NMLS.

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 12/97

COR: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

ARTHUR BAXTER
vs
REGINA

Dr. Lloyd G. Barnett for the Applicant
Hugh Wildman and Ms. Carol Edwards for the Crown

21st , 22nd September, 1998 and 26th March, 1999

FORTE, J.A.

On the 3rd February, 1997, after a trial which was concluded in four days, the applicant was convicted on two counts of an indictment which also charged him for other offences contained in two other counts. He was convicted on Count 2 of the indictment which charged him for wounding Fay Allwood with intent, committed on the 31st August, 1988. For this offence he was sentenced to serve ten years imprisonment at hard labour. In addition, he was also sentenced to twenty five years at hard labour for the offence of grievous bodily harm committed on Fay Allwood on the 2nd September, 1988 for which he was charged on Count 4 of the indictment. From these convictions, he now applies before us or for leave to appeal, a single judge having refused him such leave.

Before those incidents, Fay Allwood and the applicant had lived together in a common-law relationship, which ended when she removed out of the home, because of previous alleged abuses to which the applicant had subjected her. The prosecution case, was presented on the basis that the applicant in doing the alleged acts contained in the several counts of the indictment, was reacting to the complainant's termination of their relationship, an act which created in him severe anger.

The offence of wounding the complainant with intent (Count 2) occurred on the 31st August, 1988 when the applicant wounded her so badly in her face, that as a result she received forty three (43) stitches. The injuries extended one from behind her ear down to her cheek, and another from " above the earlobe near to the mouth". This incident had its beginning, when the complainant had gone to Leacham Avenue in Vineyard Town, St. Andrew to request her friend Janet Johnson to accompany her to Duke Street in Kingston to hand in a medical report, concerning a previous incident. Ms. Johnson being unable to make the journey with her, she requisitioned a taxi-cab and just as she was about to enter it, she saw the applicant making his way towards her. She immediately, "turned back" and sought refuge in Ms. Johnson's home. The applicant, however, chased after her into the house, where after chasing her from room to room, he came at her with a knife. She fell and he started punching her with his hand and hitting her with the "back of the knife". She managed to get away from him and ran into a bedroom but the applicant kept coming at her. In her attempt to defend herself, Miss Allwood, used a piece of stick to keep him away from her. He then came at her with a toilet seat and hit her all over her body. She again got away from him, but unfortunately she fell and the applicant fell on top of her. In trying to wrestle with him she bit his finger, but then the applicant, slashed her in her face with "two motions"

causing the injuries already described. After doing so the applicant said "I feel better" and then walked away.

In his defence of this charge, [as in the other charges], the applicant made an unsworn statement in which he contended that it was in the process of defending himself, from an attack made on him by Miss Allwood, that she received the injuries. He had gone to see her on that day (August 31, 1988), and was told by the helper that she was at Ms. Janet Johnson's home, which was nearby. He walked down to Ms. Johnson's home where he saw Miss Johnson standing at the gate. He entered the home, where he saw the complainant with a piece of stick in her hand, which she used to attack him, and then ran. He ran after her "ending up" in Janet's room where she took an opened blade knife from her jeans jumper and stabbed him on his left arm. He held unto her "to prevent her from stabbing " him again and they fell unto the bed and started wrestling for the knife. Then he says that it was in that wrestling that "she got cut'. He had not gone there with any knife. After that incident, he left those premises in a taxi.

The other incident out of which the applicant's conviction on Count 4 arose, occurred on the 2nd September, 1988, when the complainant was on Banana Lane in Allman Town. She saw the accused riding up on a bicycle and as a result, she turned back, and was offered refuge by Ms. Gracey Mae-Campbell, whose home she entered and where she remained for a while. Seeking to find out whether it was safe to depart she went unto the verandah to see if the applicant had left the area, but she saw him running towards her with a bottle in his hand. As a result she ran into the living room, but he came running behind her. An occupant of the house in an effort to "guard" her pushed her into the kitchen. The kitchen door, apparently one of the swinging

types came back and hit her and then swung back. She then saw the applicant "flash a liquid from a bottle onto me unto my person". It was flashed to the left side of her face and her shoulder, as a result both areas were covered with the liquid which burnt her so terribly that she fainted, and later regained consciousness in the Casualty Department of the University Hospital. She was admitted into the hospital where she remained for three months in the Burnt Unit of the hospital. She was treated by Dr. Joseph Bradley who testified at the trial. He described burns which appeared to be chemical burns involving the left side of the complainant's face including her left eye. There were smaller patches of burns affecting the left upper chest and the left shoulder which were consistent with "chemical splashing of liquid". The liquid he described as either sulphuric or caustic acid as he could not identify which since it is difficult to distinguish one from the other. The burns were third degree burns which affected the full thickness of the skin. The eyeball of the left eye was damaged directly by the chemical, and in addition, the eyelids were also involved. In the end, after undergoing many surgical procedures involving the eye and the eyelids, and being under the treatment and care of an Ophthalmologist and a Plastic Surgeon, Miss Allwood lost sight in her left eye.

