[1996] 2 Cr App Rep 128
COURT OF APPEAL (CRIMINAL DIVISION)
EVANS LJ, KAY, COLLINS JJ
13 MARCH 1995
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Criminal law — Assault — Defence — Self defence — Failure to give direction before jury retired — Whether jury properly directed thereafter — Whether appellant entitled to use force which he believed reasonable

This judgment has been summarised by LexisNexis UK editors.

The appellant was charged with four offences of violence against his wife. At trial, in relation to two of those counts the arguments he raised amounted to self-defence. The judge failed to refer to self-defence in summing up, however after the jury sent him a note querying the level of reasonable force, he did, subsequently provide such a direction. The appellant was convicted of the latter two offences and appealed against conviction on the ground that the judge failed to direct the jury appropriately on the issue of self-defence. In particular he contended that the judge failed to indicate that the test was subjective, in the sense that a defendant should not be convicted unless he intended to use force that was more than was necessary for self defence.

Held: The essential elements of self-defence were clear. The jury had to decide whether a defendant honestly believed that the circumstances were such as required him to use force to defend himself from attack or a threatened attack. A defendant had to be judged on his honest belief, even though that belief may have been mistaken. That did not mean that the belief of a defendant, however ill founded, would have enabled him to do what the appellant had done. The direction given by the judge had been as favourable as the appellant could have hoped, albeit that it had been given in stages. It followed that the appeal would be dismissed.

L Kamill for the Crown; P Mendelle for the Appellant

COLLINS J

(reading the judgment of the court): On 17 October 1994 the appellant, a senior registrar in microbiology, appeared before the Crown Court at Wood Green on an indictment charging him with four offences of violence against his wife, Marie. The first alleged the causing of grievous bodily harm with intent; the other three, assault occasioning actual bodily harm. Following a four day trial, on 20 October, he was acquitted of counts 1 and 2, that is to say causing grievous bodily harm and one charge of assault occasioning actual bodily harm, but was convicted of counts 3 and 4, both assaults occasioning actual bodily harm. On 18 November he was sentenced to 200 hours' community service and ordered to pay various sums by way of compensation and costs. He now appeals by leave of the single judge.

The appellant and his wife had both been married before but were divorced when they first met in 1992 when they were working at a hospital in Kent, he as a doctor and she as a nurse. They were attracted and decided that they would get married.

The appellant was to move to a new post in London in 1993, and obtained a flat in Southgate. On 3 September 1993 they were married and went to live together at that flat. Very shortly after the marriage things began to go wrong. She said that he was extraordinarily jealous, and this led to arguments in which he treated her with physical violence. He said that she had a very violent temper and would blow up and go for him in a physical way, and that any violence that he did to her was purely in order to restrain her.

It is necessary to give a short account of the circumstances of each of the alleged assaults in order fully to follow the points made by Mr Mendelle on this appellant's behalf.

The first occurred on 2 October 1993 and resulted in the appellant's wife's wrist being fractured. Mrs Owino (she was referred to at trial by her maiden name of Miss Coulson) said that a row developed following a visit to the flat of the appellant's daughter by his previous marriage and, in the course of that argument, he grabbed her by the wrists, twisted her left wrist outwards, causing the ulna to break. She said that he refused to take her to hospital for some time, an allegation which was not supported by his daughter, who was called to give evidence.

There was evidence from the surgeon who treated her that the fracture was more likely to have been caused by a twist than by a fall.

That was relevant because the appellant said that his wife had fallen off a chair when standing on it to reach for something in a cupboard in the kitchen when he was not even in the room, and it was that that caused her to break her wrist. That is indeed the story that she told various people, including the casualty officer when she went to hospital. Although some considerable time later in December, and of course when she gave her evidence, she said that that story was incorrect and that her husband had caused the fracture by twisting her wrist.

Count 2 related to an incident on 15 November. Miss Coulson alleged that the appellant had, in the course of an argument, punched her in the face a number of times, causing her to suffer a black eye.

She undoubtedly did receive a black eye and she did attend hospital as a result. The hospital notes record that she could not recall what had happened because she was drunk.

The appellant said that he saw the black eye the next morning. It had appeared overnight, and his wife told him that it had been caused when she had gone into the kitchen to get a glass of water and had unfortunately walked into the kitchen door.

Count 3 was an incident on 30 November 1993. There was an argument about sleeping arrangements. She said that this developed into him hitting her repeatedly about the head, causing her, among other things, to fear that she had damaged her eardrum. She telephoned the police.

Again she went to the hospital. She saw a Dr Shakani, who had photographs taken. There was a fresh bruise to the back of her head and old bruising to her left eye, her jaw and her arms, but the doctor said the bruising had "several different ages" and was unlikely to have been caused, he thought, in merely restraining her.

