JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 95/2004

BEFORE: THE HON. MR. JUSTICE P. HARRISON, J.A.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A. (AG.)

R. V. SYREENA TAYLOR

Mrs. Jacqueline Samuels-Brown and Miss Thalia Maragh for the Applicant

Miss Paula Llewelyn Senior Deputy Director of Public Prosecutions for the Crown.

April 5, 6, 7 and July 29, 2005

HARRIS, J. A. (Ag.)

On April 7, 2005 we refused an application by the applicant for leave to appeal against conviction and sentence and we now put our reasons in writing.

The applicant was convicted in the Saint Catherine Circuit Court on April 21, 2004, on the second of two counts of an indictment. The first count charged her with causing grievous bodily harm with intent and the second count charged her with inflicting grievous bodily harm. She was sentenced to a term of two years imprisonment at hard labour.

The facts are that at about 8 p.m. on November 3, 1997, the complainant, a Mr. Oliver Habib, with whom the applicant had been involved in an intimate relationship, was at her home in Portmore, St. Catherine. The applicant was

conversing with someone on the telephone. The complainant was watching the television set. He told her that he would be leaving if she did not come off the telephone. She continued the conversation. The complainant took up his bag and went to the verandah but found it locked. The applicant then said to him "if you are going to leave take everything."

The complainant proceeded to pack and while he did so, the applicant appeared with a container in hand which she placed on the floor. The complainant advanced towards the grill door which the applicant opened, as he was going down the steps, she said to him "I am going to see who you are going to sleep with tonight." When he got to the walkway, he looked around. The applicant threw liquid from the container on him and ran. His shirt melted. He ran leaving his bag and shirt on the walkway. He was hospitalized for two days. On his release from hospital on November 5, 1997, he attended the Police Station and made a report. On that date the police recovered the shirt and bag from the walk way.

The applicant, in her defence, in an unsworn statement, stated that she had refused to obey the complainant's order to end the telephone conversation. He unplugged the telephone, grabbed her, chased her into the bathroom and in the act of hitting her, she picked up a bottle which she threw at him and he ran. This the jury rejected.

Mrs. Samuels- Brown, counsel for the applicant, placed reliance on seven grounds of appeal.

Ground 1 was couched in the following terms:

> "The learned trial judge's directions as to the standard of proof was confusing and /or fell short of what was required as while he directed the jury that they need not be absolutely certain he went on to tell the jury that once they accepted, on the evidence, the prosecutor's version and felt sure then the prosecutor had discharged its burden to the requisite standard."

Mrs. Samuels-Brown urged that the directions of the learned trial judge on the standard of proof was confusing. However, the gravamen of her complaint was that he failed to explain to the jury what, as a matter of law, is meant by "certain".

The learned trial judge expressly told the jury in clear terms that the prosecution's duty to prove the case carried with it a particular standard and this standard is that they must be satisfied by the prosecution to the extent that they felt sure of the guilt of the applicant. The use of the word "certain" had not been introduced by him. He alluded to the word "certain" with reference to Counsel's address to the jury when she used the words "sure" and "certain" interchangeably . The learned trial judge impressed upon them that they must feel sure of the guilt of the accused, as, they could only be absolutely certain if they had been present, observing what had transpired.

The learned trial judge in that respect gave adequate, clear and proper directions to the jury touching the standard of proof. This ground is devoid of merit and therefore fails.

Ground 2 is stated thus:

> "The learned trial judge's directions in relation to the second count on the indictment were inadequate; in particular the directions relative to intention were misleading. Further the subjective test which is relevant to self defence was omitted from the learned trial judge's directions when he dealt with the evidence in the case and the Appellant's unsworn statement."

Mrs. Samuels-Brown contended that the learned trial judge directed the jury that if they found that the applicant had acted in self-defence then she would not be guilty of any of the counts on the indictment and although initially he had correctly made reference to honest belief in defining self-defence, in treating with the evidence he, in effect, abandoned the element of honest belief and dealt only with the actuality of an attack.

