IN THE COURT OF APPEAL OF NEW ZEALAND

CA140/00
141/00

THE QUEEN

V

WEI HAU LI
YUE QIANG WU

Hearing:	22 June 2000
Coram:	Blanchard J McGechan J Young J
Appearances:	G D Trainor for Li P H B Hall for Wu J M Jelas for Crown
Judgment:	28 June 2000

JUDGMENT OF THE COURT DELIVERED BY BLANCHARD J

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[1] Wei Hau Li and Yue Qiang Wu and were convicted after a jury trial in the District Court in relation to an incident that occurred in the early hours of 6 March 1999 during a fight between two groups of Asian people outside a nightclub in Christchurch.

[2] Mr Li was convicted of possession of an offensive weapon (a garden slasher) and wounding with intent to cause grievous bodily harm. On these two offences,

Mr Li was sentenced to concurrent sentences of six months and three years imprisonment respectively. Mr Wu was found guilty of an assault with a weapon and was sentenced to imprisonment for one year.

[3] Mr Wu appeals against both conviction and sentence. Mr Li's appeal is against sentence only.

The facts

[4] The altercation took place outside the Palladium nightclub in Christchurch. On Friday night, 5 March 1999, the appellants were at the nightclub with some friends, and the victims Mr Hsieh and Mr Che came to the same nightclub with their own friends. The events leading up to the altercation are unclear, but it appears that the two groups of young people (the appellants' group and the victims' group) confronted each other outside the nightclub some time after midnight.

[5] Mr Li and some other members of the appellants' group armed themselves with weapons taken from a nearby car. Mr Li was armed with a baton, but some time after the confrontation began, replaced his baton with a garden slasher.

[6] During the confrontation, Mr Hsieh was attacked with a knife by an unidentified person, and ran up the street. Mr Li chased Mr Hsieh with the slasher in hand. Eventually, Mr Hsieh turned and faced and taunted Mr Li, who swung the slasher and struck Mr Hsieh on the upper left thigh. A doorman from the nightclub prevented Mr Li from making any further attacks.

[7] While this attack was taking place, Mr Wu had armed himself with a weapon. It is unclear whether this weapon was a metal bar or a home made sword (although the sentencing Judge was inclined to believe that it was a home made sword). With the weapon in hand, Mr Wu gave chase to the second victim, Mr Che. He struck Mr Che across the back with the weapon. Like Mr Li, Mr Wu was prevented by the Palladium doormen from attacking further.

[8] Mr Hsieh suffered a 7 - 10 centimetre laceration of his left upper thigh, about 4cm deep, which required about 40 internal stitches. Mr Che did not need medical treatment, but did suffer a graze on his back which has left a scar.

[9] At trial, both Messrs Li and Wu claimed to be acting in self-defence. Mr Wu in particular claimed that he was acting only to protect his friend Mr Sue, who was being attacked by Mr Che and others in the rival group. He gave evidence that he was very concerned for Mr Sue's safety and life, and it was only at this point that he obtained a weapon and began to chase Mr Che off. He claimed that Mr Che was holding a knife. There was some support for this in evidence given by a bystander, Mr Goode, who was called on behalf of Mr Li. Mr Wu said that he lashed out in Mr Che's direction but did not know whether he had made contact. Mr Wu said he desisted once Mr Che left the footpath.

Mr Wu: Appeal against Conviction

[10] Mr Wu appeals against his conviction on two grounds: (a) that the trial Judge in his summing up misdirected the jury in relation to Mr Wu's defence of self-defence; and (b) that the Judge failed to put his defence properly before the jury.

[11] The trial Judge provided the jury and counsel with a written direction and closely followed it in what he said orally. He directed the jury to consider self-defence in a three-step process:

(1) Was the accused actually acting in self-defence? (If the jury found the accused was not, then there was no need to consider the rest of the test.)

(2) What were the circumstances as the accused believed them to be?

(3) Was the force used reasonable in the circumstances as the accused believed them to be?

[12] In discussing the first step, which is the element subjected to criticism on of Mr Wu's behalf the trial Judge stated:

> In considering the issue of self defence there are three essential things to consider. The first of those is was the accused acting in defence of himself or another at the relevant time? That is to be considered from the accused's point of view. In other words, did he truly believe, then and there, that he or someone he was trying to protect was under the threat of attack or actual attack, and that he was acting to defend himself, or the other person, against that attack or threat. That is a straight issue of fact for you to decide.
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> If your view of the evidence is that that was not the case, then you go no further, because the Crown will have satisfied you that self defence is not a reasonable possibility.