The appellant's account was that they did have a quarrel in which they both pushed each other. She was screaming that she did not want him to sleep with her. She then calmed down. She woke him again at 3am, wanting to talk to him. He refused to talk. She called him a "selfish bastard" and began pushing and shoving him, and so he picked her up to take her from the room. She broke away and things calmed down. Any injuries she sustained were thus, if he was right, caused when he was using force to restrain her from attacking him.

After this incident she left him. She returned of her own volition in mid-December, about a fortnight or so later. There was no improvement in her temper, according to him, but they did spend Christmas together. She had been staying with her sister and had completed a list of matters which had aggravated the relationship. This did not include violence by him. Her explanation for that was that she was listing things which might create violence; she was not listing violent episodes themselves.

Finally, we come to count 4, which occurred on 3 January 1994. He was decorating the bathroom. There was a quarrel about her using the lavatory. This developed into a tussle of some sort. She said he hit her and threw her out of the flat, injuring her right thumb.

Again, Dr Shakani was seen. He was not able to observe any new bruising, save for some reddening to the top of her back, but there were other bruises of variable age.

The appellant's case was that there had indeed been a quarrel. She made some very offensive remarks, and so he had lifted her up and put her out of the house.

Generally in the course of his interviews with the police he denied any violence, with the exception of slaps, which were admitted towards the end of the interview, when he said:

"I don't deny she has bruises, but usually when Marie starts lunging, I usually hold her and that's where there is some pushing and falling. I don't deliberately hit her. I have never punched or kicked her or shoved her head against a wall or the floor. I've slapped her, yes; most I've done."

He denied that he had ever deliberately used violence to her except in those circumstances.

It is clear that in relation to counts 3 and 4 self-defence was being raised, the appellant's case being that any bruising suffered by his wife for which he was responsible was caused only by reasonable force used in restraining her and in preventing her from assaulting him. In those circumstances it was obviously incumbent upon the learned judge to give a full and proper direction as to the elements of self-defence and also to draw the jury's attention to the distinction between provocation by words or by conduct, which would not, and threats or actual attack which could raise an issue of self-defence. If there is material which raises this issue, the burden is of course on the prosecution to prove that the violence used was excessive and was not used in self-defence.

Unfortunately, the learned judge did not refer to self-defence at all in his summing up, and the jury retired shortly after 1 pm without any such direction being given to them. It was perfectly plain that such a direction ought to have been given.

Then about an hour and a half after their retirement, the jury sent a note to the judge. It read as follows:

"Question on law:

We have come to an impasse on the issue of the definition of assault. If a person reacts to being assaulted themselves by grabbing or pushing, is that assault? What might be regarded as unreasonable force, ie, is lifting someone out of a room against their will (struggling) regarded as an assault? Also, one or two of us wish to take into account provocation, others of us do not believe we should do. Can you direct us, is it a question of fairness?"

There was a discussion with counsel about what the learned judge should do in answer to this note, and in the course of that the learned judge said this, at the bottom of p 22 of the transcript:

"When I was drafting up my thoughts for this summing-up, I had, in fact, put a note on self-defence and restraint, but neither of you mentioned it in your closing speeches, so I purposely refrained from mentioning it to the jury. I did not think it was right for me to do it, but in view of the note, I should have thought it was essential for me to do it."

With the greatest of respect to the learned judge, if, as indeed was clear, the issue of self-defence had been raised on the evidence, he had a duty to put it to the jury and to direct the jury upon it. The fact, if it be a fact, that counsel had not specifically referred to self-defence in the course of their speeches was no reason for the learned judge not to deal with it in his summing up.

We are told by Mr Mendelle that he did not specifically use the word self-defence in the course of his submissions to the jury, nor, as we understand it, did counsel for the prosecution, Miss Kamill. But it was a matter, he says, that the jury were well aware of because the interview which the appellant had had with the police made it perfectly plain, in the passage to which we have already referred, that any violence that he had used to his wife was used only when he was restraining her when she was attacking or, perhaps, threatening to attack him. So, as we have said, in those circumstances, it was clearly necessary for the learned judge, whatever counsel may or may not have said, to have dealt with the matter in the course of his summing up. But the jury having sent the note, he then proceeded to deal with it.

Complaint is made by Mr Mendelle that he did not deal with it even then as adequately as he ought to have done. Mr Mendelle essentially submits that he failed to direct the jury, as he ought to have done, that any force used must be unlawful, in the sense that it must have been excessive - more than was reasonable for self-defence; and further, that the test of what was reasonable was subjective, in the sense that the defendant could not be convicted unless he intended to use force which was more than was necessary for lawful self-defence. He relies on the authority of R v Scarlett [1993] 4 All ER 629, 98 Cr App Rep 290 to support that proposition.