In support of her contention she placed reliance on the case of **R v. Webley** 27 JLR 439. In that case the learned trial judge had erroneously left the jury with the impression that the onus of proof of self defence rested on the accused.

The case of **R v Webly** (supra) is distinguishable from the present case. In the case under review, the learned trial judge in dealing with the issue of self defence, outlined the law relevant thereto and related it to the evidence taking into account the defence raised by the applicant. He did not fail to mention that the prosecution must prove that the applicant was not acting in self- defence.

The evidence clearly disclosed that there was an attack by the applicant upon the complainant. Where the evidence demonstrates that there was an

attack on a complainant, the element of honest belief does not arise and it would not be obligatory on the part of a trial judge to instruct a jury on the question of honest belief, **Beckford v R.** [1987] 3 All E.R. 425).

The learned trial judge specifically told the jury that in relation to both counts of the indictment if they found that the applicant was acting in self-defence, she should be acquitted. He also told them if they were unsure whether she was acting in self defence she should be acquitted on both counts and that she could only be found guilty on either of the two counts, if they found that she was not acting in self defence.

The learned trial judge had adequately and satisfactorily dealt with the issue of self-defence. No misdirection can be ascribed to him. Ground 2 also fails.

Ground 3 was stated as follows:

> "The learned trial judge erred in that, in effect, he directed the jury that the virtual complainant refreshing his memory was irrelevant whereas it is a relevant matter in assessing the reliability of the witness."

Mrs Samuels-Brown argued that while it is permissible for a witness to refresh his memory from his statement prior to giving his evidence, the fact that the complainant did so, is relevant to the weight to be placed on his evidence and that the learned trial judge in effect directed the jury that his refreshing of his memory was irrelevant.

She prayed in aid, the case of **R v Westwell** (1976) 2 All E R 812 . In

that case it was held that there was no general rule that prospective witnesses may not be allowed to see their statements before giving evidence. They, however, may be denied this opportunity if it was in the interest of justice so to do.

At pages 29 to 30 of his summation the trial judge said thus:

> "He said before the court he was reading a document which was a statement which he had given to the court below. Now I am not too sure why this was said, Madam foreman and members of the jury, because nothing else was mentioned about it. Now this court and the proceedings in this court is not a memory test. It is a process by which you give evidence and assess it. And because it is not a memory test, and sometimes events happen long before the matter comes to court, witnesses whether for the prosecution or defence is entitled to read over statements when it gets closer to the event and apparently this is what the witness Mr. Habib said he was doing, looking over the evidence at the preliminary enquiry before the trial starts. And there is nothing wrong with this."

It was perfectly permissible for the complainant to have refreshed his memory from his depositions. There were no inconsistencies between his statement by way of his depositions and the evidence which he gave at the trial. There is nothing to show that the applicant had suffered any prejudice as a result of the complainant refreshing his memory. The learned trial judge pointed out to the jury that the witness had read the statement, and that a witness is entitled to read over his statement. His asserting that there was nothing wrong in the witness so doing, is not tantamount to his telling the jury that the complainant's refreshing of his memory was irrelevant. The learned trial judge's

directions were proper. He had no duty to inform the jury that the complainant's refreshing of memory was a matter which they ought to have taken into account in assessing the complainant's evidence.

This ground also fails.

Ground 4 is outlined hereunder:

> "The learned trial judge's summation to the jury was unbalanced as he failed to put the case for the Defendant fairly."

Mrs. Samuels-Brown further contended that on the evidence adduced there were matters which arose which impacted favourably on the case for the defence but when the summation is looked at as a whole, the learned trial judge either omitted to mention them, or, placed an unfavourable light on them or neutralized their impact on the trial. In particular, she urged that the learned trial judge had not dealt fairly or adequately with the evidence with respect to the resumption of the discussion as to compensation, as, the complainant and the applicant had resumed the relationship after the incident. On the complainant discovering that he would not get money from the applicant, he returned to court five years later.

The evidence reveals that about three or four months after the applicant was released from custody the parties resumed an intimate relationship for two to three years. During that period, the complainant discussed with the applicant compensation in the sum of $5,000,000.00 for his injury. After the applicant was arrested and charged the complainant attended court on December 4, 1997.

