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Jamaica

13th May, 1963

IN THE COURT OF APPEAL

CRIMINAL APPEALS Nos. 216, 217, & 218 of 1962

BEFORE: The Hon. Mr. Justice Cundall, President,
The Hon. Mr. Justice Duffus
The Hon. Mr. Justice Henriques.

Mr. I. Ramsay, for the Appellant
Mr. J. S. Kerr, for the Crown,

R E G I N A vs WYCLIFFE ANDERSON, DANIEL McKENZIE and FRANKLYN McDERMOTT

MR. JUSTICE DUFFUS: Wycliffe Anderson, Daniel McKenzie and Franklyn McDermott were convicted in the St. Catherine Circuit Court before Mr. Justice Semper, on 14th December, last year, on two counts of an indictment containing three counts.

The first count charged malicious injury to property, that these three persons, along with one Gladstone Belafonte, maliciously damaged a motor car belonging to one Cornelius Hin to an amount exceeding £5.

The second count on which these three appellants were convicted charged wounding with intent to do grievous bodily harm to Cornelius Hin.

The third count of the indictment charged unlawful wounding, and it is an alternative count to the second count charging wounding with intent. On the second count Gladstone Belafonte was also found not guilty.

The incidents from which these charges arose took place on 9th April last year, on the day before the last General Elections.

The facts given by the witnesses on behalf of the crown, compressed fairly briefly, are that the complainant, Cornelius Hin, was an active supporter of the People's National Party. The three appellants were active supporters of the Jamaica Labour Party. It appears that on 9th April there was a motorcade consisting of a number of motor cars, some of which were equipped with loudspeakers, proceeding throughk the district in which Cornelius Hin lived. This motorcade was one in support of

the Jamaica Labour Party. It appears that after the motorcade had passed the road leading to Hin's residence, that hin got into his motor car, drove out from his private road and on to the public road, and went in the direction in which the motorcade had gone. On the way he stopped and picked up two persons, one Webb, and one Somers. Somers gave evidence for the Crown, and Webb gave evidence for the defence.

Hin, in his evidence , stated that he did not know there was a political motordade ahead of him when he started to follow behind the line of cars. Hin, of course, was proceeding slowly, and he endeavoured to overtake and pass, but after passing the rearmost of the cars, the moto cade stop ed, and he was then hemmed in with the cars in front, and one car behind. Hin stated that two of the appellants, Anderson and McKenzie, got out of the car ahead of him, or one of the cars ahead of him, came up to his mot r car. He asked for "pass". They refused to allow hi to pass, instead of which they used threatening language to him, words to the effect "burst this rass. Let me knock him rass" McKenzie and Anderson were armed with metal bars, one an aluminium bar, and the other a bit of galvanised half-inch pipe. These two appellants proceeded to smash the window of his car which he had wound up. Apparently they were intent on dragging him out of the motor car. He locked the doors of is car, and after these two appellants had smashed the window of his car they drew off a short distance, and together with McDermott, the other appellant and the man who was acquitted, and other persons who were not charged, hurled stones at his car.

It appears that in the course of the stone-throwing one stone went through the windscreen of Hin's motor car. Apparently he saw the stone coming as he bent forward, and it hit him on the to of his head, inflicting seri us injury. It may not have been realised at the time how seri us the injury was, but the medical evidence shows that Hin received a very serious compressed fracture of his skull, and he also received another linear fracture. There was very considerable haemorrhage, and had it

not been for the fact that Hin was rushed to Dr. Leslie, a nearby medical practitioner, who rendered first aid and sent him straight off to hispital at the University College, where an emergency operation was immediately performed, Hin might not have been alive to tell the tale which he subsequently told in the Circuit Court.

Hin purported to identify the three appellants, and Belafonte, as persons who had taken part in this attack on the motor car, and in the stone-throwing which resulted in the personal injuries he sustained.

The defence of the three appellants was to the effect that they were in this motorcade, and that they were on the spot, but that it was not correct to say that they had taken any part whatever in the attack on Hin's motor car, or Hin's person.

The evidence of Hin as to the identity of the persons who took part in the attack, was for all practical purposes, the only evidence that the jury had before them to implicate the three appellants.

As I mentioned, Somers gave evidence on behalf of the crown, but he did not identify the three appellants as taking part in the attack. He did place them on the scene, and he did say that he had seen Anderson with a stone in his hand, but he did not say that he saw Anderson throw the stone, and he did not say that he saw McKenzie and Anderson damage the motor car with the metal pipes.

