Rowe Vs. United States

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Respondent : United States

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Rowe v. United States

No. 439

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ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE WESTERN DISTRICT OF ARKANSAS

SYLLABUS

On the trial of a person indicted for murder, the defense being that the act was done in self-defense, the evidence on both sides was to the effect that the deceased used language of a character offensive to the accused; that the accused thereupon kicked at or struck at the deceased, hitting him lightly, and then stepped back and leaned against a counter; that the deceased immediately attacked the accused with a knife, cutting his face, and that the accused then shot and killed his assailant. The trial court, in its charge, pressed upon the jury the proposition that a person who has slain another cannot urge in justification of the killing a necessity produced by his own unlawful acts. *Held* that this principle had no application in this case; that the law did not require that the accused should stand still and permit himself to be cut to pieces under the penalty that, if he met the unlawful attack upon him and saved his own life by taking that of his assailant, he would be guilty of manslaughter; that under the circumstances the jury might have found that the accused, although in the wrong when he kicked or kicked at the deceased, did not provoke the fierce attack made upon him by the latter with a knife in any sense that would deprive him of the right of self-defense against such attack, and that the accused was entitled, so far as his right to resist the attack was concerned, to remain where he was and to do whatever was necessary, or what he had grounds to believe at the time was necessary, to save his life, or to protect him from great bodily harm.

If a person, under the provocation of offensive language, assaults the speaker personally, but in such a way as to show that there is no intention to do him serious bodily harm, and then retires under such circumstances as show that he does not intend to do anything more, but in good faith withdraws from further contest, his right of self-defense is restored when the person assaulted, in violation of law pursues him with a deadly weapon and seeks to take his life or do him great bodily harm.

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This is an indictment for murder, alleged to have been committed by the plaintiff in error, in the Cherokee Nation, Indian Territory, on the 30th day of March, 1895; the person killed, Frank Bozeman, being a white man, and not an Indian. The verdict was guilty of manslaughter, and, a motion for new trial having been overruled, the accused was sentenced to imprisonment in the penitentiary at Columbus, Ohio, for the term of five years, and to pay to the United States a fine of five hundred dollars.

We extract from the record the following agreed statement as to the evidence:

"The testimony on the part of the government tended to show that on the evening of the 30th of March, 1895, the defendant, David Cul Rowe, who is a Cherokee Indian, and the deceased, Frank Bozeman, a white man, a citizen of the United States, and not an Indian, met at an hotel at Pryor's Creek, Indian Territory at the supper table. That the defendant appeared to be drinking, but was not much intoxicated. That defendant said that he had his gun, and that he had a right to carry it, as he was a 'traveler.' That he had made a gun play in that town on one occasion, and he would make another one. That he said to deceased, 'What do you think of that?' The deceased did not reply, and defendant said to him, 'God damn you, I'll make you hide out, or I'll make you talk to me.' That in a short time deceased got through his supper, and walked out into the office of the hotel, and presently defendant came out of the dining room. That defendant said something to deceased, which was not understood by the witnesses, but the deceased did not answer. That defendant turned to some other parties present, and said, 'He [meaning deceased] will not talk to me.' That one of the parties addressed said to defendant. 'Talk Cherokee to him.' That the deceased then said, 'He has got too damn much nigger blood in him to talk anything with any sense.' That defendant then kicked at deceased, hitting him lightly on the lower part of the leg. That immediately deceased sprang at defendant, striking him with a knife, and cutting him in two places on the face. That, after deceased began cutting defendant, the

latter drew his pistol, and fired, shooting deceased through the body. That at the time the defendant fired, the two men were in striking distance of one another. The shot struck deceased in the right arm, near the elbow, and ranged through the body from right to left side. That when shot was fired, deceased ran, and, when defendant turned round, the blood was streaming from his face, where he had been cut by deceased, and he said to the bystanders to go for a doctor, that he was killed. That a short time after the difficulty, the knife used by deceased on defendant was found near the place where the the trouble occurred. That a knife was also found on the person of deceased after his death."

