



# In The Supreme Court of Bermuda

## APPELLATE JURISDICTION 2018: 24

JUSTIN MAYBURY

Appellant

-v-

THE QUEEN

Respondent

## EX TEMPORE JUDGMENT (REASONS)

*Appeal against Conviction in Magistrates' Court  
Wounding (section 306(b) of the Criminal Code) /  
Whether Self-Defence (section 257(1) of the Criminal Code)*

Date of Hearing: 14 November 2018

Date of Judgment: 22 November 2018

Appellant Mr. Jonathan White

Respondent Ms. Karen King on behalf of the Director of Public Prosecutions

JUDGMENT delivered by S. Subair Williams J

### Introduction

1. This is an appeal against a conviction following a trial for one count of wounding contrary to section 306(b) as imposed by the learned magistrate, Mr. Archibald Warner, on 2 March 2018.
2. The thrust of the appeal is that the learned magistrate misdirected himself on the evidence and consequently erred in finding that the defence of self-defence did not arise.

3. Having heard the able submissions of Counsel for both sides, I dismissed the appeal and indicated that I would provide these written reasons.

### **Summary of the Evidence**

4. The Crown's case at trial consisted of two witnesses, namely the Complainant, Mr. Mandela Caesar, and civilian witness, Ms. Christina Musson. The Complainant and the Appellant were known to each other since their primary school years.
5. The evidence was that on 8 December 2016 at approximately 11:00pm, the Appellant and the Crown witnesses were all present at Docksiders' Pub on Front Street, Pembroke Parish.
6. The relevant events were kick-started by hostile verbal banter between the Complainant and the Appellant about their respective sports teams. On the Appellant's evidence, the Complainant asked the Appellant if he wanted to go outside. The Appellant said he understood this as a threat that the Complainant would beat him up. At some point thereafter this initial feud appeared to have diffused until an hour or two later when a subsequent encounter occurred between the two men towards the front area of the pub.
7. On the second encounter, the Complainant accepted in his evidence that he may have accidentally but non-aggressively brushed past the Appellant as the bar area was crowded. A verbal confrontation ensued resulting in the Complainant reflexively raising his hands (mid-torso – palms down demonstration provided at trial by witness Ms. Musson) without touching the Appellant and saying words to the effect; "*if you touch me then we can go outside.*" Ms. Musson who was also present during the exchange stated in evidence that she heard the Complainant say to the Appellant; "*If you touch me I would remove you from the bar.*" Under cross-examination, Ms. Musson accepted that the words uttered by the Complainant were to the effect; "*touch me and I would take you outside.*" The Appellant then hit the Complainant's hands and the Complainant responded in saying; "*Okay let's go outside.*" Ms. Musson corroborated the Complainant's evidence in her testimony that the Appellant slapped the Complainant's hands.
8. The Appellant's evidential version at trial was that he saw the Complainant's hand in his face and felt uncomfortable. So, he instinctively waved his hand (glass-free hand) and knocked the Complainant's hand out of his face. He said that the Complainant then grabbed him by the chest, picked him up and moved him in the direction towards the door. According to the Appellant, he felt scared and threatened by the Complainant because he, the Complainant, was much bigger than him.

9. At page 23 of the Appeal Record, the learned magistrate's typed note of Ms. Musson's evidence under cross examination is recorded as follows:

*“There was physical contact between the Defendant and Caesar but there was no lifting. Caesar did grab the Defendant. [but does not section the occasion when grabbing]”*

10. The Complainant's evidence was that the Appellant then shattered a drinking glass across the left side of the Complainant's face which caused the Complainant to bleed and left him with shards of glass in his eye. The Appellant then proceeded to punch the Complainant in his face three times. The Complainant at this point unsuccessfully attempted to grab the Appellant who fled the scene via the back door exit.
11. On the Appellant's evidence, he, the Appellant, instantly moved his right hand and swung at the Complainant making contact with the left side of his face because the Complainant had him in a vulnerable position. He described this motion as a reactive survival instinct.
12. The Appellant stated that when the Complainant placed his hands in the Appellant's face, he already had a drink in his hand. Initially, Ms. Musson's evidence on the stand was that the Appellant picked up a glass from the bar and hit the Complainant in his face with the same glass. However, under cross examination Ms Musson clarified that she was not sure whether the Appellant picked the glass up from the bar counter or whether he already had the glass in his hand.
13. The Appellant admitted in his evidence that he punched the Complainant a few times after the glass-shattering strike and that the Complainant was not touching him when he did so.

### **The Appellant's Grounds of Appeal**

14. The Appellant's pleaded grounds of appeal were as follows:

*1. The Learned magistrate misdirected himself as to the evidence given by Crown witness, Christina Musson (Ms Musson) under cross examination (the “Misdirection”).*

*2. In consequence of the Misdirection, the learned magistrate erred in finding:*

*(a) that any grabbing or physical contact referred to by Ms Musson was after the Complainant was struck in the face by the Defendant;*

*(b) that the Complainant's evidence as to the smashing of the glass in his face by the Defendant was supported by Ms Musson's evidence; and*

*(c) that the defence of self-defence did not arise.*

## **The Learned magistrate's Findings**

15. The Magistrates' Court judgment is noted at pages 7-12 in the appeal record. At the heart of the Appellant's complaint, the learned magistrate erred in finding that the defence of self-defence did not arise as a result of his mis-directions on the evidence. The relevant portion of his judgment is found at page 11 and reads as follows:

*"Musson said from what I saw (the) victim had his hands stretched out as she had shown. Not as defence suggest that victim had his hands in Defendant's face.*

*Musson reiterated the "No (the) victim did not have his hands in Defendant's face and that the Defendant smacked his hands away."*