Before I come to the case of Scarlett specifically, it is our view that the law does not go as far as Mr Mendelle submits that it does. The essential elements of self-defence are clear enough. The jury have to decide whether a defendant honestly believed that the circumstances were such as required him to use force to defend himself from an attack or a threatened attack. In this respect, a defendant must be judged in accordance with his honest belief, even though that belief may have been mistaken. But the jury must then decide whether the force used was reasonable in the circumstances as he believed them to be.

Scarlett was a case where a landlord of a public house had been ejecting, and perfectly lawfully and properly ejecting, a drunken customer from his public house. The allegation was that he had used excessive force in the course of ejecting him so that the customer fell down the steps of the entrance to the pub and unfortunately hit his head and was killed. What Mr Mendelle relies upon in the case of Scarlett is a passage on p 636 of the former report, where Beldam LJ, giving the judgment of the Court, said this:

"Where, as in the present case, an accused is justified in using some force and can only be guilty of an assault if the force used is excessive, the jury ought to be directed that he cannot be guilty of an assault, unless the prosecution prove that he acted with the mental element necessary to constitute his action an assault, that is 'that the defendant intentionally or recklessly applied force to the person of another'. Further they should be directed that the accused is not to be found guilty merely because he intentionally or recklessly used force which they consider to have been excessive. They ought not to convict him unless they are satisfied that the degree of force used was plainly more than was called for by the circumstances as he believed them to be and, provided he believed the circumstances called for the degree of force used, he is not to be convicted even if his belief was unreasonable.

In this case the learned judge gave no direction to the jury that the prosecution, to establish an assault, had to prove that the appellant intentionally or recklessly applied excessive force in seeking to evict the deceased."

The passage which we have cited could, if taken out of context, give rise to a suggestion that the submission by Mr Mendelle is well founded. But what, in the context, the learned Lord Justice was really saying was, in our view, this: he was indicating that the elements of an assault involved the unlawful application of force. In the context of an issue of self-defence or reasonable restraint, which was what Scarlett was essentially about, then clearly a person would not be guilty of an assault unless the force used was excessive; and in judging whether the force used was excessive, the jury had to take account of the circumstances as he believed them to be. That is what is made clear in the first part of the sentence, which we will isolate and read again:

"They ought not to convict him unless they are satisfied that the degree of force used was plainly more than was called for by the circumstances as he believed them to be and, provided he believed the circumstances called for the degree of force used, he is not to be convicted even if his belief was unreasonable."

So far as the second half of the sentence is concerned, what we understand the learned Lord Justice to have been saying was that, in judging what he believed the circumstances to be, the jury are not to decide on the basis of what was objectively reasonable; and that even if he, the defendant, was unreasonable in his belief, if it was an honest belief and honestly held, then he is not to be judged by reference to the true circumstances. It is in that context that the learned Lord Justice talks about "[belief] that the circumstances called for the degree of force used", because clearly you cannot divorce completely the concept of degree of force and the concept of the circumstances as you believe them to be. In our judgment, that is effectively all that the learned Lord Justice was saying.

What he was not saying, in our view (and indeed if he had said it, it would be contrary to authority) was that the belief, however ill founded, of the defendant that the degree of force he was using was reasonable, will enable him to do what he did. As my Lord, Mr Justice Kay, indicated in argument, if that argument was correct, then it would justify, for example, the shooting of someone who was merely threatening to throw a punch, on the basis that the defendant honestly believed, although unreasonably and mistakenly, that it was justifiable for him to use that degree of force. That clearly is not and cannot be the law.

In truth, in the view of this Court, the law was properly and adequately set out in the case of R v Williams [1987] 3 All ER 411, 78 Cr App Rep 276, which was cited and referred to in Scarlett and the Court in Scarlett was not going beyond what is set out in Williams. At p 415(F) of the former report Lord Lane CJ said this:

"In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury come to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If, however, the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected.

Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it.

We have read the recommendations in the Criminal Law Revision Committee's 14th Report, ... in Part IX of which the following passage appears:

'The Common Law defence of self-defence should be replaced by a statutory defence providing that a person may use such force as is reasonable in the circumstances as he believes them to be in the defence of himself or any other person ...'

In the view of this court that represents the law ..."

In the light of all that, we have to decide whether the direction given by the learned judge after the question was asked was adequate.

He told the jury that an assault was a deliberate, unlawful, hostile act committed against the person of another; he went on:

"If that occurs, you are entitled to defend yourself if attacked or if threatened with attack."

