

**MEDIUM
PRIORITY**THE QUEEN

v.

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QUENTIN SAVAGE

Coram: Richardson J (presiding)
Casey J
Thorp J

Hearing: 11 February 1991

Counsel: N McAteer and A R Perkins for Crown
M I Koya for Appellant

Judgment: 7 March 1991

JUDGMENT OF THE COURT DELIVERED BY CASEY J

After an 8-day jury trial Quentin Savage was found guilty on 27 June 1990 of murdering Taki O'Leary in the public bar of the Schooner Tavern in Quay Street, Auckland, on 5 August 1989. He applies for leave to appeal against that conviction. He was a 'patched' gang member and had become involved with two associates (both gang prospects) in a fight with O'Leary around 5pm on a Saturday afternoon, and in the course of it struck him a blow to the heart with a knife. At the time there was a large crowd in the bar. The police were on the scene within minutes to find O'Leary

dead or dying on the floor but Savage and his associates - Morris and Kingi - had left.

There was confusion among the eye-witness about the events, not surprisingly in the circumstances. There was evidence that O'Leary had been making a nuisance of himself in the bar for most of the day, his conduct being attributable to the effects of drugs and alcohol. At some early stage he presented a Swiss army pocket knife at a disabled patron (Moore) and appeared to threaten him with it, but desisted when Moore produced a more lethal 'butterfly' knife and showed it to him. He became involved in trouble with Savage and his two associates which resulted in them going outside to fight but this was broken up by the manager before it started and they all returned to the bar. Then O'Leary smashed a basin in the toilets and kicked in part of a tiled wall, after which he poured beer over two women sitting with Savage following their reactions to his attempts to drink their own. Then the fatal fight developed with Savage and the two gang prospects.

Moore (the disabled patron) said he was sitting to one side and that about two minutes before the fight started Savage asked him for his knife which he gave him. Witnesses described the fight as one where fists only were being used and Savage was seen to strike an upward blow at O'Leary's chest. Some said the fighters were milling around and evidently other patrons were trying to separate or put them

out. One said that he heard O'Leary shout - "He's got a knife" - or words to that effect, but none of them saw any of the participants with such a weapon. It was accepted that O'Leary did not have the Swiss army knife on him at the time because it had been found earlier by police in a vehicle he had stolen.

The fighting stopped after that blow by Savage, and a witness (Stevens) said she saw a knife fall to the ground, and thought it may have been similar to a brown-handled one found next day hidden in the womens' toilet area. The butterfly knife handed to Savage by Moore was discovered under the passenger seat of a car outside the tavern and Morris was found guilty of being an accessory by concealing it. He and Kingi drove off in another vehicle, while Savage walked up-town and hid some of his clothing in church grounds. He made a lengthy statement to the police next day in which he blamed his two prospects for starting the trouble. First he denied using a knife but when confronted with the proposition that he had received it from Moore, he said he used it in self-defence when he saw O'Leary trying to pull a knife from his back pocket.

Savage gave evidence and after describing earlier incidents involving the deceased, he said that after the latter had thrown beer over the girls he saw him with a knife in his hand and related what took place then in this passage from the evidence :

"What happened next? .. He started to walk around the table to where I was standing.
Who did? .. O'Leary. Then he just looked at me. I backed off. I started to walk back to where I was sitting before.
Take it slowly. Where do you mean? .. Where I had been sitting. What? By the table, by the ladies' toilet? .. Yeah. Well I was just freaking-out on him, because he was coming towards where I was standing. I moved back and Henry Moore just gave me his knife.
If that the knife Henry Moore gave you? .. Yes.
What happened next? .. O'Leary was about a few steps away from me, and he just went forward with his knife. And I just - I didn't mean to, I just pushed back with the knife.
Just tell us, in your own words, what happened please? .. Take it slowly .. When I got the knife off Henry, I turned around and saw this knife coming for me.
Did his knife actually touch you? .. Yes. Yes it did. It was like a thump."

He then pointed out a cut in the jacket he had been wearing to indicate where the knife had struck, and went on to say :

"Now, Mr Savage, why did you stab Mr O'Leary? .. I seen him, he was starting to come to the table where I was. I was freaking-out because he had a knife. He come forward and he just took a lunge at me with the knife. I didn't mean to stab him with the knife."