"The testimony on the part of the defense tended to show that on the day of the difficulty, defendant came into town from his home, about twenty miles distant, with his wife to do some shopping; that he brought his pistol with him, and left it at the livery stable, where he put up his team, and at supper time went by the stable and got his pistol, fearing that it might be stolen; that defendant did not have anything to say to deceased in the dining room, but was talking with the father of the deceased, and that defendant was not intoxicated; that when defendant came out in the office, deceased used the language indicated in the statement for the government, or words to that effect, and defendant kicked at him, and probably struck him lightly; that when defendant kicked, he stepped back and leaned up against the counter, and deceased sprang at him, and began cutting him with a knife; that deceased cut him in the face, and kept on striking at him with the knife, and, after he was cut in the face, defendant drew his pistol and fired at deceased, who was in the act of striking him again with the knife. The foregoing is in substance the statement of the defendant, who testified in his own behalf."

"Proof was also offered tending to show that the reputation of the deceased as a dangerous and lawless man was bad, that the reputation of the defendant as a peaceable and law-abiding man was good, and that the reputation of prosecuting witness Thomas Boseman was bad for truth in the communities where he had resided. "

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The court delivered an oral charge, occupying twenty-seven pages of the printed record, and embracing a discussion of most of the leading principles in criminal law as well as many extracts from adjudged cases and elementary treatises.

Referring to the law of self-defense, the court said to the jury:

"A man might be to some extent in the wrong, and yet he might avail himself of the law of self-defense; but what is meant by his being in the lawful pursuit of his business means that he is not himself attempting to kill, or that he is not doing an act which may directly and immediately produce a deadly affray between himself and his adversary. He is not allowed to do either. The only time when he can do an act of that kind is when the condition exists which gives him the right to invoke this law. I say if he is attempting directly to kill, he is not in the lawful pursuit of his business unless it is in his own defense under this law, and when he is doing a wrongful act which immediately contributes to the result, brings into existence an affray in which violence may be used by the adversary and he may kill because of that violence -- when that is the case, the law says he is so far the author of that violent condition as that he cannot invoke this law of self-defense, and it depends upon the circumstances and conditions of the case whether or not he can invoke the law so far as to have his crime mitigated from murder to manslaughter. Then, when he is in the lawful pursuit of his business -- that is, when he is occupying the relation to the state of case where the killing occurred which I have named -- and then is attacked by another under circumstances which denote an intention to take away his life or to do him some enormous bodily harm, he may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling his adversary without killing him, if it be in his power. Now let us go over that again, and see what these propositions are. He must be measurably in the right -- and I have defined to you what that means -- and, when he is so situated, he is attacked -- in this case, by Frank Bozeman, the man who

was killed, and attacked under circumstances which denoted an intention to take away his life or to do him some enormous bodily harm, he may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling his adversary without killing him, if it be in his power. This proposition implies that he is measurably in the right. If he is doing any of these things, which I will give you after a while, which deprive him of the law of self-defense because of his own conduct in precipitating a conflict in which he kills, then he is not in the right. He is not doing what he had a right to do, and this proposition of the law of self-defense would not avail him. He could not resort to it, because his own conduct puts him in an attitude where, in the eye of the law, he is by his own wrong the creator of the necessity under which he acts, and he cannot invoke that necessity. The necessity must be one created by the man slain, and which was not brought into existence by the direct act of the defendant contributing to that necessity."

After saying that both the accused and the deceased were upon the same plane in respect of the place or house in which they were at the time, each having the right to be there, the court proceeded:

"Neither one of them was required to retreat under such circumstances, because the hotel or temporary stopping place of a man may be regarded as his dwelling place, and the law of retreat in a case like that is different from what it would be on the outside. Still, situated as was the defendant and as was the deceased, there was a rule incumbent upon both of them which required that they should use all reasonable means to avoid the condition which led to a deadly conflict, whether that means could have been avoided by keeping out of the affray, or by not going into it, or by stepping to one side, and this law says, again, that, if a man is in the right, if he stands without being the creator of that condition, and that condition is created by the man whom he kills, and the man is doing that, in the shape of exercising an act of violence, which may destroy his life or inflict great injury upon his person, yet if he could have paralyzed that

arm, if he could have turned aside that danger by an act of less deadly character than the one he did exercise, the law says he must do that. If he could have inflicted a less dangerous wound upon the man, under the circumstances, the law commands him to do that, because when he is doing that, he is accomplishing the only purpose the law of self-defense contemplates he has a right to accomplish -- that is, to protect himself, and not to execute vengeance, not to recklessly, wantonly, and wickedly destroy human life, but to protect his own life when he is in the right and the other party is in the wrong. "

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MR. JUSTICE HARLAN delivered the opinion of the Court.

