JAMAICA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 5/91

BEFORE: THE HON MR JUSTICE FORTE, J.A.
THE HON MISS JUSTICE MORGAN, J.A.
THE HON MR JUSTICE BINGHAM, J.A. (Ag)

REGINA

VS

MARGARET CHANNER

Alvin Mundell for appellant

Paulette Williams for Crown

October 22 and December 4, 1991

MORGAN, J.A.

This is an appeal against conviction and sentence in the Home Circuit Court on the 24th January 1991 before Theobalds, J and a jury.

The appellant was convicted on Count 1 on an Indictment which charged that on the 12th September 1989 she caused grievous bodily harm to Delroy Wilkey. After hearing the matter we allowed the appeal, quashed the conviction, set aside the sentence and in the interest of justice, ordered a new trial. We promised to put our reasons in writing which we now do.

The case for the prosecution came primarily from the evidence of Mr Wilkey who said that about 7.30 p.m. he was at his apartment on the second floor of Coleen Court, St Andrew when he heard a knock at his door. He half-opened the door and saw the appellant whom he knew before, with an ice-cream dish and her sister "Dimples" with a little bottle, standing outside on the landing of the apartment. The appellant said "see how you mek police come lock

me up" then threw a substance in his face, which entered his eyes causing "a blazing fire in his face and a burning in his right eye." That eye is now blind. He made a report at the police station and was hospitalized for some time. Corroboration came from his common-law wife Grace Joseph who on her return from the shop saw the incident while standing at the foot of the stairs.

Dr Albert Lue the medical officer found the right eye-ball of the victim severely burnt, the left eye damaged and its sight minimally impaired. The appellant when subsequently arrested by the police denied the charge.

In an unsworn statement she said:

> "...When I was coming back from the home Delroy Wilkie fling a stone. When he fling the stone and hit me in my back I passed him. He hawk and spit in my face. He approached me with a bottle in his hand and I boxed it away. It catch him on his face and I walked away for his friends them come and say I have to leave or they will kill me and my kids them. Afterwards I leave my kids them in the house and go away. I go away from there. Finish."

This statement is clearly saying that she was attacked and whatever injury the victim sustained was caused when she was defending herself from his attack by boxing away the bottle.

The Crown's case however was that it was a deliberate assault as the complainant had nothing with him, and never attacked her.

The learned trial judge in his directions (at p.9-10) as to how to approach the unsworn statement said:

> "Because an accused person makes an unsworn statement, you are not to presume guilt on that basis. You are to consider that statement, give it the weight which you think in the circumstances it merits, and you take it into consideration in deciding overall whether or not the prosecution has proven the case to the level that you are sure about it. So whereas you may sit there and say, 'I wish the accused would come up here, and give evidence up here,' you are not because of her failure so to do to assume guilt. But if on the other hand you say to yourself, 'well, this unsworn statement, particularly as the suggestions put in cross-examination by the defence attorney have not been substantiated in any way by the unsworn statement or in a limited way by the unsworn statement, then you are not to

> say to yourselves, 'well because of that the person must be guilty.' You are to weigh that statement. If you feel that it has very little weight then you say so, let it reflect in your verdict, and you take it into consideration in deciding ultimately whether or not the prosecution has proven the case to the extent that you are sure about it."

We agree that these directions are correct. However at (pp.12-13) in commenting on the unsworn statement he said:

> "Now, Mr Foreman and members of the jury, I had indicated to you that the accused person has three alternatives, and that in this case, this accused person chose to make an unsworn statement from the dock. I would remind you, however, members of the jury, that an unsworn statement has no probative value. It is not capable of proving anything that is not already spoken to by the rest of the evidence in the case. Its potential effect is persuasive, it doesn't go beyond that, in that it might lead you to interpret and construe the evidence for the prosecution in a different light, but it is not capable of proving anything new in the case. The highest it can go, is that its effect can be persuasive. It may cause you to view the evidence for the Crown in a different light, but anything that is new that arises from that evidence on that unsworn statement, does not amount to evidence in the case. It has no probative value."