*Musson in cross (examination) said yes, there was physical contact between Defendant and victim. But there was no lifting. Caesar did not grab the Defendant.*

*Note: the victim's evidence is that he did try to grab the Defendant after the glassing and punching.*

*Mr. White's submission is that this contact by the victim grabbing the defendant is supportive of the defence's story of self-defence and is consistent with (the) Defendant's allegation of how the confrontation happened.*

*I disagree with Mr. White. I find that any grabbing or physical contact that Musson refers to was after being struck in the face by the Defendant and the admitted punching of the victim by the Defendant after being struck in the face.*

*After full consideration of the Defendant's evidence, the victim's evidence and Ms Musson's evidence; I find that the victim's evidence as to the smashing of the glass in his face by the Defendant is supported by Ms. Musson's evidence. Musson's evidence regarding whether or not the Defendant had the glass in his hand or not is an insignificant inconsistency. I accept the evidence of the victim Caesar as to how he was hit in the fact (sic) (face) with (the) Defendant's glass and was injured. I reject the Defendant's version of how the same event occurred. To me it seems contrived and is inconsistent with the victim's corroborated evidence. I reject the Defendant's evidence.*

*In the circumstances the defence of self-defence does not arise for consideration..."*

### **Competing arguments made on appeal**

16. The Appellant argued that the learned magistrate erred in fact when he found on the evidence that the Complainant did not grab the Appellant at all, nor prior to the glassing incident.

17. Mr. White placed before this Court an agreed mini-transcript of the relevant excerpts of Ms. Musson's evidence. The material portion of Mr. White's cross examination of Ms. Musson reads as follows:

*JW I am going to put it to you that Mr. Maybury having smacked Mr. Caesar's hand out of his face that Mr. Caesar then gripped Mr. Maybury by the chest, lapels, however you want to define it, by the shoulders and chest area with such force that he Mr. Maybury was no longer grounded. Not lifted high in the air, but no longer grounded and that Mr. Caesar spun him towards the door, in the direction of the entrance to Docksiders.*

*CM I can say that there was probably physical contact like you said where he grabbed a hold of Mr. Maybury's clothing but I wouldn't go so far as saying that he lifted him off the ground...*

18. Mr. White points to this evidence in support of his contention that the evidence did disclose (1) that the Complainant grabbed the Appellant and (2) that the grabbing occurred prior to the glass smashing against the Complainant's face. It is on this basis that the Appellant's Counsel argued that the defence of self-defence should have been properly considered by the learned magistrate.

19. On the other hand, the Crown argued that the learned magistrate did in fact consider the evidence as a whole and that he was entitled to reject any part of it. Essentially, it was the Crown's position that he rejected the evidence suggesting that the Complainant grabbed the Appellant. As a bottom line position, Ms. King for the prosecution submitted that the reasons provided under the magistrate's judgment demonstrated '*...an awareness of the salient issues, an assessment of the material evidence and an appreciation of the relevant law*' (citing *Peters v Peters (1969) 14 WLR 457, per Fraser, JA at page 458-459*)

### **The Law**

#### *Self Defence: Section 257(1) of the Criminal Code*

20. Section 257(1) of the Criminal Code provides:

*“(1) When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for him to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.”*

21. Hence, the starting point is that the person relying on the defence of self-defence must have been unlawfully assaulted without having provoked that assault. The second crucial component of the defence is that the person asserting self-defence is entitled only to use such force to the assailant as is reasonably necessary to effectively defend him or herself against the unprovoked assault, so long as that force is not intended and not likely to cause death or grievous bodily harm.

### **Analysis and Decision**

22. I find favour with Mr. White’s assessment that the learned magistrate misdirected himself on the evidence in so far as he appeared to have found that the evidence did not suggest that the Complainant grabbed at the Appellant before the glass attack. I do not agree, having had regard to the magistrate’s judgment and to the transcript of the verbal exchange between the bench and Counsel immediately following the relevant portion of Ms Musson’s cross-examination, that the Magistrate properly directed himself on the evidence of the Complainant grabbing the Appellant. The learned Magistrate mis-directed himself on this part of the evidence.
23. This mis-direction resulted in the magistrate’s failure to consider the defence of self-defence. However, the real question is whether this rendered the conviction unsafe in such circumstances. I think not.
24. The magistrate was clear in his judgment that he rejected the Appellant’s version of the disputed evidence and described it as contrived. The question is whether he would have nevertheless inevitably convicted the Appellant, had he not misdirected himself on the relevant part of Ms. Musson’s evidence. On Ms. Musson’s evidence and the Complainant’s evidence, the first occasion of physical contact happened when the Appellant slapped the Complainant’s hands. This was then followed by the Complainant grabbing a hold of the Appellant’s clothing according to Ms. Musson. In my judgment, the learned magistrate could not have reasonably found that such grabbing amounted to an unprovoked assault as required by section 257(1) of the Criminal Code.
25. I find it obvious and inevitable that the learned magistrate would have rejected the defence of self-defence had he considered it on the proportionality test. The evidence was that the Appellant struck the Complainant in his face with a glass leaving him to bleed from the resulting wound and leaving shards of glass in his eye. Without any further sign of contact from the Complainant, the Appellant then went on to punch the

Complainant in his face three times before fleeing the scene. In my judgment, the learned magistrate could not have reasonably found that such force was reasonably necessary to effectively defend himself from the Complainant's grabbing of his clothing.

26. For these reasons, I find that the Appellant would have undoubtedly failed in his reliance on the defence of self-defence.

### **Conclusion**

27. The appeal is accordingly dismissed.

Dated this 22<sup>nd</sup> day of November, 2018

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SHADE SUBAIR WILLIAMS  
PUISNE JUDGE