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JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE CRIMINAL APPEAL NO. 28/2000

BEFORE: **THE HON. MR. JUSTICE DOWNER, J.A.**
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE SMITH, J.A. (Ag.)

KEITH PICKERSGILL V R

Norman Davis for the appellant instructed by Carrol Pickersgill

Ms. Marjorie Moyston, Crown Counsel for the respondent

January 26, February 15 and June 7, 2001

SMITH, J.A. (Ag.)

The appellant Keith Pickersgill, was convicted on the 10th April, 2000, of unlawful wounding and assault by Mrs. Errar-Gayle a Resident Magistrate for the parish of St. Catherine.

The particulars of the 1st count which charges unlawful wounding contrary to Sec. 22 of the Offences against the Person Act, are that he (Keith Pickersgill) on the 14th day of July 1999, in the parish of St. Catherine unlawfully and maliciously wounded Shana-Kay Stephens.

The 2nd count charges him with assaulting Stephanie Stephens on the 14th July 1999. He was sentenced to two (2) years imprisonment on each count; both sentences were suspended for 2 years.

The complainant, Miss Stephanie Stephens is a vendor of soft drinks and biscuits. She conducts her business on the sidewalk in front of the appellant's car wash, tyre repair and auto repair business at 1 Port Henderson Road in the parish of St. Catherine. It was the habit of Miss Stephens at the end of each day to pack her wares on a table and to place the table and stall on the premises of

the appellant. The appellant protested. Despite the protest the complainant persisted in the habit to the annoyance of the appellant.

The Crown's case is that on Wednesday the 14th July, 1999, at about 7:00 p.m. the complainant as was her wont placed her table on the appellant's premises. The appellant who was standing inside his shop called to the complainant. She ignored him, telling him she had no time for him. She went to the sidewalk where her baby daughter, Shana-Kay, and her mother, Mrs. Edris Stephens were. The appellant insisted that she remove the table from his premises. There was an angry dispute between the complainant and her mother and the appellant . The complainant said she was face to face with the appellant when he boxed her. When she got up he again boxed her and again she fell. She grabbed at the appellant who backed up to his premises. The complainant followed him. The appellant, pulled his firearm, and aimed it at the complainant. At this point her little daughter Shana-Kay ran behind her and held unto her dress. According to the complainant, the appellant "shuffled the gun" and it went off. Her daughter screamed in agony. She was shot in both thighs. Complainant picked up a piece of iron and rushed at the appellant. The appellant with gun in hand retreated to his car and drove off.

In his defence, the appellant denied boxing Ms. Stephanie Stephens and claimed that he fired his gun in self defence. He is a licensed firearm holder. A few days before the incident, he suspected the brother of Miss Stephens of stealing things from his premises. Consequently, he told her not to leave her goods on his premises. She became infuriated, directed expletives at him, told him that she and "her man fire bigger gun" than his 38 and threatened him with physical harm if he dared to interfere with her things. He reported the threat to the police.

On the 14th July, 1999, at about 7:30 p.m. the appellant was at his tyre shop when the complainant entered his premises with table and iron pipe which she had on her stall. She began to pack her things on the table. He told her not to. The complainant's mother and daughter were with her. He and the complainant quarrelled . The complainant grabbed unto his T shirt and tore it. Her mother went between them. The appellant walked away. The complainant

followed him with a piece of iron in her raised hand. Her mother tried to hold her back. The appellant said he was fearful and pulled his gun. She advanced towards him. He fired the firearm. He heard the baby who was near the sidewalk, "scream."

Before this Court, Mr. Davis for the appellant relied on three grounds in respect of count 1.

> 1. The learned Resident erred in that she failed to adequately consider the appellant's defence of self-defence. In particular she mistreated the evidence of the appellant in finding he was not in fear of his life, (amended ground of appeal).
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> 2. The learned Resident Magistrate erred fundamentally in her approach to resolving the issue of self-defence She ought to have resolved that issue in the appellant's favour. In particular the conflict on the complainant's testimony that she rushed at the appellant with the iron after he discharged the firearm and the appellant's testimony that she did so before he discharged his firearm (amended ground of appeal).
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> 3 The verdict was unreasonable having regard to the evidence (amended ground of appeal).

None of the amended grounds seem to touch and concern count 2, the assault charge. However, the first of the original grounds as formulated reads:

> "1. That the conviction was not reasonable having regard to the evidence."

No doubt Mr. Davis relied on this ground as the base from which to launch his challenge to the appellant's conviction in respect of count 2. We will deal with this count first.