The exact circumstances occurred in R v Hart (1978) 27 WIR 229 where a proper direction was given and the learned trial judge later directed the jury in similar terms as Theobalds J did at p.12. What was said in Hart's case was:

> "'Now an unsworn statement from the dock has no evidential value and cannot prove facts not otherwise proven by evidence. Its potential effect is persuasive, in that it might make you Mr Foreman and members of the jury see the proven facts and inferences to be drawn from them in a different light; so that when you come to consider the statement made by the accused man, he cannot prove anything in his statement. If there is evidence given on any particular point, then his statement may be used to explain it, to understand it, you see it in a particular light, but the statement is not evidence, it cannot prove any fact. So anything that is introduced in his statement that is not in evidence anywhere, has no evidential value whatsoever.'"

It was argued that the learned trial judge misdirected the jury in this later direction as to the legal effect of an unsworn statement

and the way in which it should be treated in law. Kerr J.A.had this to say:

> "It is reasonable to deduce from the words and tenor of this passage that the learned trial judge was influenced by the judgment of Shaw LJ, in R v Coughlan. In the case the learned judge was endeavouring to distinguish between evidence on oath by an accused and an unsworn statement from the dock but in a context in which he was considering the effect of an unsworn statement by one accused with relation to the position of a co-accused. To persons learned in the law his earnest efforts may seem commendable; to those desirous of learning the law, helpful, but it seems to be asking too much of a jury of laymen to appreciate the nice distinction of a statement being of some weight but yet of no evidential value. It is confusing to tell the jury in one breath that they should give the unsworn statement such weight as they think it deserves and in the next that it has 'no evidential value whatsoever' - and all this after telling them at the outset that their verdict must be according to the evidence. Indeed, the judge in Coughlan's case was not unaware of this difficulty; thus he said:
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> > 'It is perhaps unnecessary to tell the jury whether or not it is evidence in the strict sense. It is material in the case. It is right, however, that the jury should be told that a statement not sworn to and not tested by cross-examination has less cogency and weight than sworn evidence.'"

We adopt the words of Kerr J.A. as they are applicable in this case. The directions were clearly not appropriate in these circumstances where there was only one accused person. The dicta of Kerr J.A. in Hart's case (supra) at p.234 is therefore instructive:

> "In cases such as Coughlan's where there are two or more accused and it is necessary to make it clear to the jury what is the effect of the unsworn statement of one accused upon the position of the other, the directions there may be in order. But in the ordinary case a trial judge should avoid the Coughlan prescription, which as worded seems to go too far and to go beyond the context of that case.
>
> The judge in the ordinary case should follow the 'guidance' on the objective evidential value of an unsworn statement as authoritatively advocated in DPP v Walker (1974) 1 WLR 1090 at pl096."

The concern of the court then, which is our own concern in this matter is whether or not the later directions withdrew from

the jury those portions of the statement which were unsupported by independent evidence and whether he withdrew from the jury a full or fair consideration of the issues raised in the defence.

In this matter, however, in keeping with his view of the unsworn statement it is clear and not surprising that the learned trial judge totally ignored and failed to leave the sole issue of self-defence raised by the applicant.

It is a cardinal rule that whatever the line of defence adopted at the trial of a prisoner may be the judge should put before the jury such questions as seem to him to properly arise upon the evidence even though they may not have been raised by counsel. See Lord Reading LCJ in R v Cooper (1915) 2 KB 431 at p432.

Unfortunately the learned trial judge failed to do so resulting in a fatal non-direction.

Crown counsel conceded that the omission was fatal and requested that in the interest of justice a new trial be ordered. She urged that there was an abundance of evidence in the prosecution's case upon which a jury properly directed would convict.

Mr Mundell sought to resist the application on the ground that there were discrepancies in the evidence which he considered were fatal to the case. We, however, agreed with the view of Crown counsel that having regard to the circumstances of the case it was in the interest of justice that a new trial be ordered.