New Jersey Court of Errors and Appeals

THE STATE *vs.* FRANK M. BLACK, Et Al.	*Sur Indictment* *In Error*

DEFENDANTS' BRIEF.

FACTS.

The defendants were indicted by the Grand Jury of Sussex County, at the April term, 1911, for assault and battery on one Carl E. VanEtten, in the township of Sandystone; the indictment alleges that the assault was committed on the eighth day of July, 1911.

The evidence shows that the alleged assault was committed near a gate at the end of a lane or right of way leading from the main road, commonly called the River Road, over lands of Alice W. Black, to the residence of VanEtten; VanEtten had the legal right to the use of this drive way; a dispute had arisen between the owner of the servient tenement and VanEtten concerning the right of Black to maintain gates at the termini of this road, and the question had been litigated in the Circuit Court of Sussex County, and judgment had been rendered in favor of Black, who thereupon filed her bill in Chancery to enjoin VanEtten from removing said gates and compelling him to close them; a restraining order was issued in accord-

ance with the prayer of the bill, and this restraining order is still in force by agreement of counsel; no answer has been filed nor any motion made to set aside the restraining order; the evidence further shows that VanEtten had freqnently broken down the gate where the fracas occurred and was in the act of breaking it down on the evening in question, having destroyed it when he had gone out earlier in the evening; Frank M. Black, Colin Black and Leo Black, three of the defendants, are sons of Alice W. Black, and of the other defendants, one, William Trimberth, is her son-in-law, and the other defendants are her workmen; Frank M. Black is the manager for his mother, who is a widow; the other sons, defendants herein, are also her workmen; Frank Black having been informed that VanEtten had destroyed the gate, sent his brother Colin Black, and his workmen, Bosler and Curts, to repair it; (p. 65, l. 22) this was after supper; Bosler lived in Mrs. Black's house, situate directly opposite the gate in question. After caring for a dairy of forty cattle, Frank Black and his brother-in-law, Trimberth, went down to inspect the repairs; afterward they all sat down near the gate and in the yard talking; they did not know that VanEtten was out; VanEtten afterward came along and asking for his ax, began to destroy the gate whereupon Colin Black called on him to desist, and VanEtten then made an attack upon Colin Black with the ax, saying "I knocked hell out of the gate and I will knock hell out of you" (p. 68, l. 5); thereupon Frank Black said to VanEtten, "Don't strike that boy;" VanEtten applying a vile epithet, with the ax struck and wounded Frank Black in the knee; a general fight then ensued, and VanEtten, after promising to be good, was allowed to go his way; the record of the judgment and proceedings in the case of Black vs. VanEtten was put in evidence; the affray occurred on lands of Alice W. Black.

Defendants exhibited their bill of exceptions in the Supreme Court for the following assignments of errors:—

1. Because the court denied the motion to direct an acquittal of John Curts.

2. Because the verdict is against the clear weight of evidence.

3. Because the alleged offense was commited after the grand jury that returned the indictment was selected and sworn, without opportunity to the defendants to interpose challenges to the grand jury.

4. Because the court, when requested, refused to charge that if the jury believed that VanEtten had made an attack with a deadly weapon, and Colin Black saw that attack made, Colin Black was justified in making an attack upon VanEtten in defense of his brother, VanEtten having a deadly weapon in his hand. Further when requested to charge that if VanEtten did attack Frank Black with an ax, which is a deadly weapon, and without any provocation, and Colin Black saw this, he Colin Black, had a right to make the attack in defense of his brother, and this assault by Colin Black is not limited to the use of force only so long as the necessity for self-defense exists, but he had a right to attack the aggressor within the limits of human nature as affected by the provocation; the court refused so to charge, but charged the jury that the said Colin Black was justified in getting hold of this ax and holding fast and taking it away from VanEtten, and using whatever force was necessary for him to get it.

The refusal to direct an acquittal for Curts.

At page 52, in the testimony of Stanley Warner, a witness for the state, at lines 1 to 12, it appears that Curts told the witness Warner to keep out of

the row, and made no attempt to strike VanEtten or to render aid to the Blacks; and on page 113, in his own examination Curts specifically says that he did not strike or offer to strike VanEtten, and at line 21, page 113, he says: "I said, 'Young man, stay where you are, this is no business of ours, stay where you are.' " referring to Stanley Warner.

On this state of facts it was error to refuse to direct an acquittal for Curts.

The defendants, whether sons or servants of Alice W. Black, were in duty bound to protect her property from injury and destruction, and therefore not only had the right but were in duty bound to prevent VanEtten from destroying the gate, and if in an endeavor to prevent such injury and destruction it was necessary for them to use personal violence to VanEtten, they had the legal right to do that within the bounds of reason, and if VanEtten attacked Frank Black or Colin Black while those defendants were so in the discharge of their duty, either or all the brothers and servants had a legal right to defend the one assaulted from the assaults of VanEtten.

