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JAMAICA

COURT OF APPEAL

CRIMINAL APPEAL NO. 220/62

BEFORE: The Hon. Mr. Justice Duffus — President (Ag.)
The Hon. Mr. Justice Lewis
The Hon. Mr. Justice Moody (Ag.)

Mr. Horace Edwards for the appellant
Mr. Churchill Raymond for the Crown

4th April, 1963

REGINA v ASHFORD EBANKS

JUDGMENT DELIVERED BY THE HON. MR. JUSTICE LEWIS

This is an appeal against conviction on the 13th of December, 1962 in the Grand Court of the Cayman Islands for the offence of assault causing actual bodily harm.

The prosecutor and the appellant are related to each other, and there appears to have been some dispute about a family property and the right of the appellant to enter upon it. The prosecution's case was that the appellant went to the property on the 25th of October, and when warned off by the prosecutor he attacked him and struck him with a stone wounding him on the back of the head.

The defence was a denial that the wound had been caused in that way, and self defence was set up and it was said that in the course of defending himself from an attack with a machete the appellant had tackled the prosecutor, throwing him to the ground, and that the wound probably had been caused by the appellant's head coming in contact with a stone.

There are two grounds of appeal. One is that during the course of the evidence of a witness for the prosecution — Edith Banks — she disclosed that during the past 8 years the appellant had been in prison in Jamaica, that this was prejudicial, and that the appellant had not been given an opportunity to elect for a new trial, nor was any warning about it given to the jury.

It is not clear exactly how this evidence came out. The appellant

was not represented and cross-examined Edith Banks himself, and the relevant portion of evidence reads:

> "I have been married to Ewart . . " — that is the prosecutor — ". . for eight years. During that time you went to prison in Jamaica and came back."

He does not know, because we have not got a transcript of the evidence, merely the Judge's notes, whether the appellant himself asked a question which elicited this answer. If it was volunteered clearly the Judge ought to have informed the appellant of his right to have the trial stopped and to be tried by a fresh jury. If it was not volunteered quite clearly again the Judge ought to have warned the jury that this was not to be taken into account in their consideration of the case.

It is rather strange that he didn't because in his report on the case which he has sent this Court in the absence of any transcript of a summing up, he says that he stressed the point particularly that the jury must decide only on the evidence before them "because I knew that the accused had a bad record and I thought it was possible some of the jury might have known that also"; so that the question of the appellant's record was in his mind, and it seems rather strange that having that in his mind when telling them to decide the case on the evidence before them, he did not warn them to exclude from their minds this very prejudicial piece of evidence about the appellant having gone to prison.

The other ground of appeal relates to the Judge's report of what he told the jury. He says he "directed the jury that the burden of proof was on the Crown, that they must decide the case only on the evidence that they had heard in court and that if they thought there was a reasonable possibility that the injured person had come by his injury in the manner described by the accused, and if they believed that the accused was acting reasonably to defend himself against a man armed with a machete then the fact that the injured person was cut on the head with a stone by falling on to it on the ground was a misadventure, and not something for which the accused could be held responsible, but it was for them to decide whether they believed the account given by the witnesses for the prosecution or by the witnesses for the accused".

It is not necessary to say more than that this report of the summing up does not make it clear that the jury were told what the standard of proof on

the prosecution is — that they should be sure of the guilt of the accused before they could convict, and that if as a result of the evidence they were left in doubt as to the guilt of the accused they ought to acquit.

Learned counsel for the appellant has also pointed to the fact that there may be some confusion in the way the report reads as to what the jury was really being told about self defence. It was quite possible that the jury might accept part of the story for the prosecution — that the appellant did strike the prosecutor with a stone, and also accept that the appellant was attacked by the prosecutor with the machete; if they came to the conclusion — accepting these two portions of the evidence — that he was acting in self defence, or were in doubt about it then they ought to acquit the appellant.

On the other hand they might accept the appellant's story in its entirety that he merely tackled this man in self defence, and that the injury caused by the appellant was purely accidental — misadventure, as the learned trial Judge puts it. It is not clear from this report that these two aspects of the case were made clear to the jury.

In these circumstances the Court could not think of applying the proviso. There were two stories and it was a matter for the jury whether they accepted the one or the other either in its entirety or not, or whether they were left in doubt, and it is quite possible, as was said during the course of the hearing that that little piece of evidence about the prison record of the appellant may just have tipped the scale. Unless this Court was sure that the evidence was overwhelming and that there had been an adequate summing up this Court could not apply the proviso.

The conviction will therefore be quashed and an order be made for a new trial at the next practicable sitting of the Grand Court of the Cayman Islands.

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