He added then when he was interviewed by the police he was tired and upset and claimed they had not recorded his statement that O'Leary did not have his knife in his back pocket; and that he had pointed out the cut in his jacket where the latter's knife had caught him. In cross-examination he repeated that the deceased "just freaked me out" when asked about his statement that he didn't mean to stab him. For the purposes of this appeal there is no need for us to traverse his evidence or cross-examination in detail, beyond

observing that some of his assertions must have strained the jury's credulity.

As we understand the matter, the Crown's case was that O'Leary had annoyed Savage's two gang prospects to the stage where they decided to deal with him, but found themselves in difficulties. Savage, as the senior patch member, felt obliged to come to their aid and assert his authority and for this purpose borrowed the knife from Moore, intending either to kill O'Leary or to cause him injury with the reckless state of mind of s 167(b). On the other hand, the defence case was that O'Leary was the aggressor, threatening Savage with the brown-handled knife subsequently found hidden in the toilet, which the witness Stevens saw on the floor after the stabbing; and that Savage borrowed Moore's knife to protect himself, using it in self-defence; or he was provoked into striking the blow. Accordingly he should have been acquitted or at the most found guilty of manslaughter.

Seventeen grounds of appeal were set out in the Notice, but at the hearing these were reduced to three main areas. The first was misdirection on self-defence, alleged to have arisen in the two following ways :

- (i) The Judge said a person could not as a matter of law use any pre-emptive force in defending himself. Mr Koya relied on the following passage in the summing-up :

"Now again in respect of the question of self-defence, which I reiterate is a question of fact for you to decide in accordance with the law that I am now directing you on, there are nevertheless one or two particular points which I will touch upon. It is not enough in the first place, as I have indicated, that the accused anticipates that danger may arise. He cannot take the opportunity of raising self-defence because he appreciated that at some future point, maybe moments only away, he might need the use of a knife to defend himself. The question is whether or not he in fact needed the knife then and had to defend himself at the time of the stabbing? He must at that time be under a real apprehension that his life or limb is in danger, at risk, and he must at that time have the fear which leads him to respond in self-defence."

Although the expression "maybe moments only away" was hardly appropriate to the circumstances related by the accused, when this passage is read as a whole, it is clear that the Judge was emphasising that when the knife was used, the accused must have seen himself as under a real threat of danger, and not merely think there may be some future danger to him. Such a direction is not inconsistent with anything said by this Court about pre-emptive strikes in R v Ranger [1988] 4 CRNZ 6 and R v Wang [1989] 4 CRNZ 674.

(ii) He said as a matter of law that a person under the apprehension of an attack has a duty to retreat before he can use force in his defence. After referring to a submission by Mr Williams that everyone "has a right not to run away", the Judge said :

"Well my direction to you - and you must take my directions as being the law - is somewhat different. It may well be that in the circumstances of a particular case a person is under no duty, no absolute duty, to retreat. A householder when confronted by an intruder may be in that situation. It depends on the circumstances as you determine them to be. The law is that a threat which does not involve a present danger can normally be answered by retreating or adopting some other method of avoiding the present danger. (underlining added) A person is entitled to be unwilling to fight, and it is not self-defence unless the accused has used the force to avoid injury or death. It all goes, in my suggestion to you Mr Foreman and members of the jury, to what is 'reasonable', and that is a question for you. There is no absolute rule that a threatened person has a duty to retreat, although, first, his failure to show an unwillingness to fight or, secondly, his failure to avoid the opportunity of using force, is relevant to whether or not the accused acted in reasonable self-defence. Consequently, although the Crown submitted to you that the nub of this case was whether Mr O'Leary had the knife in his hand - and that may well be correct - it is for you - it is open to you to hold that Mr Savage could, depending on where you place him in the bar at the time of the fatal stabbing, have avoided knifing Mr O'Leary."

The general tenor of this passage is clear; whether a person was justified in fighting or should have retreated depends on the jury's view of what was reasonable in the circumstances. The sentence underlined may be unfortunately worded, but in the context of the whole passage it can be seen as a statement of the practical result of the law relating to self-defence. We do not think it could have deflected the jury from their task of considering the reasonableness of the accused's actions in defending himself in the light of the circumstances as he believed them to be.

We are therefore satisfied that the Judge dealt adequately with self-defence and turn to the next ground

alleging misdirection in three respects on the law relating to provocation. The first two can be dealt with together. The applicant complains that the Judge told the jury it was a requirement of law that the retaliation must bear some reasonable proportion in relationship to the provocation, and that the provocation must occur immediately before the killing.