> If a person break down the gate or come into a close vi et armis, the owner need not request him to be gone, but may lay hands on him immediately, for it is but returning violence with violence.
>
> Whatever would justify or excuse another in taking a person's life would, of course, excuse or justify him in an assault and battery or an assault with intent to kill.
>
> Clark's Crim. Law, p. 237.

In defending himself from an assault made upon him, a person is justified in taking the life of his adversary when that act is, or reasonably appears to be, necessary in order to preserve his own life, or to protect himself from serious bodily harm.

State v. Bonofolio, 38 Vr. 239.

One may also defend a person with whom he stands in a family relation, without being guilty of an assault, whenever, under the circumstances, he would have the right to defend himself.

Clark's Crim. Law, p. 241.

A person, while he cannot use a deadly weapon, or kill another to prevent a trespass on his property not amounting to an attempt to commit a felony by force or surprise, may use any necessary force short of this in resisting a forcible trespass. If a person seek to take or *injure* another's property, not by robbery, or to trespass on his premises otherwise than by forcibly attempting to enter his dwelling, the latter may use all necessary force, short of force endangering life, to prevent the trespass, or eject the trespasser.

Clark's Crim. Law, pp. 241, 242.

Because there was harmful error committed by the court in refusing to charge the defendants' request as set out in the fourth assignment of error.

"A person is not bound to retreat to avoid an assault, but may stand his ground and return blow for blow, and he need not wait for the intended blow to fall before striking to prevent it."

Clark's Crim. Law, 241.

This doctrine is fully and clearly set forth in the case of people vs. George F. Pearl, et al., 76 Mich. 207 (1889).

This case is so completely on all-fours with the case at bar and so clearly states the law and with such good reason and common sense that the syllabi is quoted at length.

1. The law has enough regard for the weakness of human nature to regard a violent attack as a sufficient excuse for going beyond the mere necessities of self-defense, and chastising the aggressor within such bounds as do not exceed the natural limits of the provocation.

2. It would encourage and not restrain violence to allow a man to put the safety of others in danger by actual violence and offensive assaults, and then save himself from punishment by stopping retaliation as soon as his adversaries get the better of him.

3. When a man is provoked by another, the offender runs the risk of suffering to the extent of the provocation; and while the law never sanctions the use of force beyond what is naturally provoked it does not keep all its tenderness for the wrong-doer who begins the mischief.

The first assignment of error is that the Supreme Court held, at least by implication, although making no direct deliverance upon that point, that although the plaintiffs in error were defending the property of their mother and employer against illegal acts of VanEtten, they were not justified in law in so doing.

The affray occurred on lands of Alice W. Black, mother of three defendants, employer of the others; the defendants were there of right; VanEtten's right was limited to a right of passage over the place in question in a peaceable and orderly manner—he had no right to destroy the gate if it could be opened without being broken and

that it could have been opened in the usual way is sustained by the evidence—he was the aggressor; he was animated by a vindictive spirt; he had a deadly weapon in his hand with which he first attacked the gate and Colins Black and afterward Frank Black; murder was not only in his heart, but the purpose to inflict serious bodily, if not fatal injury, upon Frank Black was expressed by word and deed; if under such circumstances the law affords no protection to persons placed in the situation in which the defendants then were, there can be no guarantee of safety either to person or property, and license is given to every person of violent temper to give free rein to his passion without being answerable to law—it savors of the doctrine of frightfulness so much in evidence at the present time.

The second assignment of error is because the Supreme Court held that the trial Court properly refused to charge the request of defendants, set out in the fourth assignment in the assignments in the supreme court.

And sustains its finding by authority of the finding in State vs. Bonafiglio, 67 L. 245.

The law makes allowance for human weakness —the defendants were not the aggressors,—as before stated, they were defending themselves and their mother's and employer's property against assault and destruction; the defendants were justified in using as much force as might be necessary to reduce VanEtten *hors du combat;* their action was justified in law and under the circumstances in this case as shown by the evidence; their attacks ceased just as soon as the attacks of VanEtten ceased, and even if continued longer, were justified in subduing VanEtten to that degree that his assault upon the defendants would not be renewed, and when such occurance was

given by him, the attack ceased. Under the circumstances of this case the request to charge on this point was a proper request and the refusal to so charge was harmful error.

> "One causelessly assaulted by another is not limited to the use of force so long only as the necessity for self-defense exists, but may chastise the aggressor within the natural limits of the provocation received, and will not thereby be guilty of assault and battery."

People vs. Pearl, 76 Mich. 207, 4 L. R. A. 709.

> "One may use, in the defense of a third person, so much force as reasonably appears to be necessary, though in fact none is necessary, and he is not required to nicely gauge the proper quantum of force."

3 Cyc, 1048.

> "Defendants need not nicely gauge the quantum of force where he has good reason to believe and does believe, that great bodily harm is about to be inflicted upon him, but may use such force as, under all the circumstances, he had reasonable cause to believe, and did believe, was necessary to protect himself from impending danger."

State vs. Hickman, 95 Mo. 322.
6 Am. St. Rep. 54.
Barr vs. State, 45 Nebr. 458.
Evers vs. People, 3 Hun. 716.