The assault count (count 2)

The appellant's defence is a complete denial. This denial came during his cross-examination. Mr. Davis submitted that although the factual substratum of the Crown's case against the appellant was that he boxed Miss Stephens twice, yet she made no mention of it in her statement to the police. Such a material omission he argued rendered the evidence of the witness unreliable.

He relied on the decisions of this Court in **R v. Curtis Irving** (1975) 13 JLR 139 and **R v. Andrew Peart et al** (unreported) SCCA Nos. 62, 63, 65 and 66 delivered 31st July, 1995. In cross-examination Ms. Stephens said:

> "I gave a statement to the police. I never said I felt a box to the back of my neck. Not true, I said in my statement to the police that by the time I turned I felt a box to face."

After her statement to the police was shown to her, she had this to say:

> "Now I agree that I did tell the police that as I stepped off I felt a box to the back of my head. It was true when I told this to the police in my statement. True I felt box to my face. I know there is a difference between face and back of neck... True in police statement I never told them that he boxed me twice and I fell down twice."

It is true that there is an apparent discrepancy between her evidence and the statement to the police. In her evidence the complainant said she was facing the appellant when he boxed her. In the statement to the police she said just as she stepped off she felt a "box" to the back of her head. It is also true that she admitted that it was in Court that she first said that "he boxed her twice and she fell."

What is important however, is that she did tell the police in her statement that he "boxed" her albeit to the "back of her head". She also told the learned Resident Magistrate that what she said in the statement was true and that what she said in evidence in court was also true. It seems to us that these statements are not mutually exclusive. Both can in fact be true. Thus the discrepancy though apparent is not real.

This case is easily distinguishable from the **Curtis Irving** case (supra). In the latter there was an "incomprehensible maze of admitted untruths and blatant, and unexplained contradictions and inconsistencies" as to render the evidence so manifestly unreliable that no reasonable tribunal could safely convict thereon. In the **Andrew Peart et al** case the Court examined the statement of the witness which showed that contrary to her evidence she had fled in panic

and did not witness the shooting. This is certainly not the situation in the case now before the Court.

In the instant case the learned Resident Magistrate found Ms. Stephens the complainant, to be an "honest individual and a witness of truth." She found the appellant was not a "witness of truth." Accordingly, she accepted the complainant's evidence that the appellant boxed her.

For this Court to reverse her judgment the appellant must show that the verdict is so against the weight of the evidence as to be unreasonable and insupportable. In our view the appellant has failed to so show.

The unlawful wounding charge – count 1

Grounds 1 to 3 of the amended grounds relate to this count. In these grounds the appellant through his counsel contends that the Resident Magistrate mistreated the defence and wrongfully concluded that the appellant was not acting in lawful self defence. Further, it is contended that the evidence as a whole reasonably demonstrates (i) that the complainant Ms. Stephens was the aggressor; (ii) that her evidence as to how the shooting took place was inconsistent with the fact that the little girl Shana-Kay was shot in the thigh; (iii) that, as the appellant testified, the complainant rushed at him with iron in hand before he discharged the firearm.

Now the evidence of the complainant is that her daughter was behind her when the appellant pointed the gun at her and discharged it. It might be helpful to quote the relevant part of her evidence in chief:

> "Accused boxed out his gun from his right pants pocket. He aimed it at me (witness demonstrates with arm held at breast height). My mother and daughter came behind me. I was about nine (9) feet from him (distance pointed out and estimated by Court). My daughter started crying and ran behind me and was holding unto my dress. He go like this (demonstrates with a shoving forward of hand) and is like it stick. He then shuffle the gun again and it go off. I heard the sound and then I heard my daughter screaming."

It was then she said, that she picked up the iron and rushed at him. It is also her evidence that when the accused pulled his gun she had nothing in her hand.

During cross-examination, she admitted that she was very angry during the quarrel and told him he could not frighten her. The appellant's version is diametrically opposed. According to him after the complainant grabbed and tore his shirt, he walked away. She picked up a piece of iron (18"-20" long) and followed after him. His evidence continued:

> "She advanced to me with the iron held up in her hand. Her mother face her trying to hold her back. In fear, I pulled my gun. She was very close to me. Her mother was before us. The baby was some what out to the sidewalk. The baby was to my left. Complainant was before me.
>
> When I pulled my gun I was in fear as she was advancing on me rapidly. I felt she was going to lick me down with the iron because of the distance where she was and the manner she was in. I discharged a shot from my firearm. Some truck rims pack up there. I fired to my right. The rims pack up on top of each other around a tree. After I discharged the firearm, she stopped and I heard the baby scream."

