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SUPREME COURT OF APPEALS

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Record No. 4184

RICHMOND, VIRGINIA

IN THE  
Supreme Court of Appeals of Virginia  
AT RICHMOND.

JOHN D. BOONE, Appellant,

*versus*

COMMONWEALTH OF VIRGINIA, Appellee.

PETITION FOR WRIT OF ERROR.

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Petition for Writ of Error

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*To the Honorable Chief Justice and Associate Justices of the  
Supreme Court of Appeals of Virginia:*

Your petitioner, John D. Boone, hereinafter called appellant, respectfully represents:

That he is aggrieved by final judgment of the Circuit Court of Nansemond County, rendered on January 24th, 1953, sustaining the verdict of a jury in the cause of Commonwealth of Virginia *against* John D. Boone, upon an indictment for murder, wherein he was found guilty of murder in the second degree, sentenced to ten years confinement in the Virginia State Penitentiary, and respectfully prays a writ of error and *supersedeas* to said judgment.

Transcript of the record, with the original exhibits, is being transmitted and is hereby made a part of this petition.

This petition will be filed with the Clerk of this Court, at Richmond, Virginia, on March 24th, 1953, is adopted as appellant's opening brief and counsel desires to state orally the

reasons for reviewing the errors and judgment complained of.

A copy of this petition was delivered to Paul L. Everett, Suffolk, Virginia, Attorney for the Commonwealth on March 24th, 1953.

2\*      \*THE MATERIAL PROCEEDINGS IN THE  
                 TRIAL COURT.

Appellant was indicted at the May, 1952, Term of the Circuit Court of Nansemond County (M. R., p. 2) for the murder of Richard Collins, on April 26th, 1952. Upon that indictment a trial was had by jury on June 6th, 1952, and resulted in a hung jury (M. R., p. 11). On September 5th, 1952, a second trial was had by jury and resulted in the verdict and judgment here complained of (M. R., pp. 12, 13).

Appellant moved the Court to set aside the jury's verdict on the grounds set forth in the assignments of error, (M. R., p. 13) which motion was argued on January 24th, 1953,—being delayed in deference to sickness of counsel,—and overruled final judgment rendered and appellant sentenced (M. R., p. 15).

THE ASSIGNMENTS OF ERROR.

That the Trial Court erred in:

- (1) Refusing defendant's (appellant's) motion to strike the evidence;
- (2) Granting instructions a, b, and c, offered by the Commonwealth, over defendant's (appellant's) objections;
- (3) Refusing defendant's (appellant's) motion to set aside the verdict of the jury, and
- (4) Entering up judgment on the jury's verdict.

THE FACTS STATED.

(1) *The Locale.*

In this statement it will be of great aid to the correct understanding of the facts to refer frequently to the diagram of the locale involved on yellow paper, identified as Defendant's (appellant's) Exhibit "C", since many \*of the questions, 3\* and the answers thereto, otherwise mean nothing.

The house involved is close to Magnolia, about two miles from Suffolk, on the Old Norfolk Road.

By reference to the diagram it will be seen that the front bedroom, *right*, is Boone's (Appellant's) bedroom, which adjoins, and is entered from, the front living room. The second bedroom, *right*, is that of Richard and Catherine Collins, his wife, and adjoins, and is entered from, the second bedroom, *left*, sometimes referred to as the dining room, in which Bettie Collins and several others are supposed to have slept on one bed, also referred to as Bettie's room, (M. R., p. 36). Behind that room is the somewhat larger kitchen, along the right side of which runs a back porch. Vision may be had from the living room through two doorways across the second bedroom, *left*, to the kitchen. The cookstove therein is over by the left outside wall thereof.

In the front bedroom, *right*, or Boone's room, there is a standard size bed (M. R., p. 32) placed parallel to the front of the house, occupying approximately half the room, at the foot of which is a chest of drawers next to the partition (M. R., p. 32). The door to this room swings inward and toward the front of the house very close to Boone's bed (M. R., p. 32). The shot gun involved, a single barrel 12 gauge, was kept behind the door next to the chest of drawers and could be reached by one while sitting on the bed (M. R., p. 42).