The Judge quoted the relevant parts of s 169 of the Crimes Act and went on to say :

"So what does that mean? Well, the circumstances must be such as to deprive a person having the power of self-control of an ordinary person, of self-control. And, again, that is an objective test. That is for you to determine, whether in the circumstances of this case the ordinary person would have lost self-control to the point of stabbing Mr O'Leary. As a matter of law, the provocation must occur immediately before the killing, but this can include the build-up to some final provocative event. What the person did must bear some reasonable proportion or relationship to the provocation - for example, if one person has provoked another and it would suffice to respond with a blow across the head with a cricket bat, it would be out of proportion and out of relationship to use a shotgun. There has to be that element of proportion involved.

Mr Perkins, I acknowledge, is correct when he says that provocation as a defence exists for those occasions when the killing is committed in the heat of the moment - when the ordinary person would lose his self-control. The example of the adulterer found in bed with the wife of the husband is (I should say 'was' rather than 'is') the classic example because it was thought that on those occasions the ordinary person having the ordinary power of self-control would lose his self-control and could kill the adulterer. Of course, that may not be what juries find today having regard to our changing approach to these matters. So, it has to be something immediate. It has to be something which is done in the passion of the moment."

After making some remarks about the "characteristics of the offender" (to which we refer later), he concluded with the observation that it was difficult to know what was the basis of the defence.

Mr Koya is correct in his submission that the Judge was wrong to tell the jury that as a matter of law the provocation must occur immediately before the killing; and that it had to be something immediate. This was made very clear in R v McGregor [1962] NZLR 1069, 1079, in the following passage :

"In our opinion, then, the learned trial Judge was fully entitled to tell the jury, as he did, that it was of the essence of provocation that it should cause a sudden and temporary loss of self-control rendering the accused so subject to passion as to make him for the moment not master of his mind. This being so, it necessarily followed that the Judge was quite right in telling the jury that the time element was of importance. We agree that it would have been wrong if he had told the jury that as a matter of law it was necessary that the provocation should occur immediately before the killing...."

And further down the same page the Court dealt with the relation between the provocation and the accused's conduct by adopting what was said in R v Noel [1960] NZLR 212 - namely, that the relationship or disproportion can be a weighty factor to be considered by the jury in determining whether or not the accused acted as he did by reason of the provocation; but it is not to be elevated into a matter of law. Unfortunately the Judge did so in his statement that "what the person did must bear some reasonable proportion or relationship to the provocation".

Although he was wrong to say that the provocation must occur immediately before the killing, it should be noted that he qualified it by the comment that it could include the build-up to some final provocative event. This does not in itself remedy the misdirection. But the two statements criticised need then to be related to the manner in which the applicant's claim to have acted under provocation has been put.

Both at trial and in this Court the only basis put has been that the applicant lost his self-control ("freaked out") when he saw O'Leary coming at him with a knife. Even though put against the background of provocative action by O'Leary earlier in the day, it was that action immediately before the killing which the applicant claimed had triggered off his conduct. In that context, the Judge's reference to immediacy as a legal requirement could not have been of any consequence in the jury's deliberations, because the deceased's response exactly fitted his mistaken direction. Their finding of lack of provocation implicit in the verdict must therefore have been based on other grounds.

Taken against the same factual basis for the claim of provocation, a similar conclusion can be reached about the effect of misdirection on the need for proportionality in the accused's response to the provocation. He said he lost his self-control when defending himself against his knife-wielding victim, and pushed back at him with his own

knife without meaning to do so. Clearly this explanation mixes aspects of provocation and justified self-defence, and the latter may well have been the only live issue in the case. (The circumstances are very different from those in R v Pita (CA 146/89; 26 October 1989) in which a woman claimed to have stabbed her de facto in blind panic as he started to attack her in what she feared was going to be a repetition of a savage assault and beating which she had suffered at his hands a few days earlier. We held that the trial Judge should have allowed provocation as well as self-defence to go to the jury.)

However, if the jury had accepted the applicant's evidence that he was facing an immediate threat of serious injury or death from O'Leary, we cannot see how they could have concluded that his reaction in pushing forward with his knife was out of proportion with the deceased's conduct towards him. Accordingly, on the only factual basis on which it has been contended the plea should have been left to the jury, or on which we should have required the plea to be left to the jury, we can see no likelihood that either misdirection would have been material and have created the risk of a miscarriage of justice.

The third misdirection alleged on provocation was that the Judge said the applicant did not possess any special characteristics, thus implying that the defence of provocation was not available to him or any ordinary man.