In his defence, given in his unsworn statement, the applicant admitted to being at the Campbell's home on the day of the incident. He had been there before and had returned to see her sitting on the Campbell 's fence, speaking to Ralston Hyatt. As he rode up beside her, he called to her, but she got up and went into the yard. He followed her. She ran into the kitchen and he ran in behind her. She continued running into the living room and then back into the kitchen with the applicant chasing behind her. On running through the kitchen door, she had a bottle containing liquid in her

hand. She attempted to throw the liquid on him, but he used the kitchen door to hit her hand with the bottle. The bottle broke, spilling the substance on her. He denied having the bottle with liquid and that he attacked her by throwing the substance on her.

The issues raised on appeal involved the following:

(1) an application to call fresh evidence.

(2) The following complaints:

(i) that the applicant was deprived of his right to a fair trial when the learned trial judge failed and refused to allow an adjournment sought by the Defence for time to contact and make available a vital witness for the Defence;

(ii) the verdicts are unreasonable and cannot be supported by the evidence. This was argued with another complaint that the verdicts were inconsistent with verdicts of acquittal entered in relation to the other two counts of the indictment;

(iii) that the learned trial judge failed to give any or adequate directions on the defence of accident which arose with respect to Count 4;

(iv) that the sentences of 10 years at hard labour and 25 years at hard labour on counts 2 and 4 respectively are manifestly excessive.

1. APPLICATION TO ADDUCE FRESH EVIDENCE

The evidence sought to be adduced is contained in an affidavit sworn to by Ralston Hyatt, whom the applicant had stated in his unsworn statement, was present at the time of the incident out of which the offence charged on Count 4 arose i.e. the alleged throwing of acid by the applicant on the complainant. The relevant part of his affidavit reads as follows:

> "I noticed they both entered the Campbell's house by way of the kitchen. Shortly after, I heard arguing inside the house, I went to investigate and upon entering the house I observed Fay walking down a passage leading from the Campbell's living room to the kitchen. Baxter was walking behind Fay. I noticed she had a bottle containing liquid in her hand, which she was removing from the plastic bag I had observed in her possession earlier. When she reached inside the kitchen, she was going through a door to the western section to the kitchen, then she spun around and attempted to throw the liquid from the bottle on Baxter. Baxter used the kitchen door to block the bottle in an attempt to avoid being hit with the bottle or the contents. The impact with the door caused the bottle to break, splashing the contents on Fay. She screamed and ran into the yard..."

The statutory provision which endows this Court with the power to hear fresh evidence is contained in Section 28 (b) of the Judicature (Appellate Jurisdiction) Act which reads as follows:-

> " **28.** For the purposes of Part IV and Part V, the Court may, if they think it necessary or expedient in the interest of justice--
>
> (a) ...
>
> (b) if they think fit, order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of court before any Judge of the Court or before any officer of the Court or justice or other person appointed by the Court or justice or other person appointed by the Court for the purpose, and allow the admission of any depositions so taken as evidence before the Court".

The approach to the exercise of a discretion under this section, was settled in the case of ***Reg. v Parks*** [1961] 1 WLR 1484, which dealt with the equivalent English statutory provision, and which has been followed in our own jurisdiction in many cases. In delivering the judgment of the Court in the Criminal Court of Appeal in England, Lord Parker C.J. set out the principles to be applied in exercising the discretion under those statutory provisions. He said (at pg. 1486):

> "As the court understands it, the power under section 9 of the Criminal Appeal Act, 1907, is wide. It is left entirely to the discretion of the court, but the court in the course of years has decided the principles on which it will act in the exercise of its discretion. Those principles can be summarised in this way: First, the evidence that it is sought to call must be evidence which was not [be] available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for the court to decide whether it is to be believed or not, but evidence which is capable of belief. Fourthly, the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial".

