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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 24/98

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE PANTON, J.A. (Ag.)

REGINA vs. ROBERT MORRIS

Ernest Smith for the appellant

David Fraser and Dawn Eaton for the Crown

February 24, 25 and July 12, 1999

PANTON, J.A. (Ag.):

The appellant, having been convicted in the Clarendon Circuit Court of the offence of causing grievous bodily harm, was sentenced on February 23, 1998, to four years imprisonment at hard labour. On February 25, 1999, we allowed his appeal, quashed the conviction, set aside the sentence and ordered a new trial.

The particulars of the offence were that on April 20, 1997, the appellant caused grievous bodily harm to Wilbert Graham with intent to do him grievous bodily harm. Both men had quarrelled on April 19 and also prior to the incident on the 20th. According to the prosecution, the appellant

drove his car at the complainant who was walking on the road at Mason River, Clarendon. The complainant jumped into nearby bushes to avoid injury. The appellant returned within a minute, again swung his car at the complainant who again jumped into the bushes. The appellant drove the car into the bushes, hitting the complainant to the ground, injuring him. The complainant said he fell beneath the car with one of its rear wheels resting on his buttocks. The medical evidence revealed tender swelling at the thora-columbar region, and tenderness of the left upper rib margin posterior. There was also a large healed scar on the right buttock. All injuries were consistent with having been sustained when run over by a car.

The complainant stated that he had two stones in his hands at the time of the incident but that he never had a chance to use them. Miss Ann-Marie Brown, a witness for the prosecution, also asserted that although she had seen the complainant raise his hands with two stones, he never released them. However, she had heard the appellant saying that the complainant had used a stone to smash the car's windscreen. The police officer testified as to seeing a hole about six inches in circumference in the windscreen on the passenger's side. Inside the car itself was a stone.

In an unsworn statement, the appellant said that the complainant had used a stone to shatter the car's windscreen, resulting in the car getting out of control and injuring the complainant. He denied wilfully using the car to injure the complainant.

From the above summaries, it is clear that the prosecution was saying that the appellant deliberately used his motor vehicle to commit the offence, whereas the defence was placing the blame for the complainant's injuries on the complainant's own unlawful act. The focus of the defence was clearly on the throwing of the stones by the complainant.

In her summation of the case, the learned trial judge left the defences of accident and self-defence for the jury's consideration.

At the commencement of the hearing of the appeal, learned attorney-at-law for the appellant sought, and was granted, leave to abandon the supplemental grounds of appeal filed on February 16, 1999, and to substitute therefor five grounds that were filed on February 23, 1999.

Two of those grounds require mention:

Ground 3

"(a)That the learned trial judge misdirected the jury on the content of the unsworn statement of the accused as same relates to the evidence adduced for the prosecution when she said as follows: 'It does nothing to rebut, contradict or explain any of the evidence that any of the witnesses for the Crown has given here.'

(b) That in directing the jury as aforesaid the learned trial judge usurped the functions of the jury and thereby sought to impose her views upon them, in consequence of which the jury may have been led to believe that they had no option but to convict the accused."

Ground 5

"That the learned trial judge in her summation to the jury, failed to assist the jury on the

> defence of accident, as the said defence related to the effect if any that a smashing of the windshield of the car driven by the accused could have had on the ability of the accused to control the said motor car and that the entire summation of the learned trial judge was terse and unhelpful."

It is convenient to deal with this latter ground of appeal firstly. This is how the learned judge instructed the jury in respect of the defence of accident:

> "Now, if you believe Mr. Morris and his witness that it was an accident, or if you think that he was acting reasonably in necessary self-defence, then he would not be guilty. If you doubt whether it was an accident or whether he was acting in necessary self-defence, he would also not be guilty. But, if you disbelieve him, that is, Mr. Morris and his witness, then you go back to the Crown's case and ask yourselves, 'Has the Crown made me feel sure that the accused was not acting reasonably in necessary self-defence or that it was not an accident when Mr. Graham was injured?' Then and only then would it be open to you to convict.
>
> If you are not sure whether it was an accident or whether he was acting reasonably in necessary self-defence, or if you believe it was an accident or self-defence, then he should be acquitted."

The above represents all that was said in respect of the defence of accident. This was wholly inadequate in view of the need to emphasize the unlawful action of the complainant, that is, the throwing of the stones at the appellant resulting in the smashing of the windscreen, and loss of control of the vehicle by the appellant. This was the essence of the defence. It

required more than a repetition of the evidence. The complaint of the appellant as set out in ground 5 is well-founded.

In respect of the defence of self-defence, it is observed that the learned trial judge placed some emphasis on it to the extent that the jury was recalled for further directions. This should not have been so as there was no element of self-defence involved in the case. Self-defence constitutes some positive act on the part of the person claiming to be so acting. The appellant made no such claim. There was nothing to suggest that he was acting to protect himself from actual or apprehended harm.

The unsworn statement

In making an unsworn statement, the appellant exercised an oft-criticized right that every accused person in Jamaica has. Guidance was given in ***D.P.P. v. Walker*** (1974) 12 J.L.R. 1369 as to how judges should deal with an unsworn statement. At page 1373, Lord Salmon, who delivered the opinion of the Board, said:

> "Much depends on the particular circumstances of each case. ...There are, however, cases in which the accused makes an unsworn statement in which he seeks to contradict or explain away evidence which has been given against him or inferences as to his intent or state of mind which would be justified by that evidence. In such cases (and their Lordships stress that they are speaking only of such cases) the judge should in plain and simple language make it clear to the jury that the accused was not obliged to go into the witness box but that he had a completely free choice either to do so or to make an unsworn statement or say nothing. ...The jury should always be told that it is exclusively for them to make up their

> minds whether the unsworn statement has any value, and, if so, what weight should be attached to it; that it is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict, they should give the accused's unsworn statement only such weight as they may think it deserves."

In referring to the appellant's unsworn statement, the learned trial judge said:

> "Now you should consider the <u>content</u> of his unsworn statement in relation to the entire evidence and it is for you to decide whether what he told you is of any value and if so, what weight you should attach to it. <u>It does nothing to rebut, contradict or explain any of the evidence that any of the witnesses for the Crown had given here</u>." [Emphasis added]

Having correctly instructed the jury to give the statement what weight they think should be attached to it, the learned trial judge erred in telling them that the <u>content</u> of the statement did nothing to rebut, contradict or explain any of the evidence in the case. In effect, the jury was being told that the content of the statement was of no value. That was a matter solely for the assessment of the jury. By instructing the jury in that manner, the learned trial judge was ignoring the advice of Shaw, L.J. in ***Joseph John Coughlan v. R.*** 64 Cr. App. Rep. 11 at pages 17 to 18:

> "What is said in such a statement is not to be altogether brushed aside; but its potential effect is persuasive rather than evidential. It cannot prove facts not otherwise proved by the evidence before the jury, but it may make the jury see the proved facts and the inferences to be drawn from them in a different light. Inasmuch as it may thus

> influence the jury's decision they should be invited to consider the content of the statement in relation to the whole of the evidence. It is perhaps unnecessary to tell the jury whether or not it is evidence in the strict sense. It is material in the case."

In view of the manner in which the defence of accident was dealt with, and the erosion of the effect of the unsworn statement, we quashed the conviction and ordered a new trial.