

J A M A I C A

IN THE COURT OF APPEAL

R.M. CRIMINAL APPEAL No. 80/80

BEFORE: The Hon. Mr. Justice Rowe, J.A. (Presiding)
The Hon. Mr. Justice Carey, J.A. (Ag.)
The Hon. Mr. Justice White, J.A. (Ag.)

DERRICK CLARKE
ERROL EDWARDS vs. REGINA
EVERTON ROBERTS

Mrs. Z. Holness for the Crown.

July 30, 1980

ROWE, J.A.:

This is an appeal by Everton Roberts, Errol Edwards and Derrick Clarke from their convictions and sentences by the learned resident magistrate for the parish of St. Thomas sitting in the Yallahs Court on 22nd May, 1979, wherein each accused man was found guilty of assault occasioning bodily harm and fined \$300.00 or six months' imprisonment at hard labour.

Very briefly, the Crown's case is that District Constable Neville Lyons at about 8.30 p.m. on the 12th October, 1978, was walking in the road at Lloyds in St. Thomas when he came upon the accused, Clarke, who was riding a pedal bicycle without lights. He accosted Clarke and, according to Mr. Lyons, three other men who were colleagues of Clarke came up. They began to abuse him and

some said, "Lick him in him rass for everything that happen here him carry a Yallahs," and four men, the three appellants and another man named Frederick Mills began to beat the district constable using their hands and bottles and they beat him all over his body for about four minutes. Mr. Vassell McDonald, came up and said, "This can't happen," and parted the men away from the district constable. The district constable suffered injuries which the doctor said amounted to an abrasion of the abdomen, haematoma on the left side of his forehead and a swelling in the third rib.

The three appellants were on that same night arrested by the police for assault occasioning bodily harm and the constable who arrested them is Ricardo Myers. He says that when he cautioned the appellant Clarke, the appellant Clarke said in relation to the other accused persons, "Them nuh know anything about it officer. Is me and Lude," and the district constable is referred to as 'Lude'. Frederick Mills was not arrested on that occasion but was summoned and about a month later/was tried together with the three appellants on the same indictment.

The defence of Roberts, Edwards and Mills was that although they were present on the occasion when there was a fight between Clarke and the district constable they took no part in that fight.

Mr. Vassell McDonald whom the complainant referred to as the one who parted the fight, gave evidence for the defence and he testified to seeing the district constable and Clarke wrestling but to seeing nobody else involved in that struggle.

At the end of the trial the learned resident magistrate, notwithstanding the clear directions of Section 291 of the Resident Magistrate's Act, merely said, "Accept evidence of witness for the prosecution," and found Edwards, Roberts and Clarke guilty but found Mills not guilty and acquitted Mills. She gave no reason whatsoever for acquitting Mills in circumstances in which the evidence for the prosecution in relation to Mills was exactly the same as the evidence

in relation to Roberts and in relation to Edwards. There was absolutely no distinction between the evidence of the district constable in relation to these three persons charged and yet by some means which the learned resident magistrate has not bothered to record, she acquitted one and convicted two.

The verdicts in relation to Roberts and in relation to Edwards are clearly inconsistent with that in relation to the accused, Mills, and cannot stand.

The evidence in relation to Clarke is somewhat different. On the prosecution's case Clarke is alleged to have said to the police officer upon his arrest, "Is me and Lude. The others know nothing about it," thus putting himself on the scene in the scuffle, and he gave an account of what he says took place between himself and the constable. His account was to the effect that although he was riding his bicycle with lights the constable accosted him and claimed that he didn't have lights. The constable wanted to take his bicycle away from him or deflate it. He wouldn't allow this to happen, whereupon the constable boxed him. He boxed back the constable and from one thing to another they came into a scuffle and were later parted.

It seems clear that the resident magistrate rejected the account given by the appellant Clarke as to how the scuffle took place, and there being a distinction between the evidence in this case and the evidence in the case of Roberts and Edwards, we see no reason for interfering with the conviction of Derrick Clarke.

The appeal of Roberts and Edwards is upheld. Their convictions are quashed and sentences set aside.

We have considered the sentence imposed upon Clarke, which was \$300.00 or six months hard labour and we think that having regard to the evidence as a whole and the resident magistrate not having given any positive findings of what she said happened, the sentence in the circumstances is manifestly excessive and ought to be reduced to a fine of \$100.00 or six weeks hard labour.

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