The appellants put forward three grounds of appeal.

The first ground was to the effect that the verdict of the jury was unreasonable and could not be supported having regard to the evidence, and this Court was asked to set aside the jury's finding based on the facts in this case.

It was submitted that Hin was shown to be an extremely unreliable witness, that he was discredited in cross-examination on a number of important points, and that it was shown that when he had given evidence at the preliminary enquiry before the Resident Magistrate for St. Catherine, he had made statements which he denied making when he was cross-examined at the trial

in the Circuit Court. It was also submitted under the second ground that Hin's evidence was not supported by the evidence of the witness, Somers, and that the inaccuracies and inconsistencies in Hin's own evidence, and in his evidence when compared with that of Somers was such that no reasonable jury, properly directed, could have found the appellants guilty on thetwo counts on which they were convicted.

We have examined very carefully the various discrepancies which have been brought to our attention by learned counsel for the appellants, and it is clear from the transcript of the summing-up of the learned trial judge that he was at great pains to bring all these discrepancies - all the major discrepancies to the attention of the jury. The jury had the discrepancies before them, and it was clearly a matter for them to decide whether it was safe to act on Hin's evidence. It was a matter for them to decide whether the effect of these discrepancies was such that some reasonable doubt must have arisen in their minds, but it is clear that they overlooked the discrepancies.

Now, it is well known, as learned counsel for the appellants has pointed out, and learned counsel for the crown has also pointed out, that a court of appeal does not lightly interfere with the verdict of the jury on questions of fact in circumstances where the jury had been adequately directed. Counsel for the crown also, in his reply, referred us to a number of cases dealing with this aspect. I refer to one of them now, and that is the case of Elizabeth Perfect, C.C.A. (1917) 12 C.A.R., 273. That is a case in which it appears that there were grave inconsistencies of the story told to the jury by the complainant, so much so that in that case the learned trial judge granted a certificate in which he stated he thought the verdict was quite wrong.

Learned counsel referred us to the judgment of Lord Reading, L.C.J., at p.274-5, and I quote:-

> "Substantially, the only evidence given was that of the prosecutor and that of the appellant. It was for the jury to say which they believed, and to decide accordingly, bearing in mind that a doubtful case must result in a verdict of acquittal. In these circumstances it seems to us that we must accept the decision of the jury on the

facts, and that we are not in a position to quash this conviction, unless we substitute ourselves as a tribunal of fact when we do not have, as had the jury, the opportunity of hearing and seeing the witnesses."

It applies very aptly to the instant case, and we have decided that we cannot interfere with the verdict of the jury notwithstanding the inconsistencies. It cannot be said that the learned trial judge failed in his duty to point them out, and in doing so he did it with care and a strong emphasis on the viewpoint of the defence, as learned counsel for the appellant has himself agreed.

Now, I turn to the third ground of appeal which concerns the direction given by the trial judge in respect of Webb's evidence to the jury. The direction of which counsel complains appears on page 25 of the transcript of the summing-up when the learned judge was dealing with the evidence given by the witness, Webb. Webb was a witness who, perhaps, one might have expected to have been called for the crown as he was a passenger in Hin's motor car, but the crown wanted none of him. The defence, however called him, and he could, undoubtedly, have been an extremely valuable witness for the defence.

The passages complained of are as follows. The learned judge says:-

"There is only one other witness that I have to refer to, and that is the evidence of Webb. Webb flagged down Hin and he went in the front seat of the car, and Webb is, I think, a difficult witness from this aspect. Webb says after he ran out of the car he ran ahead of the line of cars and the line of cars was six to seven cars, and when he came back there were only three cars and he was only away for two to three minutes. Well, he can't be right, because stones take more than three minutes to be thrown and he only saw one stone, and one stone couldn't do all that damage. That is why I said he is a difficult witness. The prosecution didn't want him but the defence did, and that is what he says,"

and here I must underline the words to which particular exception was taken:-

"I don't say he is a liar, but that is a matter for you."

And then on page 26, after dealing with other aspects of Webb's evidence, the judge says this:-

"I don't take it away from you - it is a matter for you - but I don't think this man is speaking the truth. He came back two or three minutes time, and he says in cross-

examination, 'I saw one stone thrown. I saw it hit the windshield and then Hin went down.'"