[13] The Judge went on:

> The next step is what were the circumstances as he believed them to be at the time? That is a subjective test. It is necessary to examine what he believed to be going on at the time. What did he think was the nature and degree of the attack or threat of attack? Did he think that he or anyone else was in danger of bodily harm, and that he was using reasonable force to defend against that danger? You assess that by taking into account all of the evidence, including what he has said about it.
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> Having thought about that you go to the third stage. That is this. Was the force he used reasonable in the circumstances as he believed them to be? That is an objective test. Whether he thought the type or amount of force he used was reasonable, is not the point. It is for you to decide whether, in the circumstances as he thought existed, the force used was reasonable.
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> That is because the law does not give people a blank cheque to use as much force as they wish, even if they are defending themselves. The degree of force must be reasonably proportionate to the threat. Obviously enough by their nature, these things happen in the heat of the moment and you cannot expect people to weigh up the degree of force to a nicety. Nevertheless, there must be what you consider to be a reasonable balance between the perceived threat and the force used to meet it. You have to consider, at that stage, whether the force used was reasonable.

[14] For Mr Wu, Mr Hall submitted that the jury may have understood that it was not to apply a subjective test until it came to the second step, if it got there at all. It may have concluded that there was a difference in approach required between steps 1 and 2. So it may, as a threshold question, have considered whether the appellant was acting in self-defence upon an entirely objective basis. This possibility was said to

have been increased because of the absence of any direction that a mistaken belief as to the circumstances may be honestly held.

[15] Counsel for the Crown submitted that the first question is simply a threshold question, to determine if the case does raise self-defence considerations. In using the words "to be considered from the accused's point of view" and "did he truly believe", the trial Judge did emphasise the importance of Mr Wu's evidence of his belief to this threshold question. It was not necessary at this point for the jury to determine all of the circumstances as Mr Wu believed them to be: that would come later once it decided that he was acting in self-defence.

[16] In *R v Smith* (CA 263/94, 14 October 1994) this Court made it clear that, in cases of this kind, the question is not whether one section of the summing up may be open to criticism but the effect of the summing up overall. In that case, where the appeal was dismissed, the direction to the jury was similar to that given by the trial Judge here. When the Court considered the directions corresponding to those given on the second and third questions above, it was of the view that the jury had been told clearly enough that the initial threshold test was to be judged from the viewpoint of the accused, from *his* intentions in the circumstances as *he* understood them to be.

[17] The critical question is whether, taken as a whole, there is a real danger that the Judge's directions on self-defence may in this case have led the jury to overlook the need to consider the appellant's subjective understanding of the situation in which he found himself – to determine whether he was acting in defence of himself or his friend without considering how he, rightly or wrongly, saw the situation at the time.

[18] Although the sequence through which the Judge took the jury can be criticised, having looked at the passage on self-defence in its totality we have no doubt that the jury would have correctly understood the interplay between subjective and objective tests. As we have indicated, the position is not very different from that in *R v Smith*.

[19] The Judge said that there were three essential things. The first was whether Mr Wu was acting in self-defence, which was to be considered *from his point of view*, i.e. subjectively. The Judge emphasised this viewpoint by his reference to "truly believe" which, far from indicating an objective test, as Mr Hall suggested to us, simply emphasised that the belief had to be genuinely held. Did he genuinely have the belief that he or another person was under attack? We reject the submission that the use of the word "truly" would have led the jury to conclude that the belief must be judged in an objective way.

[20] The Judge then proceeded to give a standard direction about the circumstances as Mr Wu believed them to be. This was to the same effect as what he had just said. That may perhaps have caused the jury some puzzlement but we do not think that they would have been led to overlook the subjective test in the Judge's first step. The second step added further emphasis to the need to look at the accused's belief as to the circumstances subjectively.

[21] And then, finally, the Judge correctly stated the requirement that the force used must be reasonable in the circumstances as Mr Wu believed them to be.

[22] Although, looking at the entirety of what was said, we are not persuaded that the jury would have been misled by what the Judge told them, we consider that the format he adopted is one which should not be followed. The preferable approach, and the one upon which trial Judges usually proceed, is that taken by Tipping J in *Shortland v Police* (High Court Invercargill AP74/95, 23 April 1996) (see Adams CA48.07). In summary, on this approach the jury is asked to consider first what the accused believed the circumstances to be, from his or her point of view. The second question is whether, bearing in mind that belief of the accused about what was happening, he or she was acting in self-defence (again considered from his or her point of view). The last question is whether, given that belief, the force used in self-defence was actually reasonable.

