IN THE COURT OF APPEAL FOR UGANDA

AT KAMPALA

(Coram: Duffus, P., Spry, V-P. and Lutta, J.A.)

CRIMINAL APPEAL NO. 1 OF 1972

BETWEEN

JOHN BISSET STENHOUSE……APPELLANT

AND

UGANDA……RESPONDENT

(Appeal from a judgment of the High Court of Uganda at Kampala (Kiwanuka, Ag. C.J) dated 15th December, 1971 In Criminal Appeal No. 343 of 1971)

JUDGMENT OF COURT

DUFFUS, P.

The appellant was convicted on a charge of manslaughter by the Chief Magistrate at Gulu. His appeal to the High Court was dismissed. A second appeal only lies to this court on questions of law. In this case the appellant complains that the decision of both the Chief Magistrate and the Chief Justice who heard the appeal based on a complete misconception of evidence caused by both misdirection and non-direction on the facts as proved. This then becomes a question of law and this Court then has to consider all the facts and circumstances of the case, to first decide whether there has in fact been a misdirection and then further to decide whether this misdirection has resulted in failure of justice.

The appellant was a school master at Mvara Senior Secondary School at Arua. On the day that this incident happened, the 20th February, 1971, there was disciplinary trouble in the school and

it was decided to suspend some of the forms. Some of the students including the deceased were young men of around 20 years of age. On that night stones were thrown and some hit the roof of the appellants a house. He lived with his wife on the school compound. The appellant then, admittedly irresponsibly, fired three shots with his repeater shot gun. The appellant's case is that he fired in the Air to scare the students. There is no evidence that these shots hurt anyone. The appellant wife then drove up their car and the appellant got into the car with his gun in order to go with his wife to the police station and report the matter.

The incident happened on their way out of the school compound. There are various accounts as to what happened. The prosecution case based on the evidence of some of the students and a watchman was that the appellant fired two shots at the students standing in the ground from the moving the car and that killed the deceased. None of these witnesses saw any stones thrown or any attack on the car. The appellant's defence as related first in his statement to the police and then in evidence in court and an borne out by his wife's evidence in that his wife slowed down the car to pass some apparent obstruction on the road, and then a group of students rushed at the car shouting and throwing stones and that one of these stones hit his wife on the head and then she lost temporary control of the car which went up the bank and one of the back wheels was spinning in the murram so the car almost stopped and the appellant said that It was at this stage that he took his gun from the back seat and from behind his wife fired two shots.

He did this because he said he thought that the students might have killed his wife or himself or his unborn child. These were the shots that killed the deceased. It was not suspected that he deliberately aimed the gun at anybody. The appellant stated he intended to fire over the students' heads but a stone struck his arm when he was about to fire causing an abrasion. He fired two shots instead of one. The students then stopped throwing stones and his wife—recovered control of the car and drove straight to the police station. Proved facts which confirm the appellant's account were first that the appellant's car was damaged. The off—side door would not shut properly. It was not possible to raise the front window due to the window frame being bent; there were also three dents on the driver's door, eel marks indicating hits on the windscreens. There was also the fact that Dr. Bawa found an abrasion on the appellant' arm and the further that the prosecution expert witness Grimley thought that the deceased was shot only about 10feet away.

The appellant admitted firing the fatal shot but he pleaded that he did so in self—defence. The use of force in self—defence by section 17 of the Penal Code determined in accordance with the principles of English Law. We consider that the learned Chief Magistrate and the learned Chief Justice correctly directed themselves on the law. The onus is on the prosecution to establish that the killing was not done in self—defence. In this connection we could set out a short quotation from the judgment of the Privy Council in Palmer v. Reginam (1971) 1 A.E.L.R. 1087 at l08 which has already been quoted by both the Chief Justice and Chief Magistrate:

> "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 it's raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence."

We will first consider the Chief Magistrate's judgment. The appellant listed some fifteen grounds of appeal in his appeal to the High Court. The main grounds were that he failed to give proper consideration to the defence and that he misdirected himself on the facts in a number of instances and came to conclusions completely unsupported by the evidence and that he ignored facts which supported the defence.