He did not return to court between December, 1997 and the year 2002.

In cross-examination, when asked for an explanation for his non-attendance, he said:

> "Because we talk about surgery and I was thinking I would be alright and everything would be alright."

He was subsequently asked:

> "And you went back to this woman for a year knowing what she have done to you?"

He replied:

> "Because she said she going give me back my money to go and do my surgery."

The learned trial judge dealt with the matter of the resumption of the relationship, the discussion with respect to compensation and the failure of the complainant to attend the trial between 1997 and 2002 thus:

> "Now, there was also evidence led during cross-examination about what happened after a report was made and Miss Taylor was arrested. He said he came to court and then after that the case was set for the 4th of December, and he didn't come back, 4th of December, 1997. He didn't come back. He said they resumed a relationship and they had discussions about compensation and he was expecting compensation. Some time afterward the relationship broke down. Talk of compensation apparently broke down, so he went back to court and gave evidence.
>
> Now, counsel for the defence seem (sic) to be saying that you must look at this, and to say that all he was interested in is money. But you will have to look a little bit further, Madam Foreman and members of the jury. You have to look at his subsequent actions to determine whether or not he is speaking the truth about what happened. If you accept that he is speaking the truth about what happened on the

> 3rd of November, then you might well say to yourselves, his reasons for not coming to court doesn't affect what happened on the 3rd of November. What it might affect, all he gives is his reason for not coming and you have to apply your common- sense."

A trial judge is at liberty to express an opinion or make comments on the evidence, provided the opinion or comment does not influence the jury's independent assessment of the evidence. No harm is done, even if a comment or an opinion of a trial judge is strong, provided he leaves the determination of the facts to the jury.

In **R.v. Robinson,** 28 J.L.R 130 cited by Mrs. Samuels-Brown, comments of a trial judge were challenged on the ground that they had effectually cast doubt on the defence. The Court of Appeal in allowing the Appeal held that comments of the trial judge would have inordinately affected the jury's independent assessment of the evidence.

The effect of the learned trial judge's comments in the instant case are distinctively contrasting to those which were made by the learned trial judge in **R v. Robinson** (supra), as they could not have instilled in the minds of the jury any perverse bias towards the applicant. He clearly adverted the jury to the fact of the resumption of the relationship after the incident, that the discussion with respect to compensation had broken down and expressly told them they should examine the complainant's subsequent actions to decide whether he was being truthful.

The fact that the learned trial judge commented that if they believed him,

his reasons for not attending court would not have affected what occurred on November, 3 cannot be interpreted as an improper comment. He had issued a warning to them that although they may adopt his comments, they may reject them if they disagreed with them. He was careful to remind them that it was their view of the evidence which was important and it was their view of the evidence from which they should deliver a verdict.

A further complaint of Mrs. Samuels-Brown is that the learned trial judge failed to point out to the jury that the complainant said the substance thrown on him was from a "container like what Vaseline is packaged in not a bottle and not a cup that you can drink out of either." This he subsequently described as a cup/container and stated that the cup was between a quarter and a half full.

In dealing with the aspect of the evidence with respect to the description of the container, of which the complaint spoke, the learned trial judge said:

> "Again you remember the question about whether or not this container was a cup or not a cup. It was suggested to him that he told the police that it was a cup. He says it was a cup container. When the word cup was used, Madam Foreman and members of the jury, nobody sought to determine what this cup is. A cup could be a drinking cup, a tea cup, but we are all Jamaicans. If you should get one of these plastic containers that you get when you go to Kentucky or some other, the big plastic ones, do we call them a cup? When you go to some place and you are having drinks out of these plastic containers, do you call them glass or you call them cup? So you have to use your knowledge of the Jamaican vernacular to understand what we mean. He says it is this plastic and he describes it. You will have to determine whether or not it is farfetched for him to describe this plastic container, round container as the size of a cup.

He is saying cup or a cup container is the same."

