JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 67/1970

BEFORE: The Hon. Mr. Justice Eccleston, Presiding
The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Edun, J.A.

REGINA vs. DELROY GRANT

H.A. Harris for the Crown.

R. Spaulding and W. Wainwright for Applicant.

Heard: 10th, 11th, 12th, 19th February 1971
Delivered: 2nd April, 1971

FOX J.A.

On 19th February, 1971 the Court announced that this application for leave to appeal against conviction and sentence had been treated as an appeal. The appeal was allowed. The conviction and sentence were set aside and a new trial ordered in the Home Circuit Court. The Court also promised to put the reasons for its decision in writing. It now proceeds to do so.

At the trial of the applicant before Parnell J and a Jury in the Home Circuit Court on the 19th and 20th May, 1970 for wounding with intent, the defence was self defence. In this connection, the crucial question for the consideration of the jury was whether the complainant, Stanley Barrett had drawn a knife and attacked the applicant. This fact was asserted in the unsworn statement of the applicant. It was denied by the two eye-witnesses, Barrett and his cousin Alma Cole, who testified in support of the Crown's case. Cole is a store clerk. On 14th November, 1969 she was living at Gordon Road. She is the mother of two children. The youngest, Patricia, was then two years old. The applicant is the father of this child. He lived at 14 Paisley Road. Cole said that after returning from work on that Friday night, she went to the home of the applicant at about 8 p.m. and asked him for 'the baby's money'. The applicant gave her no money. They had an altercation. She left.

The applicant followed her. She again asked him for money. He assaulted her. As they struggled, he thumped her and she fell to the ground. He continued hitting her. Her brother Neville who lived at Rousseau Road, was coming along Paisley Road at the time. He remonstrated with the applicant. When this had no effect, he threw a blunt object - a stone or a brick - at the applicant thereby wounding him in his face. The applicant left off hitting Cole and went back towards his house. Neville took a bus to his house. Cole went home. She was standing in the yard when she saw the applicant come to her gate. He was armed with a matchet. He did not see her. As he walked away she heard him say "I must kill someone tonight". She went into her house. Her 'big' sister, Shirley came running into the house from the road. Her dress was torn, her face swollen, she was bleeding from some injury in the vicinity of her mouth, and crying. They spoke. Shirley left the house, still crying - "bawling for murder". Alma followed her. The two sisters went along Gordon Road and came to Slipe Pen Road where they met their brother Wilbert Cole. He joined them. They came to Paisley Road where they met the complainant Barrett. All four persons then walked towards the applicant's house. They saw him sitting on a motor cycle which was on the side-walk in the vicinity of his gate. A quarrel commenced. Shirley was still crying. Alma was complaining, - "why you have to knock she (Shirley) through my brother not there and you can't get to knock him you have knock her". Wilbert spoke to the applicant. Barrett said to him, "what happen, why you have to beat the little girl like that?" The applicant replied "I have done it already and I don't care what want to happen". Barrett then gave the applicant a "pat in his chest and said what happen man say something" whereupon the applicant drew a matchet which was behind his bike. Barrett ran. The applicant chased him. Barrett slid and fell. The applicant chopped him with the matchet on his left forearm, wounding him severely. The time was then about 9 p.m. In his evidence, Barrett said that he was walking along Paisley Road towards Slipe Pen Road. He met Alma and Wilbert Cole below the applicant's gate. All three walked to the applicant's gate. They saw him there sitting on his motor cycle. The applicant called to Barrett 'what happen; how you just pass me like that'. Barrett said "I don't want to hear from you because you beat up two of my

cousins". The applicant said, "why you dont want her ..." Apparently, they did not wait for completion of the sentence. All three, that is Barrett, Alma and Wilbert Cole continued up Paisley Road where they met Shirley walking in the opposite direction. Shirley was crying. She made a report to them. All four then went down Paisley Road towards the applicant. In cross-examination Barrett explained that he did this to take Shirley away from the applicant because he did not want her to be beaten up again by him. They came up to the applicant. He was still sitting on his motor cycle. A "talking" commenced between Shirley and the applicant. Barrett tried to take Shirley away. She resisted. He then asked the applicant why he had beaten up Shirley. The applicant replied that he had done it already and did not care what happened. Barrett said "say something". The applicant drew a matchet from the fence, chased him, and chopped him on his arm as he slid and fell.