The doorway to Boone's room is about eighteen inches or two feet from the doorway between the living room and the center dining room, or second bedroom, *left*, (M. R. pp. 32, 44). The doorway to the room of the second bedroom, 4\* *right* \*or Richard Collins' (the deceased) room, was in approximately the center of the room partition. The doorways, while not exact in measurement in the testimony, were such as found in the average small colored cottage house and generally are about two feet six inches wide. This would put the entrance to the Richard Collins, or second bedroom, *right*, about three and three-fourths or four feet from the doorway between the living room and Bettie Collins' room, and not more than five and one-half or six feet from the doorway of John Boone's room. Single bulb drop cord sockets were in the rooms, but burning only in the kitchen and dining room (Bettie's room), and Richard's room (M. R., p. 48).

(2) *The Events.*

The references will henceforth refer to Defendant's (Appellant's) Exhibit "C", or to the pages of the stenographic record of the testimony.

John D. Boone had been living in the home of Bettie Collins about eighteen months prior to the alleged offense, occupying the front bedroom (M. R., p. 32). He was the father of an infant child by Bettie (M. R., p. 86), furnished a good portion of,

if not all, the groceries (M. R., pp 33, 86) and to a practical degree was head of the household.

On April 26th, 1952, a Saturday, Boone bought groceries and carried them home (M. R. pp. 34, 86). He went back to Suffolk in the afternoon and returned home about eight o'clock. He had been drinking (M. R., pp. 25, 69). Bettie was sitting down ironing and also had something on the stove cooking. Richard was not there (M. R., p 34).

It is stated by some that Boone ate supper at home, but since the time he arrived home appears not in dispute \*it seems 5\* certain that he did not. (M. R., pp. 34, 69). At all events when he arrived he first played with his baby a few minutes in the dining, or Bettie's room (M. R., pp. 33, 35, 56) and then asked Bettie why she did not fix him some supper, to which she made a nasty reply (M. R., p. 87). Bettie says that an argument started over the purchase of some cigarettes (M. R., pp. 25, 35), but Boone's statement is supported by Bettie's daughter, Thelma. Whatever the argument Boone then grabbed Bettie and slung her in such manner that she, or they, fell (M. R., p. 56). Her children, Thelma, Goldie Mae and Richard's wife, Catherine, were also in the kitchen (M. R., p. 55) and Goldie Mae began to holler (M. R., p. 25).

Prior to Boone's return Richard had gone over to a small stove nearby where he was when the argument started (M. R., p. 47). In the excitement Richard's wife, Catherine, ran to get Richard to come home (M. R., pp. 26, 47). When Bettie fell, or they fell, she got immediately up and Boone then walked to his bedroom (M. R., p. 87), saying, which he denied, "don't nobody come back *her* in this room" (M. R., p. 26). Everything was then over with (M. R., pp. 26, 27). Richard then came in running (M. R., pp. 47, 57), followed by Catherine, and wanted to know what the mess was all about, and started back toward the back porch when his sister Thelma asked him why he didn't go talk to Boone (M. R., pp. 26, 48, 58). Boone's door was slightly ajar but not shut or locked (M. R., pp. 90, 89). Richard went to Boone's door, followed part the way by Thelma, Catherine and Goldie Mae, looked in and saw Boone and at once ran to his room (M. R., pp. 48, 68, 71, 80, 89), got his single barrel 12 gauge shot gun, went hastily, or ran, back toward Boone's room (M. R., pp. 59, 68, 89) and was shot by Boone while Richard was either in the doorway between Bettie's room and the living room, where blood was found (M. R., pp. 32, 60), or in the doorway to Boone's room (M. R., p. 49).

6\* \*The discharge of the gun entered his body, in front, above the heart leaving power burns on his clothing and body (M. R., p. 19).

When shot he whirled and was caught by his wife, Catherine, and assisted toward the kitchen where he fell and died (M. R., p. 52).

Boone testified that Richard came to his door, saw him sitting on his bed, at once ran to his room for his gun which he heard him get from the corner where it stayed (M. R., p. 89) and that upon hearing this and someone who sounded like Bettie say, "don't go in that room with that gun" (M. R., p. 89), he reached for his gun from where he was sitting, put the only shell he had, which was on the dresser, in the gun and when Richard came back he, Richard, pushed back, or opened, the door with the gun barrel then level toward him (M. R., pp. 89, 90), at which time he fired standing beside his bed (M. R., pp. 12, 89, 90). That Richard was then in his doorway and at once whirled and fell toward the "middle", or Bettie's room door (M. R., p. 91), and was carried to the kitchen door where he fell and died.

