CA: Criminal Law — Assault occasioning actual bodily harm — Appeal against conviction and sentence. (Victim ex-wife of appellant) Whether victim trespasser — whether more force used than necessary — Appeal against conviction dismissed — force excessive in circumstances. Sentence varied from fine of $3000 or six months imprisonment at hard labour to $350 or 6 weeks imprisonment at hard labour. ["appellant was sorely provoked" injury to victim brought about by own imprudent conduct.] Appeal dismissed in part

No Case referred to

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE COURT OF APPEAL NO. 93/88

BEFORE: THE HON. MR. JUSTICE CAREY, P. (Ag.)
THE HON. MR. JUSTICE WRIGHT, J.A.,
THE HON. MISS JUSTICE MORGAN, J.A.

THE QUEEN vs. KEITH MARCH

Mr. H.G. Edwards, Q.C., & Mrs. Pryor Levers for appellant

Kent Pantry & Miss Carol Malcolm for Crown

November 29, 1988

CAREY, P. (Ag.):

In the Resident Magistrate's Court for the parish of St. Andrew held at Half-Way-Tree on the 9th of November, the appellant was convicted for the offence of assault occasioning actual bodily harm to one Beverley Ward. The appellant and the victim were at one time husband and wife but at the time of the offence had been divorced. The appellant was sentenced to pay a fine of Three Thousand Dollars ($3,000.00) and in default, six months imprisonment at hard labour. He appeals against that conviction and the imposition of that pecuniary penalty.

The facts in this case are quite distressing. On the 12th August, 1987, about 9 o'clock in the morning, Mrs. Ward went to her ex-husband's home where living with him, are two children of their marriage. The evidence discloses that two months after the birth of the last child, Mrs. Ward migrated to the United States abandoning this child with a congenital ailment. She returned for the first time to this country on the day of this incident. She was minded to see her children but when she went to his house, the appellant was out.

She left some message. When she called him on another occasion, apparently from the house, he enquired what she was doing in his house; she responded that she desired to have some discussion about the children because she was in the island for a few weeks, and of course, she would like to see them. On the day the accused arrived at the gate. Upon his arrival, he asked her what she was doing in his house and demanded that she leave. It would appear from the evidence that she did not leave. The appellant returned to his car, opened the trunk and took out a baton. On seeing this act of aggression on his part, she said she jumped over the verandah and went towards the lawn. It is not quite clear in the evidence where she intended to go. There was some evidence of a heap of stones there. According to her, he came at her with the baton and dealt her a blow which caught her on her right knee which caused her to fall. Thereafter, while she was on the ground, he proceeded to rain a number of blows on her left thigh which resulted in black and blue marks all over that limb. As he continued to hit her, she grabbed onto him and bit him on his face. Her brother who had accompanied her intervened, when he observed hthat his sister was being beaten.

So far as the defence was concerned, the appellant said that on his a arrival he saw the complainant on the verandah and a television set and a settee on the verandah. Those were items belonging to him. He was greeted with some abusive terms; he was referred to as "bald head boy." She hurled stones at him and he took fdefensive action by getting his baton and he admitted that he did giver a blow.

The learned Rosident Magistrate accepted the evidence given by the victim as to the circumstences in which she was assaulted and rejected the evidence given by the appellant and the witness, the helper, whom he called to support him. Then the learned Resident Magistrate added this to his findings-

> "Consider trespass, concluded complainant
> not trespasser as went to see children.
> Even if trespasser, more force than
> necessary used."

We have heard arguments this morning from Mr. Edwards and from Mrs. Levers and the matter really resolves itself into this

Did the appellant use more force than was necessary in the circumstances?

The learned Resident Magistrate found that the complainant was not a trespasser. We do not think he was right in that finding. But he did hold that if in the end, he were held to be wrong, more force was used. So we return to the question - was more force used, than was necessary?

So far as the evidence of the complainant goes, and that was the evidence which the learned Resident Magistrate accepted, the material before him amounted to this: That the appellant used a baton to eject somebody who may or may not have been a trespasser. At law, the appellant was entitled to use no more force than was necessary. There was some evidence that there was a heap of stones on the premises and the appellant had said that stones were hurled at him which was the reason why he armed himself. The learned Resident Magistrate rejected that. Nevertheless, we think he was required to consider whether the appellant may have thought even if mistakenly that in running on the lawn, the complainant may have had in mind arming herself, in which event the appellant would have been entitled to take such defensive action as was necessary.

Even if one were to accept that he was entitled to hit her and disable her so that she was no longer a threat, we agree with the learned Resident Magistrate that the further blows rained on her when she was thus disabled, would make such force excessive in the circumstances. So that, insofar as the conviction is concerned, we are not persuaded that the learned Resident Magistrate erred.

We come then to the question of sentence. The learned Resident Magistrate imposed a sentence of a fine of Three Thousand Dollars ($3,000.00). We suspect that he was punishing the appellant for fracturing the victim's knee. We do not think, however, that was the proper approach to the situation. If the appellant was entitled to disable her, but not to continue to rain blows when she was disabled, then what he must be punished for is the excessive action. We wish this to be clearly understood that we do not treat this case as the usual case of wife abuse. As we said at the outset of this judgment, this was a distressing case, where a husband who has cared for his children all these years without the assistance of any wife, suddenly finds her coming in his premises, removing his

furniture and [illegible]nding the children, whom, as we have said, she had previously abandoned. In imposing sentence, we think those are circumstances that ought to have told in h's favour. There was also evidence given by the brother of the victim, that the appellant, for the many years that he was acquainted with him, was a peaceful man. So that would convey to the learned Resident Magistrate that this was a man who was sorely provoked, and that whatever injury was done to this ex-wife, was brought about by her own imprudent conduct. Nevertheless, we are not to be thought to be condoning assaults upon women. To strike a woman must be regarded in a serious light. We think the learned Resident Magistrate fell into error when he imposed a fine of $3,000.00, which was wholly out of proportion to the peculiar circumstances of this case.

We fell that a fine of $350.00 or six weeks imprisonment at hard labour will meet the justice of this case. The conviction is affirmed and the sentence varied as stated. The appeal is dismissed in part.