We think that these portions of the charge (to which the accused duly excepted) were well calculated to mislead the jury. They expressed an erroneous view of the law of self-defense. The duty of the jury was to consider the case in the light of all the facts. The evidence on behalf of the government tended to show that the accused sought a difficulty with someone; that on behalf of the accused would not justify any such conclusion, but rather that he had the reputation of being a peaceable and law-abiding man. But the evidence on both sides was to the effect that the deceased used language of an offensive character for the purpose of provoking a difficulty with the accused or of subjecting him to the indignity of a personal insult. The offensive words did not, it is true, legally justify the accused in what he did, the evidence of the government tending to show that "he kicked at deceased, hitting him lightly on the lower part of the leg;" that on the part of the accused tending to show that he "kicked at" the deceased, and "probably struck him lightly." According to the evidence of the defense, the accused then "stepped back, and leaned up against the counter," indicating thereby, it may be, that he neither desired nor intended to pursue the matter further. If the jury believed the evidence on behalf of the defense, they might reasonably have inferred from the actions of the accused that he did not intend to make a violent or dangerous personal assault upon the deceased, but only, by kicking at him or kicking him lightly, to express his indignation at the offensive language of the deceased. It should have been submitted to the jury whether the act of the accused, in stepping

back and leaning against the counter, not in an attitude for personal conflict, was intended to be, and should have been reasonably

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interpreted as being, a withdrawal by the accused in good faith from further controversy with the deceased. On the contrary, the court in effect said that if, because of words used by the deceased, the accused kicked at or kicked the deceased, however lightly, and, no matter how offensive those words were, he put himself in a position to make the killing manslaughter, even if the taking of life became, by reason of the suddenness, rapidity, and fierceness of the assault of the deceased, absolutely necessary to save his own. By numerous quotations from adjudged cases, the court, by every form of expression, pressed upon the jury the proposition that "a person who has slain another cannot urge in justification of the killing a necessity produced by his own unlawful and wrongful acts." But that abstract principle has no application to this case, if it be true -- as the evidence on behalf of the defense tended to show -- that the first real provocation came from the deceased when he used towards the accused language of an offensive character, and that the accused, immediately after kicking at or lightly kicking the deceased, signified by his conduct that he no longer desired controversy with his adversary, whereupon the deceased, despite the efforts of the accused to retire from further contest, sprang at the latter, with knife in hand, for the purpose of taking life, and would most probably have accomplished that object if the accused had not fired at the moment he did. Under such circumstances, did the law require that the accused should stand still and permit himself to be cut to pieces under the penalty that if he met the unlawful attack upon him and saved his own life, by taking that of his assailant, he would be guilty of manslaughter? We think not.

If a person, under the provocation of offensive language, assaults the speaker personally, but in such a way as to show that there is no intention to do him serious bodily harm, and then retires under such circumstances as show that he does not intend to do anything more, but in good faith withdraws from further contest, his right of self-defense is restored when the person assaulted, in violation

of law, pursues him with a deadly weapon, and seeks to take his life, or do him great

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bodily harm. In *Parker v. State,* 88 Ala. 4, 7, the court, after adverting to the general rule that the aggressor cannot be heard to urge in his justification a necessity for the killing which was produced by his own wrongful act, said:

"This rule, however, is not of absolute and universal application. An exception to it exists in cases where, although the defendant originally provoked the conflict, he withdraws from it in good faith and clearly announces his desire for peace. If he be pursued after this, his right of self-defense, though once lost, revives. 'Of course,' says Mr. Wharton, in referring to this modification of the rule,"

"there must be a real and *bona fide* surrender and withdrawal on his part, for if there be not, then he will continue to be regarded as the aggressor."

"1 Wharton's Cr.Law (9th ed.) 486. The meaning of the principle is that the law will always leave the original aggressor an opportunity to repent before he takes the life of his adversary. Bishop's Cr.Law (7th ed.) 871."

