[COURT OF APPEAL]

# *REGINA v. BIRD

1985 March 22 Lord Lane C.J., Skinner and Simon Brown JJ.

*Crime—Self-defence—Unlawful wounding—Need to demonstrate unwillingness to fight—Whether only method of establishing defence—Whether action in self-defence possible without temporising, disengaging or withdrawing*

The appellant, a girl aged 17, held a glass in her hand and lunged at a young man, injuring him. She was tried on a count of unlawful wounding. She claimed that he had slapped and pushed her so that her back was to the wall and that she acted in self-defence without realising until later that she had been holding the glass in her hand. The jury were directed that an attack could not be wrapped up in the cloak of self-defence and it was necessary that a person claiming to exercise a right of self-defence should demonstrate by action an unwillingness to fight. She was convicted.

On appeal against conviction:—

*Held,* allowing the appeal, that use of the word "necessary" in the judge's direction to the jury put too high an obligation on the appellant; that, in some circumstances a person might act in self-defence and have a good defence without temporising, disengaging or withdrawing; that, therefore, the jury had been misdirected and in the circumstances the conviction had to be quashed (post, pp. 820C–D, E, 821A–B).

*Reg. v. Julien* [1969] 1 W.L.R. 839, C.A. explained.

*Reg. v. McInnes* [1971] 1 W.L.R. 1600, C.A. and *Palmer v. The Queen* [1971] A.C. 814, P.C. considered.

*Per curiam.* If a defendant is proved to have been attacking or retaliating or revenging himself, he is not truly acting in self-defence. Proof that he tried to retreat or call off the fight may be a cast-iron method of rebutting the suggestion that he was an attacker or retaliator or was trying to revenge himself, but it should be stressed that it is not the only method of doing that (post, p. 820D–E).

The following cases are referred to in the judgment:

*Palmer v. The Queen* [1971] A.C. 814; [1971] 2 W.L.R. 831; [1971] 1 All E.R. 1077, P.C.

*Reg. v. Julien* [1969] 1 W.L.R. 839; [1969] 2 All E.R. 856, C.A.

*Reg. v. McInnes* [1971] 1 W.L.R. 1600; [1971] 3 All E.R. 295, C.A.

No additional cases were cited in argument.

APPEAL against conviction.

The appellant, Debbie Bird, aged 17, after a re-trial was convicted on 24 January 1985 in the Crown Court at Chelmsford (Judge Taylor and a jury) on a count charging that on 10 March 1984 she unlawfully wounded Darren John Marder, contrary to section 20 of the Offences against the Person Act 1861. She was sentenced to nine months' youth custody. She sought leave to appeal against conviction on the ground, inter alia, that the judge erred in law in directing the jury that before she could rely on a plea of self-defence it was necessary that she should have demonstrated by her action that she did not want to fight.

A The facts are stated in the judgment.

*James Pavry* (assigned by the Registrar of Criminal Appeals) for the appellant.

*Robert Neill* for the Crown.

LORD LANE C.J. gave the following judgment of the court. On 24 B January 1985 in the Crown Court at Chelmsford, the appellant, as she now is, this court having given her leave to appeal against conviction, was convicted after a re-trial of unlawful wounding under section 20 of the Offences against the Person Act 1861, and she was sentenced to nine months' youth custody.

The facts of the case are these. On 10 March 1984 the appellant, C Debbie Bird, was celebrating her seventeenth birthday. There was a party at a house in Harlow. Unhappily it was at that party that the events occurred which ended with her being sent to youth custody. There was a guest at the party called Darren Marder, who was to be the victim of the events which occurred thereafter. He and the appellant had been friendly and had been going out together between about January and the middle of 1983. That close friendship had come to an end, but D Marder arrived at the party with his new girl friend and, for reasons which it is not necessary to explore, an argument broke out. After a great deal of bad language and shouting, the appellant told Marder to leave, and leave he did. A little later he unwisely came back and a second argument took place together with a second exchange of obscenities between the two of them. What happened thereafter was the E subject of dispute between the parties, though not so much dispute as often arises in these sudden events. The appellant poured a glassful of Pernod over Marder, and he retaliated by slapping her around the face. Further incidents of physical force took place between them. The appellant said that the time came when she was being held and held up against a wall, at which point she lunged at Marder with her hand, which was the hand, unhappily, which held the Pernod glass. The glass F hit him in the face, broke, and his eye as a result was lost. It was a horrible event in the upshot, but of course she would not realise the extent to which she was going to cause injury to this young man.