The substantial discrepancy between these two versions of the incident was drawn to the attention of the jury. It was not suggested that this had so weakened the evidence as to render it incapable of supporting the verdict of the jury. The several complaints on appeal were confined to misdirections of the jury, and misconduct of the trial by the judge. As to the first, the jury were told that if they believed the applicant when he said that Barrett drew a knife and attacked him as he sat on his motorcycle, or if they had a reasonable doubt about this, they would have to find the applicant not guilty of any offence. He would have been unable to retreat. In those circumstances he was justified in striking at Barrett with the matchet in self defence. It was contended that this direction was wrong. The jury should have been told that on this version of the incident, it was also open to them to convict the applicant of the lesser offence of unlawful wounding. We are unable to detect the logic or the principle in this view which, if it had been taken at the trial, would have had the effect of removing the applicant from the advantageous position of an absolute acquittal into which he had been placed by the directions which had in fact been given, and of exposing him to the danger of a conviction. It was not argued, and we agree that no middle factual position was capable by combining the version of the applicant with that of the witnesses for the Crown. It was therefore right to demand

of the jury a verdict of guilty or not guilty as charged, and to tell them that the applicant could be convicted only if they felt sure that the injury was inflicted as described by the witnesses for the Crown.

Complaint was made of the judge's conduct of the trial. Our attention was drawn to several instances of interruptions by him of the crossexamination of the Crown's witnesses. In some of these the witnesses were forbidden to answer the questions of counsel. The printed record of the testimony of the witnesses for the Crown consists of 81 pages. Only two of these are free of interruptions by the Judge. This is not as bad as it seems. Faulty acoustics are an unfortunate feature of many court rooms in the Island. As a result, the questions of counsel sometimes, and the answers of witnesses more frequently, are indistinct. The judge has not heard, or has not understood fully, and has no alternative but to ask for clarification. During the hearing of this case the situation appears to have been worsened by outside noises. On some occasions also, a judge is obliged to ask for pause so that he can make a note of what has been said. Again he may have to intervene to give directions or make rulings. Interruptions which fall within these categories are necessary if the judge is to maintain control over the proceedings. By far the larger proportion of the interruptions by the judge in this case are of this nature. It is of interruptions outside these categories that complaint has been made. They were said to have had the effect of hindering the conduct of the defence to such an extent as to deprive the applicant of a fair trial. We have examined those portions of the transcript of the evidence upon which this submission is based and are unable to agree that it is justified. In the main, the interruptions occurred because questions asked by counsel were either,

(1) many questions rolled up into one question, or,

(2) repetitive, or,

(3) put in such a manner as to be in the nature of invitations to argument rather than to elicit answers to matters of fact, or,

(4) irrelevant, or,

(5) not in accordance with proper procedure.

There is no justification for questions of this kind. Very rarely can they be excused. They serve only to add to the burden upon the judge to ensure a proper conduct of the trial. On such occasions it is the duty of all counsel to assist the judge by accepting his rulings and endeavouring to follow his directions. It cannot, and it did not help in this case for counsel to show a willingness to argue with the judge, or to persist with questions in defiance of his clear rulings, or to go so far as to say that a suggestion of the judge as to the most effective manner in which a question may be put was not in accordance with the teachings of counsel's learned leader. The really serious complaint in this appeal is in connection with comments made by the learned trial judge in the course of his directions to the jury. After reminding them that the witness Alma Cole had denied in examination in chief by Mr. Wolfe that she saw Barrett with a knife, the learned judge continued at page 13 of the summing up:

> "Now you remember that this witness, Alma Cole, was the second witness called; the first witness called was the complainant, Stanley Barrett. It was put to Stanley Barrett by Mr. Spaulding that he, Barrett, drew a knife and cut at the accused and that he, Barrett, was chopped while he drew the knife at the accused. All this was denied by Barrett. So that suggestion having been put Mr. Wolfe now in examining Cole asked her this question, whether she had seen Barrett with any knife and she said Barrett didn't have any. But you will remember when this witness was cross-examined at some length by Mr. Spaulding the specific suggestion as to what Barrett is supposed to have done with the knife, what he did was not put to the witness although as trial judge it was my duty to point out to defence counsel that if that is what he is saying he should put it to the witness and I was given a very strange reply and the reply being that he, as defence counsel, he having put it to one witness he was not under no duty to put it to this witness.
>
> Here again I have been saying, I was making these comments. We learn a little every day. It is completely wrong for defence counsel to think this because this witness, Alma Cole, was working together as it were with Barrett, Wilbert Cole and the other sister, Shirley, all four together go down there to attack the man. If that is so, what each one was doing was working as the act of the other, so it would have been his duty to put it to this witness what Barrett is supposed to have done. And to argue that it had been done already is news to me. That is not the proper way to conduct the case. That is not the way to do it, and particularly when the judge

> pointed out to him and gave him all this opportunity he still refused to put these things there would suggest - I said I would make the comment on it - I said you would have to examine very carefully these suggestions that Barrett had any knife and that Barrett attacked the accused with a knife. As I have said before it is the duty of the Prosecution to prove its case. The accused is under no duty to prove anything, but it is the duty of everybody, whether the Prosecution or for the Defence, to let the jury know what is happening, what they say took place. You don't hide what should be put forward. Everybody should put forward to the light of the situation every material point and every suggestion which is being put forward so that the jury, who are considering the case, will have the whole picture."