There was no issue that liquid was thrown on the complainant from a container. The complainant stated that it was thrown from a plastic container which he depicted as a cup. It is clear that the learned trial judge was directing the jury's minds to the fact that the complainant described the container as a cup but no one sought to determine the type of cup used. However, the complainant's reference to a plastic container as cup or a container, and the matter of the quantity of liquid which was in the container, would not have been in any way material, with respect to the account given by either the applicant or the complainant, as to how the complainant received the injuries. Therefore there was no misdirection which would have resulted in a miscarriage of justice.

The learned trial judge also reminded the jury of a suggestion made by counsel for the applicant that it was the complainant's parents who had insisted on his making the report. He correctly instructed them that what they were asked to determine was whether the offence was committed and not who insisted on making the report.

The learned trial judge went on to say:

> "Because you might well find in certain circumstances where the victim doesn't want to make a report but somebody else suggested that the victim makes a report, does that mean, Madam Foremen and members of the jury that something did not happen?"

In dealing with the suggestion by counsel, the learned trial judge was simply identifying issues for the jury to consider. He went on to tell them that

they may use subsequent events to determine what had occurred at the time of the incident. With such directions, obviously, he was being very generous to the applicant.

The learned trial judge clearly pointed out the issues and left it to the jury to arrive at such facts as they found proved. His summation was fair and balanced. This ground also fails, there being no merit in it.

Ground 5 was stated as under:

> "The learned trial judge misdirected the jury as to how to deal with the character evidence called on behalf of the Appellant (sic) and failed to direct them how to use the evidence in assessing whether the Appellant's (sic) word could be accepted on a point of importance."

In her submission on this ground, Mrs. Samuels-Brown stated that in treating with character evidence the learned trial judge erred. As regards the evidence, the learned trial judge dealt with propensity only and failed to remind the jury that the witnesses Reverend Daniels and Mr. Crawford testified to the applicant's character. Alternatively, his summing up was not fair.

An accused who exercises the option to give unsworn statement does so at his or her peril. An unsworn statement is not commensurate with sworn testimony. It is open to a jury to attach to it such weight as it deems fit. The applicant having not given sworn testimony, no issue as to her credibility would have arisen . The trial judge was under no obligation to have given directions on her credibility. He would only have been under a duty to have done so, had there been in evidence a pre-trial exculpatory statement made by her in respect

of her good character on which the applicant had placed reliance. In **R v Vye** [1993] 3 All E R 241 Lord Taylor of Gosforth C.J. declared:-

> " In our judgment, when the defendant has not given evidence at the trial but relies on exculpatory statements made to the police or others, the judge should direct the jury to have regard to the defendant's good character when considering the credibility of those statements."

He went on to state:

> "Clearly if the defendant of good character does not give evidence and has given no pre-trial answers or statement, no issue as to his credibility arises and the first limb of the direction is not required"

These principles were reproduced by Lord Steyn in **R v. Aziz** [1995] 3 W.L.R. 53 at page 60 in the following terms:

> '(1) A direction as to the relevance of his good character to a defendant's credibility is to be given where he has testified or made pre-trial answers or statements.
>
> 2. A direction as to the relevance of his good character to the likelihood of his having committed the offence charged is to be given, whether or not he has testified, or made pre-trial answers or statements."

The learned trial judge, however, made reference to Reverend Daniel's testimony of the applicant's "good character and honesty." Honesty in this context, is referable to the applicant's credibility. The learned trial judge had not sought to place restraint on the jury's right to examine the applicant's credibility notwithstanding that there was no onus on him to have given directions on it. This ground is unmeritorious and consequently fails.

Ground 7 was stated thus:

> "The learned trial judge erred in that he interrupted the applicant in the giving of her unsworn statement and /or he unduly restricted her in relation to same."

Mrs. Samuels-Brown contended that the learned trial judge prevented the Applicant from giving a statement as to her character at the time when she said "I will formally introduce myself."

At the trial judge's request, the applicant gave her name, occupation, place of employment and the parish in which she lived. He then asked her "What is it that you have to tell us?' He went on to say, "You have to speak loudly, clearly and slowly in order that we can write what you have to tell us". At this point she declared, "I will formally introduce myself." Thereupon, the learned trial judge reminded her that he had told her to speak loudly, clearly and slowly and that she had already given her name, occupation and address and he then continued by saying, "What is it that you have to tell us now in relation to this matter?" She could therefore have said what she wished to say.