Applying this principle to the present case, it is obvious that the evidence sought to be adduced is evidence which was available at the time of the trial. That the content of the proposed evidence of the witness was known at the time of the trial is evident from the fact that before the commencement of the trial counsel for the applicant made an application for adjournment of the case, on the basis that the very witness (Mr. Hyatt) was unable to attend Court at that time, being in the United States of America and apparently unable to make the necessary arrangements to be in Jamaica at that time. Consequently, one of the main criteria for allowing the introduction of fresh evidence at this stage cannot be met, and a fortiori the application must meet with

failure. This leads us to a consideration of the second complaint which is also concerned with the witness Hyatt in regard to the learned trial judge's refusal to grant an adjournment to allow the defence counsel to make contact with him.

2. DID REFUSAL OF POSTPONEMENT RESULT IN UNFAIR TRIAL

It should be recorded that although other reasons to found postponement were given by counsel on the date on which the trial was set to commence, but before the commencement, the refusal of the learned trial judge to grant the postponement is now only being challenged in respect of the request to be given time to "contact and make [him, the witness] available".

The case was set for trial on the 27th January, 1997. On that morning counsel for the defence, in applying for a postponement of the case said inter alia:

> "...I indicated my position to the Director of Public Prosecution promptly on Tuesday of last week and in that letter I had indicated to them, sir, that the defence would have its difficulties in proceeding this morning because there is a material witness for the defence who lives in New York and arrangements would have to be made with the person to facilitate (him) sic in giving evidence on our behalf".

The learned trial judge responded as follows:-

> "There are a number of adjournments in this mater, 16th September, 7th November, I have a firm fixture made for today. What is your position, Madam Crown Counsel?".

Crown Counsel responded inter alia:-

> "M'Lord, I am opposing this application in fact, it is imperative that this matter be started because the complainant who lives abroad has made a special effort to be here for it to be started today. This is a matter in which the circumstances originate from 1988 and through no fault of the prosecution the matter was not prosecuted

> until some time in early last year when the accused was formerly (sic) arrested.
>
> It is true that Counsel does in fact have a particular statement. That was something which Counsel indicated to me when he first saw me this morning; a particular count on the indictment, that the position will be addressed, M'Lord. I can only urge you to decide this matter in light of the very important fact that the complainant has at least left her work. She is already here".

After further discourse, the case was postponed to the 29th January, 1997 on which date counsel for the defence renewed his application for postponement. Here is what he said on the issue being discussed:-

> "I indicated to the court that there is a witness who resides in the United States of America and efforts had been made to contact him. I eventually got a fax message from the witness Ralston Hyatt dated Tuesday, the 28th January, 1997, to the effect that he is willing to attend on this Court at the time specified therein, so that he might give evidence on behalf of Mr. Baxter. I had indicated, M'Lord, that this is a witness of critical importance to the defence, very vital to the defence without which I cannot offer Mr. Baxter the professional assistance I swore to give. He is very vital to the defence and I cannot stress it any more, M'Lord, having regard to count four and five of the indictment".

On counsel submitting that the defence was entitled to adequate time and facilities to present its defence, the learned trial judge reminded him that the case had been before the Court since September of the past year, and questioned whether that was not sufficient time to have had the witness present. Not having got a satisfactory answer, and apparently influenced by the fact that the complainant had come from the United States of America for the trial, the learned judge ruled as follows:-

> "Mr. Morrison I am not persuaded. I am not going to postpone again this matter, the trial will begin. You can make the necessary arrangements to get your witness

> here. We are going to start the matter, you can make your arrangements to get your witness".

The case then proceeded, and after the Crown closed its case, the applicant gave an unsworn statement which was concluded on 3rd February, 1997 on which date the defence again requested an adjournment as follows:

> "M'Lord at this juncture there are a number of witnesses for the defence with whom (sic) we already contacted but will not be available today. It is therefore my application to this Court that we be offered additional time with a view to interview the witnesses so that we can conclude this matter on Monday".

The learned trial judge obliged:-

> "I will adjourn until Monday. We will expedite this matter on Monday".

When the case was called up for continuation on Monday, 3rd February, 1997 counsel addressed the court inter alia as follows:

> "M'Lord the promise which I had given to the court, for the records I advise, is not forthcoming, that being the case we have no alternative but to rest the defence case as it is".

The exercise of the learned judge's discretion to refuse the adjournment has to be viewed on the basis of the history of the case and all the circumstances that existed at the time. The incident out of which the charges arose all occurred in 1988, and through no fault of the Crown came before the Court many years after. The date for trial was apparently the third trial date, and as counsel for the Crown pointed out the complainant had made a special trip from the United States of America to the island to testify in the case. The witness for the defence, as it turned out would not have been required until the 3rd February, 1997, giving the defence almost a week after the case was set for trial to make arrangements to have the witness present. In the end, instead

of doing so, counsel for the defence closed the case without the benefit of that witness. In our view given all the circumstances, the learned trial judge was correct in proceeding with the trial, as the defence had ample time to have secured the presence of the witness. In any event, the content of the proposed testimony of the witness, adds nothing to a defence which was clearly rejected by the jury. This ground therefore fails.