With great respect to the learned and experienced judge, this statement is open to objection on more than one ground. In the first place, the suggestion that any part of the defence was being hidden from the jury was not an accurate representation of the position. The picture of the defence which emerged subsequently in the statement of the applicant had been foreshadowed by the suggestions put to Barrett by counsel for the defence, and even if there had been a complete failure to be similarly explicit with the witness Cole, this could on no reasonable construction be regarded as an attempt to conceal the defence from the jury. Secondly, having regard to the way in which the defence was conducted, a failure to be explicit in suggesting to Cole that she was not speaking the truth was undeserving of the strictures which were pronounced, and the jury should not have been told, in effect, that this failure could adversely affect the weight to be given to the statement of the applicant that Barrett had attacked him with a knife. It is, indeed, a general rule that a witness should have his attention drawn to any facts with respect to which it is intended to impeach his credit by other witnesses. This is to give the witness an opportunity for explanation whilst he is on the stand and in a position to do so. Lord Herschell L.C. regarded the rule as "absolutely essential for the proper conduct of a cause". (Browne v Dunn House of Lords, 1894, 6 The Reports 67). The consequence of failure to observe the rule will be more readily visited upon the defaulting party in a civil action than it will be upon an accused. For in a criminal case particularly, such cross-examination of the witnesses for the crown as is necessary or

advisable, is essentially and entirely a matter for the judgment of counsel for the defence. Error in this respect may have unfortunate results. If the witness "tells the whole truth, cross-examination may be dangerous, as it may have the effect of rendering his story more circumstantial, and impressing the jury with a stronger opinion of its truth; and counsel will be well advised in such a case, either not to cross-examine him at all, or to confine his questions to the witness's credibility, by impugning his means of knowledge, his disinterestedness, or his integrity." (Archbold Criminal Pleading Evidence and Practice 37th edition paragraph 1385). We do not have a record of the speeches of counsel to the jury, and do not know the suggestions which were made to them on this aspect of Cole's evidence, but on the material in the case it was open to counsel to attempt to impeach her credibility on the ground that she was not a disinterested party. To have confined the cross-examination to this particular would have been unobjectionable. But counsel may also have thought it worthwhile to try to detract from the credit of the witness by questioning her ability to see the knife when it was pulled, and this leads us to the third respect in which we consider the statement of the learned trial judge open to objection. For in truth and in fact counsel did not fail to question Cole about the knife. At page 70 of the transcript the following is recorded:

"DEFENCE COUNSEL: Did you <u>see</u> Barrett pull a knife from his left hand trousers pocket?

HIS LORDSHIP: No. Did you see Barrett ...?

A.: When?

HIS LORDSHIP: Just wait. Where he pulled it from is immaterial. First of all find if she see him Barrett pull a knife. Mind this double-barrel question. That is what I am trying to stop all along. Did you see Barrett pull a knife from anywhere?

A.: No.

DEFENCE COUNSEL: Did you <u>see</u> Barrett stab at Grant?

A.: No. No. "

In our view, even if it was not suggested in formal terms, this was a sufficient putting to the witness of so much of the defence as concerned her. Counsel should not have been called upon to do more. His refusal to comply with the judge's suggestion should not have been pointed out as a circumstance capable of reducing the value of the applicant's statement.

If this had been the only irregularity at the trial, there might perhaps have been room for application of the proviso, but further adverse comments upon the critical facts of the defence were made by the judge in such circumstances as to lead us to decide, not without hesitation, that despite the strength of the case for the prosecution, the proviso ought not to be applied. In concluding his review of the evidence of Cole, the learned judge said that he was leaving it to the jury to think out for themselves whether she and her relatives had approached the applicant "with the intention to beat him up for what he had done or just to make enquiries of what had taken place". There then followed the following passage:

> "One piece of evidence that we have in the case, we have it from the statement from the accused: Why you don't give the money for the baby? If Barrett did use these words to the accused when he was along with the other people, then you may think it to be inconsistent for them to use violence to beat him up and at the same time to want 'baby money' from him, because if they had come there to beat him up they couldn't expect to beat him up and he would give the money willingly and expect to beat him up, search him and take the money. And there is no suggestion here that they had held the accused and searched him for money. So if they really wanted the money from him for the girl, what they going to hold him and beat him up for and attack him with knife for? "

These considerations were repeated when the jury were being reminded of the statement of the applicant. The narrative was interrupted and the following comment made:

> "Well what he pulled the knife for, to extract the money from him or to beat him up? If he genuinely wants his cousin to get the money does he want to pull the knife because by fighting him the man will get vexed and wouldn't give the money at all. Use your common sense."