The prosecution case was this, that Marder only slapped the appellant once and that was in order to calm her down, the commonly believed remedy for hysterics. The jury were accordingly invited to infer from G that that she could not possibly have been acting in reasonable self-defence when she retaliated against that slap with a weapon as grave as a glass. Secondly, there was evidence of Marder, and also a Miss Bryant, who was his new girl friend, that so far from showing remorse after the event, the appellant said that she would do it again if the same situation arose. Thirdly, there was the evidence of Mrs. Sharpe, who was the owner of the house where the party was taking place, who said H that after the incident the appellant had admitted to her, Mrs. Sharpe, that she had slashed Marder in the face with a glass after he had punched her.

The appellant herself was interviewed by the police. She said that it was only afterwards that she realised that a glass was in her hand, the hand with which she struck the appellant. The appellant gave evidence. She insisted that she had been acting in self-defence. She was being pushed. Marder had said to her that he would hit her if she did not shut

up. He slapped her in the face, she was being held by him and thought the only thing for her to do was to strike back to defend herself. In the agony of the moment, so to speak, she did not realise that she was holding the glass. Those are the comparatively simple facts of the case.

The grounds of appeal are these. First of all, the judge was in error in directing the jury that before the appellant could rely upon a plea of self-defence, it was necessary that she should have demonstrated by her action that she did not want to fight. That really is the essence of the appellant's case put forward by Mr. Pavry to this court in what, if we may say so, was a most helpful argument.

The relevant passages in the summing up are these—first, towards the beginning of the direction to the jury:

> "You cannot wrap up an attack in the cloak of self-defence and it is necessary that a person claiming to exercise a right of self-defence should demonstrate by her action that she does not want to fight. At one time it was thought that in order to demonstrate that, that the person seeking to raise a question of self-defence had to retreat. That is not so any longer at all, but there is an obligation to see whether the person claiming to exercise the right of self-defence should have demonstrated that she does not want to fight at all."

Towards the end of the summing up the judge used these words:

> "You will have to consider whether in the circumstances of this case self-defence has any application at all. Does it look to you that this lady, who was behaving in this fashion, had demonstrated that she did not want to fight and if she had demonstrated that she did not want to fight, was the use of the glass with a hard blow which broke it, reasonable in the circumstances? All these are matters for you and not for me."

Those words were taken very largely from a decision of this court in *Reg. v. Julien* [1969] 1 W.L.R. 839. That was an ex tempore judgment by Widgery L.J. to which I was a party as was Karminski L.J. The passage from which the words are taken reads, at p. 842:

> "The third point taken by Mr. McHale is that the deputy chairman was wrong in directing the jury that before the appellant could use force in self-defence he was required to retreat. The submission here is that the obligation to retreat before using force in self-defence is an obligation which only arises in homicide cases. As the court understands it, it is submitted that if the injury results in death then the accused cannot set up self-defence except on the basis that he had retreated before he resorted to violence. On the other hand, it is said that where the injury does not result in death (as in the present case) the obligation to retreat does not arise.
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> "The sturdy submission is made that an Englishman is not bound to run away when threatened, but can stand his ground and defend himself where he is. In support of this submission no authority is quoted, save that Mr. McHale has been at considerable length and diligence to look at the text books on the subject, and has demonstrated to us that the text books in the main do not say that preliminary retreat is a necessary prerequisite to the use of force in self-defence. Equally, it must be said that the text books do not state the contrary either; and it is, of course, well known to us all that for very many years it has been common form for judges

directing juries where the issue of self-defence is raised in any case (be it a homicide case or not) to say that the duty to retreat arises.

"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 Mr. McHale; 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 that that is necessary as a feature of the justification of self-defence is true, in our opinion, whether the charge is a homicide charge or something less serious. Accordingly, we reject Mr. McHale's third submission."

That decision was to some extent followed later in *Reg. v. McInnes* [1971] 1 W.L.R. 1600. The judgment of the court was delivered by Edmund Davies L.J., and the passage in question reads, at p. 1607:

"The first criticism of the 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 upon his attacker. The direction given was in these terms: '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.'