He continues to analyse Webb's evidence, and then he says,-

"So we have to regard Webb's evidence with a grain or two of salt. Of course, as I told you, the prosecution didn't want him but the defence called him."

Learned counsel for the appellant admits that in the first three passages I have quoted that the judge did inform the jury quite clearly that it was a matter for them as to whether Webb was speaking the truth or not, in spite of his opinion that he was a liar, but when he came to the last passage, telling the jury to regard Webb's evidence with a grain or two of salt, he failed to give this further direction that it was a matter for th

Well, we have given the matter serious consideration, and we have arrived at the conclusion that the learned judge did not tak away the question of what credit was to be attached to Webb's evidence from the jury, but he left it squarely to them, not only when dealing with Webb's evidence, but he made it quite clear in the course of his summing-up that all questions of fact were for the jury.

On page 10 of the transcript he says this, dealing with the injuries to the car, and the injuries to Hin, and the stone-throwing:-

"All those are questions of fact, and of the facts you are the sole judges. You are to make up your minds and determine the issues of fact."

And then a few lines further down he is reported as saying:-

"I am not a judge of fact at all, but it is regular and usua for the judge to make some survey of the evidence which has been laid before you, the jury, as it might help you althou you are judges of facts. You will remember that you have heard the evidence, you have seen the witnesses, and you are the judges of the evidence, and if I omit or overstress any matter in my review of the facts contrary to your view, it is your view which is the dominant view in the case."

It has been submitted to us by counsel for the appellants, relying on the case of Walter Beeby (1911) 6 C.A.R. 138, the head note of which states:-

"A judge should not express his view of the facts of a case in such a way as to lead the jury to believe that the questions of fact are withdrawn from them."

That was the sum total of the effect of the learned trial

judge's directions to the jury on Webb's evidence, and that the effect of it was that he was withdrawing from their consideration the question of his credit, and so, more or less, instructing them that they must find that he was a liar.

Well, with that submission we cannot agree. Undoubtedly the directions of the learned judge were strong, but he had the right to express his opinion and to express it strongly so long as he did not purport to take away the issues from the jury. We were referred by learned counsel for the crown to O'Donnel 12 C.A.R. 219. I refer to the judgment of Lord Reading, L.C.J., p. 221, where the same point has been dealt with, and this is what he says:-

> "In regard to the second point, it is sufficient to say, as this Court has said on many occasions, that a judge, when directing a jury, is clearly entitled to express his opinion on the facts of the case, provided that he leaves the issues of fact to the jury to determine. A judge obviously is not justified in directing a jury, or using in the course of his summing-up such language as leads them to think that he is directing them that they must find the facts in the way he indicates. But he may express a view that the facts ought to be dealt with in a particular way, or ought not to be accepted by the jury at all. The judge did express himself strongly, but he left the issues of fact for their decision, and therefore this point fails,"

and that is our view here. Ground three fails.

That leaves me with grounds 4 and 5 which learned counsel for the appellants stated to us he thought were his strongest grounds.

Ground 4 was that the verdict of the jury was inconsistent in that the three appellants were found guilty whereas the fourth accused, Belafonte, was found not guilty upon what was for practical legal purposes identical evidence.

Well, this has given this Court a considerable amount of concern, because it is clear from Hin's evidence that he was saying that all four persons charged had ~~been~~ taken part in the stone-throwing at the same time, in the same circumstances, and we had to look through the evidence carefully in order to see whether the jury could have drawn any distinction in respect of the accused, Belafonte.

Undoubtedly there are some distinctions. They are not very

substantial distinctions, perhaps, but nonetheless they are distinctions.

The first distinction is that the three appellants gave evidence for themselves and were strongly cross-examined in the court below by counsel for the crown, whereas Belafonte gave no evidence, nor did he make any unsworn statement. Apparently Belafonte's case rested on submissions made by his learned counsel for it is clear from the summing-up thatlearned counsel, in the course of his address to the jury, did seek, himself, to draw to the attention of the jury special reasons why Belafonte should be acquitted.

It may be, as counsel for the crown said, that the demeanour of the three appellants in the witnessbox did not assist their case at all; and perhaps if they had followed the same course that Belafonte had followed, they might have been in a stronger position. We cannot say, and we cannot speculate what operated in the mind of the jury.

Then there was another little bit of evidence which has been drawn to our attention, and that evidence comes from the witness, Somers. Somers, in examination-in-chief, said that he met Belafonte some distance away from the scene, and that Belafonte said this to him, "them lick off Hin's crown. Go and tie it up because he is bleeding."