He then gave the classic direction in relation to self-defence. Unfortunately, he did not indicate that the burden was on the Crown to disprove self-defence. That was raised by Mr Mendelle, and the learned judge,

that having been raised, said:

"You are absolutely right; I am grateful. Members of the jury, self-defence is, of course, a plea of not guilty. In other words, 'I did not assault. I did not do what the Crown allege.' The burden is always on the Crown to prove their case and to establish that the force used or the restraint used was not reasonable in the circumstances. The burden shifts to the Crown to negative and destroy the defence of self-defence if it is put forward by a defendant. That was your point, was it not, Mr Mendelle?

MR MENDELLE: Yes."

Mr Mendelle rightly criticises that because it indicates that there is a defence of self-defence and the burden shifts to the Crown. In one sense, of course, technically it does, because there is an evidential burden on the defence to raise the issue of self-defence in the first place. But, it is not a helpful way of putting it.

Nonetheless, we have to ask ourselves whether, in the context of the direction as a whole, that really can have muddled the jury or led them to believe that there was any burden on the defence. In the light of the direction as a whole, we do not think that can reasonably have been the impression gained by the jury.

But it did not stop there, because the foreman of the jury then himself asked a question; he said:

"The question is about lifting people out of the room against their will while they are struggling."

That, clearly, was highly material on count 4 and may have been material too on count 3. The learned judge then said this:

"That must be a question of fact for you. You must look at all the circumstances of the case and you must say, 'In those circumstances, was that reasonable force?' Indeed, you must go further than that because it is not only whether it is reasonable force objectively looked at, it is whether or not the person so acting genuinely and instinctively believed it was other than reasonable force - genuinely believed that it was reasonable force, but it is upon the prosecution to establish that there was no such genuine belief. It is important to remember that."

That direction was, on the face of it, as favourable, in our view, as the defence could have hoped. Indeed it went further in favour of the defence than the law made necessary.

Mr Mendelle has submitted that the jury had been out for an hour and a half, or thereabouts, without having self-defence put before them and entrenched attitudes may have been established, and that, even though the learned judge dealt with the matter at that stage and even if it can be said he dealt with it adequately (which of course Mr Mendelle disputes) nonetheless it would be unsafe for us to uphold the convictions because one does not know what the jury may have decided in that hour and a half.

In our view, it is plain from the question asked that this was a jury that was well aware of the issue and had not actually needed the direction from the learned judge to take the point themselves. They then received a direction which, at the end of the day, albeit perhaps it had to be done rather incrementally, was in our view adequate and did leave to the jury, and properly leave to the jury, the correct basis upon which they should approach their task in deciding whether the Crown had or had not negatived self-defence. We are therefore satisfied that, despite the deficiencies in the summing-up, the verdicts as again given on that ground cannot be impugned.

Mr Mendelle takes two other points. He says that the character direction which the learned judge gave, and properly gave, was watered down because the learned judge used the word "can" instead of "should".

In our view, there really is nothing in that point at all. Indeed, at p 5(A), after dealing with first aspect of character as going to credibility, he said this:

"It does not mean that a person who is alleged to have committed some form of mischief can simply say, 'I am a person of good character, acquit me', but it is something which you can - and indeed should and I am sure you will give appropriate weight to. What weight you give to it is a matter entirely for you."

And in relation to the second aspect, namely, not so likely to commit the offence, he said very much the same thing. He ended the passage at (D) by saying:

"He can rely upon it and I am sure you will give him all due credit for it."

He then went on to indicate that he supposed everybody else was of good character but that the defendant did have the advantage because he was the person who stood accused and could pray that in aid.

In our view, the learned judge perfectly properly made plain to the jury the basis upon which they could take account of character and that the weight which they should attach to character was a matter for them.

Finally, Mr Mendelle complains that the acquittals on counts 1 and 2 and the convictions on 3 and 4 were inconsistent.

We think in the course of reciting the facts it has been made perfectly plain that there were two major distinctions between counts 1 and 2, on the one hand, and 3 and 4 on the other. In the case of counts 1 and 2 the defendant denied that he had ever touched his wife at all and the injuries had been caused quite accidentally without his intervention in any way, whereas in the case of counts 3 and 4 he admitted that he had at least restrained her and thereby used some violence towards her. Secondly, in relation to counts 1 and 2, his wife gave accounts at the first opportunity which accorded with the appellant's version, namely that in each case the injuries had been caused accidentally. In those circumstances, it comes as no particular surprise that this jury, having seen the parties, were not persuaded so that they were sure that the appellant was guilty of the first two counts but were persuaded so that they were sure that he was guilty of the third and fourth. We see no inconsistency between the verdicts at all.

In those circumstances and for these reasons, this appeal against conviction is dismissed.

Appeal dismissed.