There can be no doubt that the Chief Magistrate materially misdirected himself on the facts and also that he arrived at conclusions adverse to the appellant which were not based on the evidence or on any facts proved in Court.

The first material misdirection is that the Chief Magistrate apparently concluded that the damage to the car was done by stones thrown in the vicinity of the accused's house. With respect the Chief Magistrate is not always clear is his findings but, this must be his reasoning in the following passages from his judgment: -

> “The car of the accused had received some damage. It could be seen from photographs (Ex. 1) produced in court. I also saw the car in person. The prosecution witnesses have not explained this damage. They did not see anyone damaging the car. This is possible. The witnesses who have given evidence were somewhat for from the house of accused and could not have seen what happened to the car before it reached headmaster’s house. Only those students who were near the house of accused and would have appreciated what took place and they would have thrown stones. At that time the gun of the accused was in the back seat. By the time he would take out the gun and shoot, the car would move forward and the moment of peril if any would have passed. I am satisfied that the prosecution witnesses are telling the truth when they deny throwing stones as they were near dining hall or administration block and would not have even known that the car of the accused had anything to do with the first firing.”

There the Chief Magistrate is really finding that the stones were thrown and the car damaged near to the accused’s house and not at the sport where the car was when the deceased was shot. He thus rejects and disbelieves the appellant’s defence that he was attacked by stones from the students at the time he fired the second lot of shots. This would completely destroy the appellant’s defence but this finding is based on absolutely no evidence and was not even suggested by the prosecution in cross-—examination or otherwise at the trial. With respect this was mere conjecture on the Magistrate’s part and was a most serious and fatal misdirection.

Another misdirection was in this finding by the Chief Magistrate:

> “Though the prosecution has not clearly proved that a boy named Chandia was wounded by these shots there is some evidence on record from which this could be inferred. The prosecution could have called Chandia to give evidence as to where he was when he received the shot. Had Chandia died as a result of these shots the accused would in all probability he facing a charge of murder.”

This quotation does not really have a material bearing on this charge but again it is based on no evidence and was not part of the prosecution’s case, and it does show that the Chief

Magistrate is again conjecturing on facts not proved, unfortunately to the prejudice of the appellant. That this incident did prejudice the appellant in the mind of the Magistrate is shown in his Comment when he deals with the fact that the appellant had re—loaded his gun and says:—

> "It seems to me that accused was bent upon killing someone that night."

In this highly prejudicial finding the Magistrate ignores the fact that the appellant and his wife were driving their car 1eaving the school compound in order to proceed to the police station to report the trouble at the school.

The important features of the appellant's defence is that he and his wife were attacked by the students throwing stones and that it was only when his wife was hit by a stone and the car had got out of control and mounted the bank and practically stopped and the students were still approaching and throwing stones that he fired as he feared their lives were in danger. The Chief Magistrate does not make any very clear findings as to this incident. He apparently completely rejects this defence, but in doing so he has misdirected himself on the evidence, as we pointed out happened when considering where the car was stoned and damaged. He finds that he does not believe that the appellant had any real trouble with his car but as the appellant points out he does not take into account that P.W.3 does say the car was going slowly when the gun was fired. Then the Chief Magistrate states that there was no doubt that some students were running towards the car but no one seems to have been near enough to cause danger to the accused, but here again he does not deal with the evidence of the expert that the deceased was shot when only 10 feet away. Then in his final reasons for conviction he said:

> "The most natural reaction of anyone would be to avoid stones, by raising the glass of the window of the driver's side. No one did this. The accused did not ask his wife to do so"

With respect this would possibly have been a highly dangerous manoeuvre as the glass would most likely have been shattered and in any event the police evidence establishes that the window could not have been raised as it was damaged during, the incident. Mr. Wilkinson for the appellant pointed out other misdirection's or non-directions, hut it is abundantly clear that the Chief Magistrate did misdirect himself on the facts to the prejudice of the appellant.