Now, this bit of evidence appears to have been led by the crown, perhaps inadvisedly, but nonetheless it was led as evidence against Belafonte. The crown, certainly, would not have led it in support of Belafonte. Nonetheless the jury might very well, in spite of directions given to them by the learned judge, have elected to treat this evidence which was stressed before them, it would appear, by his counsel in the course of his closing address, as something very favourable to Belafonte, namely, that he was implicating other persons by the use of the word "them"; he was insinuating that other persons had injured Mr. Hin's head. It was Belafonte who called Somers, and he was sympathetic to Hin, and suggesting that Somers who had been in the car should return to the spot and tie the man's head because

it was bleeding.

As I say, we cannot speculate what motivated the jury to arrive at the conclusion that Belafonte was not guilty in spite of Hin's evidence that he had taken part in the stone-throwing; but we cannot say that the verdict of the jury was inconsistent and cannot be supported.

In respect of the fifth ground learned counsel complains on the summing-up of the trial judge when he said this: "In this case there are four accused," and later on "you may find one guilty, but that does not necessarily mean you will find all guilty." He submits that this amounted to a mis-direction, because the only evidence, he says, that the jury had before them on which they could convict, it was a case of all four or none at all, and it was wrong for the judge to say to the jury that they could distinguish.

Well, with that view we do not agree. In fact, I think the contrary applies: had the judge directed otherwise it would have been a mis-direction, particularly in this case where three appellants elected to give evidence, and each one gave a different account of his own personal movements. McDermott said he was sleeping at the time, and that he was awakened when the incident was over. McKenzie and Anderson denied having the metal bars and denied taking part in any stone-throwing.

Now, another important matter dealt with by Mr. Ramsay, which gave us some concern was the question of identity. He submitted that no identification parade was held, and this was a case in which, after the police had apprehended the appellants, that they should have been placed on an identification parade, and then Hin ask to point out the persons who he said had done the harm to his car, and to himself. His reasons in support of that submission are that Hin, in his evidence, stated that he did not know the appellant, McDermott at all - he had never seen him before the incident, that he had seen the appellants Anderson and McKenzie, but he did not really know them, and that while he did know Belafonte he was acquitted.

We have examined this aspect carefully, and we observe from the appellants' evidence that apparently the three of them knew Hin quite well. That, of course, does not mean that Hin knew them quite well. But this aspect of the matter was before the jury, and it was for the jury to decide on the evidence as to identity, whether they were in fact satisfied that Hin had correctl pointed out the persons who were responsible for the harm done to his car and to himself. It seems that he must have had very ample opportunities to observe very carefully indeed, both Anderson and McKenzie, because they are the persons who came up to his car in broad daylight, both armed with pipes, and both of them were standing close to his door while smashing his door glass. Therefore we cannot say that the jury were unreasonable in arriving at the conclusion they did in respect of the identification.

To sum up briefly, therefore, the appeal fails in respect of all three appellants in respect of the convictions recorded against them on the two counts. We cannot say that the jury were unreasonable; we cannot say that there was no evidence to support the convictions.

I turn now to the question of sentences.

Learned counsel has drawn to the attention of this Court that the three appellants hitherto bore unblemished characters; hard-working men who had established families which they were supporting. It appears from the evidence given, counsel submits, that these men did not premeditate what they did, that they acted on the spur of the moment, and that they acted hastily, no doubt allowing the passion of the election campaigns to carry them away in doing what they did. It is unfortunate that passions are allowed to rise as they appear to do in this country in elections. Speaking from recollection I think this is one of the few elections in which no one lost his life. But it is well known in many of our elections that in the campaign leading up to the fina day supporters of each party get so carried away that they resort to extreme violence, in cases when reason should prevail, an yet reason fails to prevail.

We cannot say the sentences imposed by the trial judge, in this case two years on the first count, and three years on the second count on each appellant, were manifestly excessive. They were reasonable sentences in the circumstances of this case. A motor car was very badly damaged. The police found stones in it, and the police found, I think, one of the iron bars in one of the appellants' cars. Him himself escaped death only by the mercy of God. He, himself, according to the medical testimony, carries injuries with him which will impair his future life till he dies.

The Court will not interfere with the convictions or the sentences.

The appeals are dismissed, and the convictions and sentences confirmed.