Recognizing this exception to be a just one, the court properly said, in addition:

"Due caution must be observed by courts and juries in its application, as it involves a principle which is very liable to abuse. The question of the good or bad faith of the retreating party is of the utmost importance, and should generally be submitted to the jury in connection with the fact of retreat itself, especially where there is any room for conflicting inferences on this point from the evidence."

Both parties to a mutual combat are wrongdoers, and the law of self-defense cannot be invoked by either so long as he continues in the combat. But, as said by the Supreme Court of Iowa in *State v. Dillon,* 74 Ia. 653, 658, if one

"actually and in good faith withdraws from the combat, he ceases to be a wrongdoer, and, if his adversary have reasonable ground for holding that he has

so withdrawn, it is sufficient, even though the fact is not clearly evinced."

See also 1 Bishop's New Crim.Law, 702; *People v. Robertson,* 67 Cal. 646, 650; *Stoffer's Case,* 15 Ohio St. 47. In Wharton on Homicide 483, the author says that,

"though the defendant may have thus provoked the conflict, yet, if he withdrew from it in good faith, and clearly announced his

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desire for peace, then, if he be pursued, his rights of self-defense revive."

We do not mean to say that the jury ought to have found that the accused, after kicking the deceased lightly, withdrew in good faith from further contest, and that his conduct should have been so interpreted. It was for the jury to say whether the withdrawal was in good faith or was a mere device by the accused to obtain some advantage of his adversary. But we are of opinion that, under the circumstances, they might have found that the accused, although in the wrong when he kicked or kicked at the deceased, did not provoke the fierce attack made upon him by the latter, with knife in hand, in any sense that would deprive him altogether of the right of self-defense against such attack. If the accused did in fact withdraw from the combat, and intended so to do, and if his conduct should have been reasonably so interpreted by the deceased, then the assault of the latter with a deadly weapon, with the intent to take the life of the accused or to do him great bodily harm, entitled the latter to the benefit of the principle announced in *Beard v. United States,* 158 U. S. 550 , 158 U. S. 564 , in which case it was said:

"The defendant was where he had a right to be when the deceased advanced upon him in a threatening manner and with a deadly weapon, and, if the accused did not provoke the assault, and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life or to do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon in such a way and with such force as, under all the circumstances, he at the moment honestly believed and had reasonable

grounds to believe was necessary to save his own life or to protect himself from great bodily injury."

The charge as above quoted is liable to other objections. The court said that both the accused and the deceased had a right to be in the hotel, and that the law of retreat, in a case like that, is different from what it would be if they had been on the outside. Still, the court said that under the circumstances,

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both parties were under a duty to use all reasonable means to avoid a collision that would lead to a deadly conflict, such as keeping out of the affray, or by not going into it, or "by stepping to one side," and if the accused could have saved his life or protected himself against great bodily harm by inflicting a less dangerous wound than he did upon his assailant, or "if he could have paralyzed that arm" without doing more serious injury, the law commanded him to do so. In other words, according to the theory of the charge, although the deceased sprang at the accused with knife in hand for the purpose of cutting him to pieces, yet if the accused could have stepped aside or paralyzed the arm of his assailant, his killing the latter was not in the exercise of the right of self-defense. The accused was where he had the right to be, and the law did not require him to step aside when his assailant was rapidly advancing upon him with a deadly weapon. The danger in which the accused was or believed himself to be at the moment he fired is to some extent indicated by the fact, proved by the government, that, immediately after he disabled his assailant (who had two knives upon his person), he said that he (the accused) was himself mortally wounded, and wished a physician to be called. The accused was entitled, so far as his right to resist the attack was concerned, to remain where he was, and to do whatever was necessary, or what he had reasonable grounds to believe at the time was necessary, to save his life or to protect himself from great bodily harm. And under the circumstances it was error to make the case depend in whole or in part upon the inquiry whether the accused could by stepping aside have avoided the attack or could have so carefully aimed his pistol as to paralyze the arm of his assailant without more seriously wounding him.

Without referring to other errors alleged to have been committed, the judgment below is reversed, and the case is remanded for a new trial.

Reversed.

MR. JUSTICE BROWN and MR. JUSTICE PECKHAM dissent.