And this applies with equal force to the case of a person who defends one in peril from a murderous attack commited with a deadly weapon—

especially where a duty for such defense exists, as it existed in this case.

It must be borne in mind that in this case the defendants in resisting the attack made with a deadly weapon used only the arms and means of defense provided by nature.

A master may do that to protect his apprentice which another person could not do without being an assailant, or giving provocation for an assault.

Orton vs. State, 4 Green (Iowa) 140.

And this applies with equal, if not with greater force, in this case where the defended was a brother.

HENRY C. HUNT,

Attorney of Plaintiffs in Error.

Court of Errors and Appeals of New Jersey.

STATE OF NEW JERSEY, *Defendant in Error,* vs. FRANK BLACK, ET ALS, *Plaintiffs in Error.*	*On Indictment.* *On Writ of* *Error of* *New Jersey* *Supreme Court.*

Brief for Defendant in Error.

At the April Term, 1911, of the Sussex Oyer and Terminer, Frank Black, Collins Black, Leo Black, Albert Bosler, John Curts and William Trimberth were indicted for committing an assault and battery upon one Carl VanEtten. The defendants were tried together at the December Term, 1912, of the Sussex Quarter Sessions, and a verdict of guilty was rendered against all of the defendants. A writ of error was sued out in the Supreme Court, directed to the Sussex Quarter Sessions. This was argued at the February Term, 1914. By an opinion filed in the Supreme Court on January 11, 1915, the judgment of conviction was affirmed. The writ of error in this case is sued out to review the decision of the Supreme Court. There are two assignments of error, which will be considered in order.

I.

A careful examination of the opinion filed by the Supreme Court fails to disclose any finding which would justify the first assignment in error. The Supreme Court assumes, for the purposes of the case, that Alice Black was the owner of the gate over which the controversy between the private prosecutor and defendants arose. They do not find that the plaintiffs in error were defending the property of their mother; neither do they find that VanEtten was, at the time, guilty of any illegal act. As a matter of fact, neither of these questions was before the Supreme Court for determination, nor could they have been under the bill of exceptions filed. Whether the defendants were at the time of the alleged assault defending the property of their mother was purely a jury question, and one finally disposed of by the verdict. Whether VanEtten was acting illegally at the time of the alleged assault was also a question entirely within the province of the jury.

As the Supreme Court points out in its opinion, these questions deal with the weight of evidence, and are, therefore, not properly the subject of review in a proceeding of this character.

II.

The question raised by the second assignment of error is practically the same question raised by the fourth assignment of error in the proceeding before the Supreme Court. The defendants urge that instead of the rule charged the Court should have adopted that expressed in the case of People v. Pearl, 76 Mich. 207. In that case it was held that one *causelessly* assaulted by another is not limited to the use of force so long only as the necessity for self-defense exists, but may chastise the aggressor within the natural limits of the provocation received. In Volume 3, Cyclopedia of Law and Procedure, at page 1047, the authors refer to this case as contrary to the

usual rule, and lay down the following as the correct rule: "This defense (self-defense) cannot be successfully interposed, moreover, where the force is used after the necessity therefore has passed."

In the case of the State v. Burton, et al., (Delaware) 47 Atl. Rep., 619, the Court held:

"In self defense, the person attacked can use only as much force as is reasonably necessary to protect himself. If he uses more force, and follows his assailant when retreating, he becomes an aggressor, and is guilty of an assault, though he may have been justified in the commencement of the attack."

In Wharton's Criminal Law, Tenth Edition, Volume 1, Section 102, the author states:

"When the danger is over, the right of self-defense ceases." And again, in the same section:

"But an assault on his person he cannot punish when the danger is over. His right is defense, *not retribution.*

There are several cases in New Jersey wherein the right of self-defense is discussed, but in each case the Court clearly restricts the right to defend one's self to the apparent necessities of the situation. Among the recent cases are:

State v. Bonofiglio, 67 N. J. L., 239;
State v. Jones, 71 N. J. L., 543;
State v. Mount, 72 N. J. L., 365.

Each of these deals with the question of the right to take life in defense of one's person, and in each case the rule laid down by the Court is "that before a person can avail himself of the defense that he used a weapon in defense of his life he must satisfy the jury that defense was necessary to protect his own life, or to protect himself from such serious bodily harm as would give him reasonable apprehension that his life was in immediate danger."

If Courts insist on apparent necessity, where one's life is in danger, certainly no less rigid rule would be applied where the situation is less serious.

Assuming that the charge delivered by the Court in the case under consideration might not have been as lib-

eral as the rule laid down in the case of People v. Pearl, supra, it is well within the general rule applied to cases of this character and as adopted in New Jersey.

As is aptly stated by the Supreme Court in the opinion filed in this case, to give countenance to the doctrine embraced in the proposition refused to be charged by the Court below, would be to sanction what the chief aim of the law is to prevent, that is, persons avenging their own wrongs by taking the law into their own hands.

It is respectfully suggested that the judgment of the Supreme Court ~~shall~~ should be affirmed.

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