonably intelligent jury in no doubt as to how they should approach their task. The material words in *R.* v. *Wheeler*[2] ought to be well known but are far from habitually observed. I, therefore, quote from Winn L.J.'s judgment[3]:
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> > 'The Court desires to say, for general application, that wherever there has been a killing, or indeed the infliction of violence not proving fatal, in circumstances where the defendant puts forward a justification such as self-defence, such as provocation, such as resistance to a violent felony, it is very important and is essential that the matter should be so put before the jury that there is no danger of their failing to understand that none of those issues of justification is properly to be regarded as a defence: unfortunately, there is some-

1 [1969] 2 All E. R. 856 at 858.
2 [1967] 3 All E. R. 829.
3 [1967] 3 All E. R. at 830.

times a regrettable habit of referring to them as, for example, the defence of self-defence'.

If I may stop quoting for one moment it is to be observed that the trial Judge in the present case unfortunately did that very thing. I resume the quotation[1]:

> ' Where a Judge does slip into the error or quasi-error of referring to such explanations as defences, it is particularly important that he should use language which suffices to make it clear to the jury that they are not defences in respect of which any onus rests on the accused, but are matters which the prosecution must disprove as an essential part of the prosecution case before a verdict of guilty is justified.'

What accordingly is the drill, if that term may be used, which a trial Judge should faithfully follow in dealing with such special pleas as self-defence? Surely it is this: give a clear, positive and unmistakeable general direction as to onus and standard of proof; then immediately follow it with a direction that in the circumstances of the particular case there is a special reason for having in mind how the onus and standard of proof applies, and going on to deal in, for example, the present case with the issue of self-defence and to tell the jury something on these lines:

> ' Members of the jury, the general direction which I have just given to you in relation to onus and standard of proof has a particularly important operation in the circumstances of the present case. Here the accused has raised the issue that he acted in self-defence. A person who acts reasonably in his self-defence commits no unlawful act. By his plea of self-defence the accused is raising in a special form the plea of not guilty. Since it is for the Crown to show that the general plea of not guilty is unacceptable, so the Crown must convince you beyond reasonable doubt that self-defence has no basis in the present case.' ".

Lastly, it is useful to refer, too, to the manner in which the Privy Council in England approached the question of self-

1 [1967] 3 All E. R. at 830.

defence in *Palmer* v. *The Queen*, [1971] A.C. 814, where the following were stated (at pp. 831-832):-

"In their Lordships' view the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence. Of all these matters the good sense of a jury will be the arbiter. There are no prescribed words which must be employed in or adopted in a summing up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self-defence. If there has been no attack then clearly there will have been no need for defence. If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken. A jury

will be told that the defence of self-defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence. But their Lordships consider, in agreement with the approach in the *De Freitas* case [1960] 2 W.I.R. 523, that if the prosecution have shown that what was done was not done in self-defence then that issue is eliminated from the case. If the jury consider that an accused acted in self-defence or if the jury are in doubt as to this then they will acquit. The defence of self-defence either succeeds so as to result in an aquittal or it is disproved in which case as a defence it is rejected."

The application of the relevant legal principles to the facts of the present case is not free from difficulty in view of the rather special situation in which the appellant found himself at the material time; it is true that he was standing next to the railings of the terrace, high above the ground, and so he did not have any real possibility of retreating; but, it is equally true that, when he got involved there in a fight with the first complainant, he did not limit himself strictly to avoiding being hit, but returned the blows using, as already stated, a pair of pliers.

We have found some guidance in an old case in relation to self-defence, that of *Deana*, 2 Cr. App. R. 75, which is referred to in Halsbury's, *supra*, as being still good law; this case seems to establish the proposition that if somebody is attacked and is given a blow he does not automatically forfeit the advantage of the plea of self-defence if he does not restrain himself to merely warding off the blow but strikes back in return; it all depends on the circumstances of each individual case.

Taking into account the rather special circumstances of this particular case, we have, in the end, reached the conclusion that it was not safe for the trial Court to hold that the prosecution had discharged the burden of establishing beyond reasonable doubt that the appellant was not acting at the material time in self-defence and, therefore, we have decided to allow this appeal and to set aside the conviction of the appellant.

Appeal allowed.