"One does not have to seek far for the source of this direction. It was clearly quoted from *Archbold Criminal Pleading Evidence & Practice,* 37th ed. (1969), p. 780, para. 2495, which is in turn based upon a passage in *Hale's Pleas of the Crown* (1800) vol. 1, pp. 481, 483. In our judgment, the direction was expressed in too flexible terms and might, in certain circumstances, be regarded as significantly misleading. We prefer the view expressed by the full court of Australia that a failure to retreat is only an *element* in the consideration upon which the reasonableness of an accused's conduct is to be judged (see *Palmer v. The Queen* [1971] 2 W.L.R. 831, 840) or, as it is put in *Smith and Hogan Criminal Law*, 2nd ed. (1969), p. 231: '. . . simply a factor to be taken into account in deciding whether it was necessary to use force, and whether the force used was reasonable.'"

Had the judgment stopped there, there would have been no difficulty. But it continues by citing the passage from the judgment in *Reg. v. Julien* [1969] 1 W.L.R. 839, 842 which we have already read.

The court in *Reg. v. Julien* was anxious to make it clear that there was no duty, despite earlier authorities to the contrary, actually to turn round or walk away from the scene. But reading the words which were used in that judgment, it now seems to us that they placed too great an obligation upon a defendant in circumstances such as those in the instant case, an obligation which is not reflected in the speeches in *Palmer v. The Queen* [1971] A.C. 814.

The matter is dealt with accurately and helpfully in *Smith and Hogan Criminal Law,* 5th ed. (1983), p. 327:

"There were formerly technical rules about the duty to retreat before using force, or at least fatal force. This is now simply a factor to be taken into account in deciding whether it was necessary to use force, and whether the force was reasonable. If the only reasonable course is to retreat, then it would appear that to stand and fight must be to use unreasonable force. There is, however, no rule of law that a person attacked is bound to run away if he can; but it has been said that— '. . . 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.' [*Reg. v. Julien* [1969] 1 W.L.R. 839, 842]. It is submitted that it goes too far to say that action of this kind is *necessary*. It is scarcely consistent with the rule that it is permissible to use force, not merely to counter an actual attack, but to ward off an attack honestly and reasonably believed to be imminent. A demonstration by [the defendant] at the time that he did not want to fight is, no doubt, the best evidence that he was acting reasonably and in good faith in self-defence; but it is no more than that. A person may in some circumstances so act without temporising, disengaging or withdrawing; and he should have a good defence."

We respectfully agree with that passage. If the defendant is proved to have been attacking or retaliating or revenging himself, then he was not truly acting in self-defence. Evidence that the defendant tried to retreat or tried to call off the fight may be a cast-iron method of casting doubt on the suggestion that he was the attacker or retaliator or the person trying to revenge himself. But it is not by any means the only method of doing that.

It seems to us therefore that in this case the judge—we hasten to add through no fault of his own—by using the word "necessary" as he did in the passages in the summing up to which we have referred, put too high an obligation upon the appellant.

The next question is whether it was in the circumstances of this case a material misdirection or perhaps, put in another way, is this a proper case for the court to apply the proviso to section 2(1) of the Criminal Appeal Act 1968. One should say that in very many cases a direction of this sort would have no effect. But this particular case was what Skinner J. described in argument as a "back against the wall" case, certainly if the appellant's version of the facts was true or might have been true. Consequently this was perhaps one of the rarer cases where this direction was one which may very well have affected the outcome of the case, for the simple reason that on one version of the facts it may have been impossible for the appellant to demonstrate the matters which the judge said it was necessary to demonstrate for the defence to succeed.

The real problem for the jury to decide in this case was whether the appellant realised that she had a glass in her hand when she, in her reaction, struck the blow that she did. It may very well have been, in all the circumstances of the case, that the jury came to the conclusion that they were doubtful as to whether she realised that or not. Of course if they were doubtful, then the judgment on that aspect of the case had to come down in favour of the appellant. If the jury thought that she did not realise that she had a glass in her hand, then they might very well have turned to the next problem, namely, to consider what the judge

had been telling them about the "necessity" for the appellant to demonstrate by her actions that she did not want to fight.

In those circumstances this misdirection might very well have caused them to come to a wrong conclusion. Accordingly it is not a case where we feel it would proper for us to apply the proviso. This was a material misdirection and consequently this appeal must be allowed and the conviction quashed.

*Appeal allowed.*
*Conviction quashed.*

*Solicitors: J. J. Goodwin, Chelmsford.*

L. N. W.