In the first appeal taken by the learned Chief Justice he entirely supported the findings of the Chief Magistrate. The appellant claims that the Chief Justice failed to consider and re-evaluate the evidence and form his own conclusions. We are satisfied that the learned Chief Justice did consider the evidence but the appellant further complains that not only did the Chief Justice misdirect himself in accepting and acting on the findings of the Chief Magistrate but that he also further erred in his own evaluation of the evidence. Thus the appellant complained that the Chief Justice was wrong in saying that Mrs. Stenhouse stated that the stones had not hit the car when the gun was fired on the second occasion. The record bears out this objection. A more serious objection was to the Chief Justice suggestion that the damage to the car might have been done after the incident. This was never suggested during the trial and is not borne out by the evidence. The car was in police custody from that night.

The main complaint against the Chief Justice's judgment is that he did not consider and find that there had been the various misdirection's and errors in the Chief Magistrate's judgment that we have pointed out. The Chief Justice's decision really appears to be based on the findings of the Chief Magistrate.

We consider that the misdirection's end erroneous conclusions arrived at both is the judgment of the Chief Magistrate as well as in that of the learned Chief Justice are of such a material nature directly affecting the decision of thin case that it could be dangerous to maintain this conviction unless we can fine that there has been no substantial miscarriage of justice.

This will really depend on a proper consideration of the defence, and the issue would simply be could the trial court properly directed have been able to find that the appellant was justified in firing his gun. On this question we would toy that in our view on a proper and balanced consideration of the evidence the trial court must have accepted the appellant's version as being the true account of what occurred. The prosecution's case is that there were no attacks and no stones were throes. This in view of the damage to the car must clearly be untrue. Mr. Sekandi for the Republic quite properly concedes that some stones were thrown. This no doubt was the reason for the reduction of the charge to manslaughter. The appellant's account as supported by his wife is that they were on their way to the police Station, and that a large body of students rushed at the car shouting and throwing stones, and that it was only after Mrs. Stenhouse had

been hit and temporarily lost control of the car which practically stopped that he fired, as he feared for their lives. There were real facts supporting, the truth of the defence. The bruise on the appellants arm, the comparatively short distance that the deceased was from the car when shot, but the main evidence was the damage to the car. There were some seven marks caused by the stones on the car. The most significant was the damage to the window frame. This was just beside where Mrs. Stenhouse was sitting in the driver's seat. The damage must have been caused either by a large stone or one thrown with grate force. In any event if this missile had hit anyone it might have caused grievous harm, and certainly blows from stones can be lethal and cause death. The appellant's defence is that he fired in "the agony of the moment", when in the dark with his car almost stopped, and with his attackers advancing, shouting and throwing stones and only then a short distance away, and when escape must have appeared improbable. We are of the view that the appellant and his wife were at that time placed in such a position of danger that a court could reasonably have come to the conclusion that the appellant was justified in firing in self—defence. The fact that about an hour later another master was attacked an so maliciously injured that he had to spend three weeks in hospital while his car was burnt is some indication of what could have occurred, although at this time the students' temper would have been greatly aggravated by the appellants shooting.

In his address Mr. Sekandi stressed that both shootings must be considered together. We agree that in considering the appellants defence it must be remembered that he was then on his way to the Police Station and it was at this stage, when he was leaving the scene, that he was attacked and stoned. His defence must in our view be considered on the facts and circumstances happening at that time.

We are in no doubt that this conviction cannot be sustained. We allow the appeal and quash the conviction for manslaughter and set aside the sentence and order that to appellant be acquitted and discharged.

Dated at Kampala this 11th day of March, 1972.

W.A.H. DUFFUS
PRESIDENT

F. SPRY
VICE PRESIDENT

This judgment has not been signed by Lutta, J.A.

W.A.H. DUFFUS
PRESIDENT

I certify that this is a true copy of the original.

REGISTRAR