Boone further testified that there was no argument with Richard, that he thought Richard was going to shoot him, that he would not have shot him unless he had thought he was going to be shot (M. R., pp. 89, 90) and that he had been warned by Bettie, which is not denied, that he should watch Richard because "Richard would hurt me" (M. R., p. 90).

There is testimony on the part of the Commonwealth that Richard Collins did not get all the way to the living room door in his haste toward Boone's room, that his gun was then pointed downward and that when Boone fired he was standing in his bedroom doorway or partly in the living room, 7\* but \*it should be borne in mind that it is only three and three-fourths feet from Richard's door to the living room door and only five and one-fourth to five and one-half feet to Boone's door (M. R., p. 60).

There was blood just inside the doorway between the living and dining, or Bettie's, room (M. R., pp. 12, 91) and some about two feet in the dining, or Bettie's, room from the living room (M. R., pp. 66, 100, 101), but the major amount was just inside the kitchen from Bettie's room where Richard finally fell.

Immediately after the shooting Boone left the scene; he said to go for help, came back, left again and came back when he was arrested by Sheriff Culpepper, who testified he was under the influence of intoxicants (M. R., p. 9). He denied the shooting, claimed suicide and Sheriff wrote this down and had him sign it while in that condition (Exhibit "A", M. R., pp. 8, 9, 10).

The Sheriff found Boone's gun in his room on his bed and

Richard's gun on his bed in his room. The Collins gun had not been fired, and the testimony of all the witnesses, who are likewise members of the Collins family, is that the gun was unloaded, though none apparently had looked at it. But Boone did not know this.

Other facts will appear in the argument.

### THE QUESTION PRESENTED.

*The only question presented, is whether there is sufficient evidence to sustain the verdict.*

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### \*THE ARGUMENT.

*It is respectfully submitted that the evidence is not sufficient to sustain a conviction of murder in the second degree, or of any offense whatever.*

This is pointed up by the fact that the first trial resulted in a hung jury and the verdict of the second jury was affirmed by the Court only after long deliberation and, counsel believes, with considerable hesitancy.

Even if it be conceded that the argument between Boone and Bettie Collins was solely his fault, this merely goes to show the reason for Richard Collins wanting to avenge the affront to this mother, but does not militate against Boone, because so far as he was concerned the row with Bettie was over and he had gone to his room and nearly closed his door. Moreover, there had been no argument between Boone and Richard, no words had been passed, no threats had been made and Boone had no reason to know where Richard was or that he was coming home to pursue the matter.

Further, there is absolute want of motive or of malice, and malice aforethought is essential to the crime of murder in the second degree. Indeed the testimony from every Collins available, and the Sheriff as well, shows that Boone did no more than any reasonable prudent man would have done for his own safety.

It perhaps may be argued that he came out of his room, or came to the doorway, and shot Collins, but this is of no consequence, for he had every reason to believe, and did believe, that Collins intended to do him serious bodily harm, or bring about his death. He could hardly have forgotten the argument and tussle with Richard's mother and that this \*had prob-

9\* ably aroused Richard. He had been warned of Richard's dangerous disposition. He saw Richard when he came to

his room opened the door and spotted him sitting on the bed. He heard Richard run to his room, get his gun and start to his (Boone's) room. He heard someone say "don't go in there with that gun". Only then did he make ready to defend himself.

Even if we believe Boone was in his doorway, or in the living room, when he fired, this does not alter the situation, for he had the right to defend himself as best he could under the circumstances and not wait to be himself shot like a sitting duck.

There was nothing unusual or aggressive in his acts in protecting himself. Then too, Richard was aided and abetted by Thelma, Goldie Mae and Catherine and although either of them could have reached out and restrained Richard not one of them turned a hand. Why? Because they anticipated and were waiting to see that Richard either killed or did serious bodily harm to Boone. Neither knew then, or had any good reason to know, that the gun was not loaded, but, whether loaded or unloaded, a 12 gauge single barrel shot gun is a dangerous and deadly weapon at close quarters. Again, if Richard did not intend Boone serious bodily harm, or death, why did he run and get his gun after he had spotted Boone's exact position? Evidently, the gun was loaded, or he thought it was, and after the killing the shell was taken out and thrown away and the gun placed on his bed, for it fell when he was shot (M. R., p. 40).