[23] This formulation clearly indicates where a subjective or an objective test is to be applied but wisely avoids the use of those terms which may not be familiar to all jury members.

[24] The second ground of appeal was that the Judge failed to put an essential part of the defence case before the jury, in that he did not mention when summarising the defence of Mr Wu that Mr Wu had claimed in evidence that he acted in the belief that Mr Che was armed with a knife and had been an aggressor towards Mr Sue.

[25] Mr Hall submitted that as the summing up was given the morning after the addresses of counsel it was particularly important that the jury be reminded of the essential points in his client's defence. But the Judge had entirely omitted to mention the evidence from the appellant, apparently supported by that of a bystander, Mr Goode, that the complainant was holding a knife. Mr Goode was a witness called on behalf of the co-accused, Mr Li, and had said that he saw the complainant, Mr Che, returning to the scene of the fight with a knife. There had undoubtedly been a knife attack on Mr Sue although there was no evidence directly implicating Mr Che in this.

[26] It was Mr Hall's submission that although Mr Che was struck on the back when apparently running away, it would still have been open to the jury to take the view that Mr Wu was acting in self-defence, in the belief, for example, that armed with a knife, Mr Che was repositioning himself for another attack.

[27] For the Crown, Ms Jelas conceded that the Judge had not mentioned the possibility that the complainant had been carrying a knife but she pointed out that this suggestion had not been made to him when he was giving evidence and that it had emerged only during the defence cases. Counsel said that if the Judge had mentioned it, that might merely have had the effect of re-emphasising a submission made on behalf of the Crown that Mr Che had not been cross-examined on the subject and that the appellant was "making it up as he went along".

[28] We are persuaded that in all the circumstances there was a significant omission in the Judge's summary of the appellant's case and that the jury should have been reminded of what had been said about Mr Che carrying a knife. Although the Judge had referred to some of the background, in particular the injury to Mr Sue, he put the defence as simply being that Mr Wu was justified in warding off the complainant in defence of Mr Sue; that he was justified "in getting rid of the

attacker". This was an inadequate statement of the defence case. It contrasted with a more explicit statement of the case which had been advanced by the Crown in closing.

[29] We do not consider that this is an appropriate case for the application of the proviso to s385(1). The appeal against conviction must therefore be allowed

Mr Li: Appeal against Sentence

[30] Mr Li appeals against his three year sentence on the ground that it was clearly excessive having regard to what are said to be mitigating factors. These include the appellant's youth (he was 17 at the time of the offending); his previous good character and cultural background; the fact that he landed only a single blow on Mr Hsieh; and that the injury was not life-threatening and is said not to have had long-lasting consequences. It was also submitted that the attack was relatively spontaneous and, as the sentencing Judge accepted, was in response to some provocation.

[31] Ms Jelas submitted that the sentence is not manifestly excessive and that the appropriate range for offending of this character ("an impulsive act of violence involving the use of a weapon or intent to inflict serious injury") is three to five years (*R v Hereora* [1986] 2 NZLR 164, 170). The Crown argued that the offending was not entirely spontaneous. Mr Li had armed himself with a baton when it appeared that trouble might be going to break out in the street. He had asked his girlfriend to move the car closer (apparently so it would be within easier reach if he needed to get away from the scene). And when events took a serious turn he had chosen to arm himself with a more dangerous weapon, namely a garden slasher.

[32] Furthermore, the victim impact report revealed that there were long-lasting effects of the wound. Thirteen months after the attack the scar was still very visible. The complainant said that his leg ached in cold weather and was considerably weaker than his other leg.

[33] The Court was referred to several cases and comparisons were made. In the end, we did not find these particularly helpful. Whilst the sentence was stern, the appellant chose to use a dangerous weapon and inflicted a severe wound which required 40 stitches and is still troubling the victim a year later. We are of the view that, no credit for any guilty plea being available, the sentence cannot be said to be manifestly excessive and the appeal must be dismissed.

Result

[34] Mr Wu's appeal against conviction is allowed, the conviction is quashed and an order is made for a new trial. Mr Li's appeal against his sentence of imprisonment for three years is dismissed.

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