3. VERDICT UNREASONABLE

The applicant also argued that the verdicts are unreasonable in that they are inconsistent to the extent that the jury having rejected the prosecution's case on Counts 1 and 3 the jury could not reasonably be free of reasonable doubt in respect of Counts 2 and 4 on which they found the applicant guilty.

The argument is based on the premise that the evidence on Counts 1,2 and 4 came from Fay Allwood and that on Counts 2 and 3 from the witness Janet Johnson, and therefore the acceptance of the credibility of these witnesses on Counts 2 and of Fay Allwood on Counts 4 is inconsistent with the rejection of their evidence in Counts 1 (Fay Allwood) and Counts 3 (Janet Johnson). This submission ignores the principle that a witness can be believed in respect of part of his/her evidence and be rejected on other parts of the evidence. All the incidents were separate, and consequently the jury was bound to assess each witness' testimony as it relates to the several counts of the indictment and in doing so for example may well have concluded that the evidence in relation to the counts on which they acquitted did not reach the standard of proof required to make them sure of the applicant's guilt.

We say this to say, that the acquittal on some counts in an indictment, in which the same witnesses have testified on Counts which concluded in conviction, does not

without more make it conclusive that the verdicts are inconsistent. For these reasons, this ground also fails.

4. ACCIDENT

The appellant also complains that the learned trial judge failed to give any or any adequate directions on the defence of accident which arose with respect to count 4. The issue of accident did not arise in the defence, as the applicant contended that the complainant suffered her injuries as a result of an attempted attack upon him, causing him in defence of himself to push back the door on her hand, which resulted in the liquid substance falling on her, instead of on him as she had intended. The Crown's case however, gave a scenario of the applicant chasing the complainant, and thereafter deliberately throwing the liquid from a bottle unto her. This version disclosed no accidental falling of the liquid upon the complainant. It is difficult to see, how accident could have arisen as a defence, given the two versions outlined above. Nevertheless, the learned trial judge directed the jury thus:-

> "If the acid was poured on her accidentally, it is no offence at all. That is not what the accused is saying. It was not poured on her accidentally, he said he slammed against her hand in order to protect him. If you reject self-defence it is open to you to convict him of that offence".

We agree with the cited passage. If the jury rejected the appellant's account which would have amounted to self defence, it would necessarily follow that they would not have found that the bottle with the acid was in the hands of the complainant. On the other hand, if they had accepted his account, then they would necessarily have concluded that he acted in self-defence, and the question of accident

would not arise. In those circumstances it was not incumbent on the learned trial judge to embark on a legal thesis as to the definition of accident.

Before leaving this ground, it should be noted that this ground of the application made the relevant complaint only in respect of count 4 which has been dealt with (supra) Nevertheless Dr. Barnett for the applicant pursued this contention as it relates to count 2. The evidence in this regard was diverse as between the version of the complainant and that of the applicant. The evidence of the complainant spoke to an incident in which she was under severe attack by the applicant from whom she was fleeing and whom at one time during the incident she had to hit with a stick to escape him . In spite of that he continued to chase her culminating in his falling on top of her and deliberately slashing her in her face. On the other hand, the applicant presented the complainant as the aggressor, and contended that he was defending himself, having already received wounds on his arm, which she had delivered with a knife. They fell, he said, and it was in the 'wrestling' that ensued when he was trying to prevent her stabbing him with the knife again that "she get cut". If his version was correct then, he would succeed on the basis of defending himself, and no question of accident would arise. If however, the jury accepted the evidence of the complainant as no doubt they did, then there being no room in her evidence to find that her injuries were accidentally caused, the learned trial judge would not be required to give any directions on accident in this regard.

For these reasons, this ground also fails.

5. SENTENCE

The applicant was sentenced to ten (10) years and twenty five (25) years on counts 2 and 4 respectively. Dr. Barnett argues that these sentences are manifestly excessive.

He contends that the sentences fall outside the range or pattern of sentences of similar offences and inadequate account was taken of the applicant's good record and character.

Sentences must have some relationship to the seriousness of the offences, the circumstances under which they were committed, and of course the antecedents concerning the person to be sentenced

The offences committed in this case, and the manner in which they were committed in our view warranted the sentences imposed by the learned trial judge, and in these circumstances, we cannot say that they were manifestly excessive.

In the event the application for leave to appeal against conviction and sentence in respect of both counts are refused. We order that the sentences should commence on May 7, 1997.