In cross-examination the appellant said:

> "When complainant had iron, her mother was between me and her. Her mom's back was to me. Her mom was restraining her from advancing towards me. It is then I took out my firearm and fired a shot because I was fearful of my life."

The learned Resident Magistrate in her findings of fact accepted the complainant's version and rejected the defence. She gave reasons for her judgment. In addressing the appellant's assertion that he was fearful that the complainant would strike him with the iron, she recounted the evidence of the appellant that complainant's corpulent mother was between them restraining the complainant. She then reasoned:

> "If this is so then he was obviously not in fear of his life as he would have the Court believe. Mrs. Edris

> Stephens would obviously be a buffer or a protection for him from any alleged onslaught."

The Magistrate was of the view that the appellant's account was that of an intemperate person seeking to justify his unlawful act of discharging a firearm in a dispute. She found that he fired "knowing that a young baby ... stood in danger..." and that even on his own account he had no justification for firing his gun. She was not impressed with his demeanour in court.

On the other hand the learned Resident Magistrate found the complainant to be truthful and was ready to "acknowledge her conduct." She stated "Miss Stephens demeanour is that of someone who is honestly recounting the events as they unfold that day."

We are of the view that the Magistrate gave adequate consideration to the cardinal defence of the appellant. She found that he was not acting in necessary self-defence. Having so found she was entitled on the evidence which she accepted to find him guilty of unlawful wounding.

It was not in issue that Shana-Kay was injured as a result of the appellant discharging his firearm. There was evidence to establish the necessary mental element of the offence that is to say:

> "either (1) an intention to do the particular kind of harm that in fact was done
>
> or (2) recklessness as to whether such harm should occur or not i.e. the accused person must have foreseen that the particular kind of harm might be done and yet went on to take the risk of it. It is neither limited to, nor does it indeed require, any ill-will towards the person injured."

The above passage which appears in the headnote to **R v Cunningham** (1957) 41 Cr. App. R. 155 was accepted as a correct statement of the law by this Court per Downer J.A. in **R v. Garfield Sinclair** (1991) 28 JLR 675 at 676.

Mr. Davis combining clarity with admirable forcefulness, sought to persuade this Court to the view that the Magistrate's decision was unreasonable. He pointed to evidence which he submitted, showed that the

complainant was the aggressor. Further, he argued that on the Crown's case it was physically impossible for the child to have been shot as the complainant alleged. The reasonable conclusion, he contended, is that the incident happened in the manner described by the appellant.

As this Court has said time and time again, an appellate court will only interfere with a trial judge's or a jury's findings of facts if it is shown that such findings are "obviously and palpably wrong"- **R v Joseph Lao** (infra).

The principles which guide this court in resolving matters of this kind are summarized in ROSS ON THE COURT OF CRIMINAL APPEAL, (1st Edn.) at p. 88 and have been accepted by this Court in **R v Joseph Lao** (1973) 12 JLR 1238 at 1240:

> "It is not sufficient to establish that if the evidence for the prosecution and defence, or the matters which tell for and against the appellant, be carefully and minutely examined and set one against the other, it may be said that there is some balance in favour of the appellant. In this sense the ground frequently met with in notices of appeal – that the verdict was against the weight of evidence – is not a sufficient ground. It does not go far enough to justify the interference of the court. The verdict must be so against the weight of evidence as to be unreasonable or insupportable. Nor, where there is evidence to go to the jury, is it enough in itself that the judges after reading the evidence and hearing arguments upon it consider the case for the prosecution an extraordinary one or not a strong one or that the evidence as a whole presents some points of difficulty, or the members of the court feel some doubt whether, had they constituted the jury, they would have returned the same verdict, or think that the jury might rightly have been dissatisfied with the evidence and might properly have found the other way. The jury are pre-eminently judges of the facts to be deduced from evidence properly presented to them, and it was not intended by the Criminal Appeal Act, nor is it within the functions of a court composed as a court of appeal that such cases should practically be retried before the court. This would lead to a substitution of the opinion of a court of three judges for the verdict of the jury."

Having given careful consideration to the submissions made by both counsel we are unable to say that the verdicts were "obviously and palpably wrong" or in other words that they were so against the weight of the evidence as to be unreasonable or insupportable.

Accordingly, the appeal is dismissed and the convictions and sentences affirmed.