It is not reasonable to conclude that the trial judge had restricted her from giving evidence as to her character. To presume so, would be speculative. The learned trial judge's question was with reference to matters relevant to the unsworn statement. An accused is not entitled to an unrestricted right to determine what he or she desires to state at a trial. Any information which he or she wishes to put before the court must be relevant to the proceedings. The applicant was afforded the opportunity to outline her defence. It cannot be

interpreted from the words he used that the learned trial judge had in any way restricted her in making her unsworn statement.

This ground also fails.

Ground 6 was stated as follows:

> "The sentence imposed by the learned trial judge was manifestly harsh and excessive."

Mrs. Samuels-Brown urged that the sentence should be varied as a custodial sentence was not the most appropriate one and the court may take into account matters subsequent to the passing of the original sentence.

The learned trial judge had intended to impose a sentence which he described as a "short, sharp shock" and imposed a sentence of two years hard labour. Mrs. Samuels-Brown submitted that even if the learned trial judge had considered a period of incarceration, a period of 2 months would have been adequate and cited the case of **Sophia Thomas v R** 27 JLR 59 in support of her submission.

In that case the appellant pleaded guilty in the Resident Magistrate's Court, Sutton Street, for the offence of wounding. She was sentenced to a term of 6 months imprisonment, the learned Resident Magistrate having stated that a sharp harsh sentence would have been appropriate. The Resident Magistrate at the time of sentencing had not been privy to certain factors to which the Court of Appeal had become aware. Taking those factors into consideration, the Court of Appeal in reducing the sentence to 2 months plainly stated:

> "It has to be clearly understood that the use of lethal weapons in the course of domestic brawls is not something which the court will view lightly, nor will the court, be impressed by the fact that it is dealing with someone who has no previous convictions or a young person. Violence in the society is quite evident and the court must make every effort it can to inhibit further violence."

Mrs. Samuels-Brown also relied on **Barrington Simpson v R.** S.C.C.A. No. 122 of 193. In that case a sentence of 2 years imprisonment at hard labour was imposed on the appellant having been convicted on a charge of inflicting grievous bodily harm. A review by the court of the circumstances under which the injury was inflicted on the complainant moved the court to set aside the sentence of imprisonment and substitute a fine of $1,000.00 or 3 months imprisonment.

Reliance was also placed on the case of ***R v Yvonne Jump*** S.C.C.A. No. 70 of 1993 by counsel for the defence. The appellant was convicted on a charge of causing grievous bodily harm, she having poured hot water on the complainant. She was sentenced to a term of 7 years hard labour which was varied on Appeal to 3 years hard labour, suspended for 3 years.

In varying the sentence, this court emphasized that "In imposing a sentence of seven years hard labour upon the appellant the learned trial judge correctly took cognizance of the high incidence of violence involving the throwing of substances on persons " with devastating results." The reference there is to burning of people with acid. By distinction the appellant's weapon was hot water."

None of the foregoing authorities avail the applicant. The sentence was not excessive for such a heinous act committed by her. The maximum sentence for the offence for which she has been convicted is 3 years imprisonment at hard labour.

An appellate court will only disturb a sentence if the learned trial judge had applied the wrong principle. He had taken into consideration the applicant's good character, the fact that she had no previous convictions and had led a useful life in the community. He also took into account the prevalence of use of corrosive substances. His application of the foregoing principles was correct.

This court also supports the view that the use of corrosive substances to inflict injury must be denounced. The applicant did not act on the spur of the moment but in a deliberate and calculated manner. While the complainant packed his belongings, she took the container with the substance, rested it on the ground in readiness and as soon as the complainant was leaving her residence, she threw the substance on him.

The applicant had been placed on bail in error. However, she will be treated as having been in custody since April 21, 2004. In all the circumstances, the appeal against conviction and sentence is dismissed. Sentence shall commence to run as of July 21, 2004.