As noted above, he did deal at some length with the reference in s 169 to the offender's characteristics, but it is common ground that the accused possessed none, and the defence did not suggest otherwise. Accordingly, it is difficult to understand why the Judge thought it necessary to discuss this matter at all, but we are satisfied that his remarks could not give rise to the implication suggested by Mr Koya. Indeed, the matter is put beyond doubt by the Judge's closing remarks on provocation - "You are concerned with the person having the power of self-control of the ordinary person".

Finally, it is claimed on behalf of the applicant that in his summing-up the Judge made unfair and prejudicial comments on his case. The first example cited occurred in his statement illustrating the importance of ensuring that the accused received a fair trial. He said it was permissible for the defence to attack the character of a deceased but it was not permissible, except in very limited circumstances, for the Crown to attack the character and background of an accused. Mr Koya submitted that the inference was clear - the applicant had criminal convictions which could not be disclosed to a jury.

Such a suggestion (if it can be implied from these comments) could hardly have come as a surprise to them. Having regard to his status as a 'patched' gang member with two prospects, and to the background circumstances

(including their visit to Paremoremo prison earlier that morning) the jury would have good reason to conclude that he was likely to have had a criminal past, without any assistance from the Court. The Judge emphasised at some length the need to decide the case only on the evidence. We are satisfied that any adverse inference which might be drawn from the remarks now criticised could not have influenced the way the jury went about their task.

Mr Koya then put forward a more general criticism of the way the summing-up prejudiced the defence case. We must say that his first example of the way the Judge used evidence to illustrate a legal point was wide of the mark: in telling the jury they could not use out of court statements by one accused as evidence affecting another, he referred to the police statement by Morris in which he said Savage stabbed the deceased, and told them to shut that out of their minds when considering the case against the latter. This was a proper direction illustrated in a way which stressed its importance, and did not prejudice Savage, who had admitted throughout the trial that he did stab the deceased.

The next criticism is about the way the Judge dealt with defence counsel's submission to the jury that the deceased was a raving lunatic. He referred to his questions to witnesses seeking to establish that he was mentally sick, disturbed, provocative and a troublemaker. He correctly reminded the jury that they should pay regard to the

witnesses' replies rather than what counsel had asked. After accepting that some of those present saw O'Leary as a nuisance and that he did some peculiar things, he pointed out that not all saw him as wayward as counsel would have it. He read extracts from the evidence of the witness Stevens, suggesting she did not see him in that light. He concluded by saying they had to assess the evidence themselves, making certain it was given, and not the way it was portrayed to them.

We see nothing more in these passages than a proper attempt by the presiding Judge to restore some balance to what he regarded as an overstatement by defence counsel of the deceased's condition and conduct. It was done with moderation as part of his function to ensure the jury received a full picture of the evidence and we see no basis for any complaint.

Finally Mr Koya submitted that over ten pages of the summing-up he dealt with the defence case in a way that must have overwhelmed the jury into accepting his own view of the evidence, notwithstanding his occasional reminders that they were judges of the facts. He directed their attention to the inconsistencies between Savage's evidence and his earlier statements to the police, and also between it and the evidence of witnesses at the scene. He reminded them of the fact that the police had made notes of their conversations with him, although he pointed out that he did

not wish the jury to think he was necessarily disagreeing with Savage's allegation he had said other things to the police which were not recorded. He asked the jury to consider the accused's explanation to the police that O'Leary was trying to take his knife from his pocket when he stabbed him in self-defence; whereas in his evidence he said O'Leary was coming at him with the knife in his hand. Finally he referred to the Crown's submission that Stevens may have been mistaken when she identified the knife dropped on the floor as having a brown handle and not like the butterfly knife used by Savage in the attack. He read an extract from her evidence on this point. In spite of Mr Koya's submissions to the contrary, we are satisfied that the Judge's observations did not go beyond the bounds of fairness in the circumstances of this case.

Self-defence was adequately put to the jury. We think provocation was barely open, and would not have been surprised if the Judge had not allowed it to go to them. However, with the two serious misdirections on that issue, the almost inevitable result would have to be a new trial. But for the reasons stated earlier, we are satisfied - quite exceptionally - that in the circumstances of this case there has been no miscarriage of justice, and that it is appropriate to apply the proviso. The application for leave to appeal is accordingly dismissed.

A handwritten signature in black ink, appearing to read 'Mr. Casey', with a stylized flourish at the end.

Solicitors: Crown Solicitor, Auckland