It is clear that the judge thought it necessary to assist the jury in thinking out for themselves the question he had stated, by inviting them to consider the improbability of the allegation that a knife was drawn by Barrett by reason of the statement Barrett was alleged by the applicant to have made; "why you don't give the money for the baby?"

In our view, the approach suggested was inadequate. It was no doubt unintended, but we think that the likely effect of this comment was to encourage the jury to reflect on one part of the factual picture in isolation from the other part, and so form a judgment as to the credit which should be given to the allegation. On the totality of the evidence it is reasonable to infer that Barrett and his relatives had approached the applicant not so much with a view to obtaining money from him, but to protest the injury which it would appear he had caused to Shirley shortly before. The question accredited to Barrett by the applicant does not weaken this inference. If, therefore, the jury were to seek aid in forming a judgment of the credit to be given to the statement of the applicant that Barrett attacked him with a knife, by considering the probabilities of that fact, the relevant material tended to induce belief rather than disbelief, and if the matter was being discussed with the jury this was the satisfactory approach to adopt.

A judge is entitled to express his views strongly in a proper case, but the facts must always be left to the jury to decide. The stronger the comments the greater is the need to make it abundantly clear to the jury that if they do not accept the judge's view of the facts, they must discard it and substitute their own. In this case the comments adverse to the defence were extremely strong. A further instance of this occurred in connection with the statement of the applicant that when he was attacked he jumped off his motor cycle, his back reached against the fence, he drew the matchet from the bike and made a wild chop. As to this, the learned judge said, -

> "where the matchet come from? From the bike, he said. How did it get there. According to the accused - he supplies the answer - the reason for having the matchet there - "I was coming from Christmas bushing."

The probability of a messenger in a city office being engaged in Christmas bushing was discussed and the view expressed that this was conceivable. The learned judge then commented:

> "But then, use your common sense. If he had gone out to do Christmas work, how is it that the matchet is still on the bike at 9.00 o'clock. What happened, was the matchet tied down there? Just sitting there? Why is it he has it there, he doesn't put down the matchet - 9.00 o'clock at night?

> Would be a matter for your consideration. But the Prosecution's case is that there was no Christmas work, you had it armed and ready, parading earlier on, what you intend to do with it."

The jury could not have failed to perceive that the learned judge was firmly convinced that upon a common sense approach the defence was incredible. In our view this was going too far. When he came to sentence the applicant, the learned judge said,

> "Delroy Grant, the jury had no hesitation in finding you guilty on this evidence. I am entirely in agreement with their verdict. Through your counsel you put up an incredible story believing that you would be able to fool up seven sensible people, but this jury gave the case the consideration which it deserved and came in with the correct verdict."

This statement is consistent with the balance which was struck in discussing the defence.

The disparagement of the defence assumes more unhappy proportions when it is compared with the favourable way in which the testimony of the witnesses for the Crown, particularly that of Barrett, was reviewed. The situation is not retrieved by the following statement which was made at the opening stages of the summing up, -

> "..... you are the ones who have been selected and put there to use your common sense and to return a true verdict according to the evidence in the case. If any view that is put forward by counsel or by me in this summing-up, I promise - I think that it was Mr. Spaulding - there was a certain aspect that I would make a reference to it, mixture of law and facts, you are under no duty to accept any views which I put or which counsel put unless you agree with them."

Having regard to the strong views subsequently expressed by the learned judge, we doubt that this direction sufficiently alerted the jury to their duty to reject these views if they disagreed with them and to substitute their own. In Broadhurst v. Reginam [1964] 1 All E.R. 111 Lord Devlin said at p.124, -

> "The learned Chief Justice indicated his opinions very freely during his summing-up and they were usually, if not invariably, against the accused. The opinions of the presiding judge on issues of fact can often be of great assistance to the jury. But it is very important that the jury should be told that they are not bound by them nor relieved thereby of the

> responsibility for forming their own view. Nevertheless, a jury is likely to pay great attention to them: and even in a case where a proper warning is given, an appellate court may still intervene if it considers them far stronger than the facts warrant. In the present case no warning was given; and their lordships consider also that, even had there been a warning, the Chief Justice went too far in revealing his views, so far that there was a danger of the jury being overawed by them."

Throughout the summing up in this case, the opinion of the learned judge as to the conclusions on critical issues of fact which would follow upon the use of common sense was unmistakeable. We consider that this gave rise to the very real danger of the jury being inhibited in the independence of their judgment on these issues.

The effect of these irregularities is cumulative. We could not say that properly directed, the jury would inevitably have come to the same conclusion. It appeared to us that the applicant had been deprived of the substance of a fair trial, and in the interests of justice the order in terms of the statement at the commencement of these reasons for judgment was accordingly made.

J.A.

J.A.