Much will be made of this question of where Boone was when the shot was fired, and this is inconsequential, as above pointed out, but in the nature of things and from the physical facts he could not have been anywhere else than \*in his 10\* own room. This is because the first blood from Richard (M. R., p. 12) was in the doorway between the living room and Bettie's or the second, bedroom, *left*, and this spot is only eighteen inches to two feet from Boone's doorway. The length of Boone's gun was more than three feet and Boone was some short distance from Richard when the shot was fired, so that he is bound to have been in his own room when he fired. It was then that Catherine went toward him, he whirled,—a fact which is stated also by his sister,—and fell on his wife's shoulder.

As the Court instructed in defendant's (Appellant's) instruction number 3, (M. R., p. 8) Boone had every right, indeed the duty, to do exactly as he did do. Let's test the facts by the instruction.

(1) Boone was without fault in so far as Richard was concerned;

(2) Boone was threatened with an attack upon his life by Richard, then armed;

(3) The manner and circumstances were such as to furnish reasonable grounds for apprehending a design to take away Boone's life;

(4) There was reasonable ground for believing the danger imminent that such design would be accomplished;

(5) Boone believed the danger to his life to be imminent, and it was imminent;

(6) Boone could, and did, act upon appearances;

(7) Boone was under no duty to retreat; and

(8) Boone believed his act was necessary to defend his life.

\*Under the facts presented in this case, even though it be believed that Collins had no intention of killing Boone,—and such belief cannot be supported by the evidence,—there is no possible escape from the conclusion that the homicide was excusable. How can it be said that there is proof beyond a reasonable doubt that Boone is guilty of murder in the second degree under the law and upon the foregoing facts?

What did Boone do, under the circumstances, as appeared to him, that was not imperative to do in protection of his own life? Surely he had done nothing that would justify the taking or the threat of taking, his life. How would one protect himself except as he did? He had no place to retreat, and no door to use, except that which brought him face to face with Richard.

If one cannot protect himself when another advances on him with a deadly weapon with the apparent intent and purpose of doing him serious bodily harm, or of taking his life, and he may not act in his own protection when assailant is within five or six feet of him, then there is no situation under which one may defend himself, however innocent he may be. In this case Boone did nothing more than any other normal human being would have done. He was justified in acting first, for, had he not, the reasonable probability is that he would not be living today. That is said notwithstanding the testimony that Richard's gun was not loaded.

The witnesses all say that the gun was not loaded, but so far as Boone was concerned it was. Those same witnesses had not examined the gun before, nor did they examine the gun after the shooting, but they had every opportunity, which no doubt someone availed himself of, to remove the shell from the gun before the Sheriff got to the scene to take it in possession.

It is respectfully submitted that this case is one of self-defense in every sense of the word and the evidence does not justify a conviction. It is asserted therefore that the Court erred for the reasons set forth in the assignments or error.

Accordingly, appellant prays that a writ of error be awarded; that the judgment of conviction be reviewed and set aside and appellant discharged, or that appellant be awarded such other relief as adapted to the nature of his case.

Respectfully,

JOHN D. BOONE  
By Counsel.

THOMAS L. WOODWARD,  
EDWIN C. FERGUSON, JR.,  
American Bank Building,  
Suffolk, Virginia,  
Counsel for Appellant.

I, Thomas L. Woodward, of the City of Suffolk, Virginia, an Attorney at Law and Counsel for the appellant in the above styled cause, do certify that John D. Boone is the only appellant and Commonwealth of Virginia is the only appellee against whom an appeal is sought, the names of both of which appear in the caption, or style of the cause.

THOMAS L. WOODWARD,  
Of Counsel for Appellant.

13\* \*I, Thomas L. Woodward, Attorney at Law, practicing in the Supreme Court of Appeals of Virginia, residing in the City of Suffolk, Virginia, do certify that in my opinion the decree complained of in the foregoing petition should be reviewed by the Supreme Court of Appeals of Virginia.

THOMAS L. WOODWARD

Received 4/3/53.

H. G. TURNER, Clerk