JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 1/90

BEFORE: THE HON. MR. JUSTICE CAREY, P (AG.)
THE HON. MR. JUSTICE FORTE, J.A
THE HON. MR. JUSTICE GORDON, J.A (AG.)

REGINA v. EVERTON HENRY

Glen Cruickshank and Lavern Chambers for Appellant

Lancelot Clarke for Crown

July 1 and 17, 1991

GORDON, J.A (AG.)

This appeal from conviction on an indictment for wounding with intent before Theobalds, J., and a jury on 20th December, 1989 at the Circuit Court for Clarendon held at May Pen came before us by leave of the single judge. At the conclusion of the hearing, we dismissed the appeal, affirmed the conviction and ordered that the sentence of imprisonment at hard labour for two years should commence on 20th March, 1989. We now fulfil the promise we made to place on record our reasons.

The underlying facts of this crime are these:

Mr. Errol Morris and his sister, Miss Janey Morris, were walking along a parochial road at Longsville in the parish of Clarendon at about 6:15 p.m on Christmas day 1988 when Mr. Morris was attacked from behind by the appellant who threw the complainant to the ground on his face. The appellant proceeded to stab the victim in his back thrice with a knife. The complainant struggled and spun to face his assailant. He asked the appellant if he

intended to kill him, and the appellant replied in the affirmative. The complainant grabbed the knife with his left hand. The appellant drew away the knife cutting the complainant's hand. The appellant then drew the knife on the right side of the complainant's face injuring him in that area. The appellant then got off the fallen victim and fled the scene. Miss Janey Morris took her stricken brother to the police station at May Pen, then to the May Pen Hospital where he was admitted and remained a patient for ten days. Blood and air were found in his left pleural cavity. The appellant and the complainant had not been on good terms. The appellant had threatened the complainant three days previously and had stoned his sister's gate.

The appellant in a statement from the dock said that for some years he and the complainant had not been on good terms, and recently this situation took a turn for the worse. On the evening of the incident he was attacked by the complainant and his sister. The complainant used a bit of stick to smash his tape recorder, struck him in the head and on his ankle injuring him, then threw him to the ground. While they grappled, the complainant's sister was urging him on, so the only thing he could do "is to stab at him in his back so that he could ease off me". The appellant then ran away and went to the May Pen Police Station, and was sent to the doctor.

Detective Acting Corporal Samuel Clunis received the appellant's report and observed injuries on his left forehead and a swollen left ankle. He sent him to the doctor. Dr. Hugh Allison told of injuries he saw and treated the left forehead and left ankle of the appellant.

Mr. Cruickshank urged two grounds of appeal. He submitted <u>firstly</u> "that the learned trial judge failed to adequately

and fairly put the defence of the appellant to the jury" and secondly "that the learned trial judge gave no assistance whatsoever to the jury how to treat witnesses that were called by the appellant to testify on his behalf."

Passages of the summing up were referred to, and relied on by Mr. Cruickshank in support of these grounds. With respect to ground 1, he complained that the judge went across the line in his comments and this resulted in a failure on his part to deal adequately with the defence. At page 20 of the record, the following passages appear:-

> "Well, this witness (the complainant) was cross-examined at some length and certain discrepancies did emerge in the cross-examination but more importantly he rejected the suggestion that it was he, Morris, who had attacked the accused person. He said that he never expected the attack and when he got away from him the accused man stood up and ran off after he had stabbed him.
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> Now you might wish to consider, Mr. Foreman and members of the jury, that the unsworn statement of the accused man supports or corroborates that because he said, the accused man said, "After he eased off me I ran away, leave him right there." So you have to ask yourself why did the accused man run away if he had been the victim of an attack and he if he had acted honestly in self-defence, why he run away? It is a matter that you could consider. I merely point it out to you and you decide whether you agree or what you make of it.
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> If you have been attacked, you would more likely wish to run to the shop nearby and say, "This man attack me. See, this man damage me fore-head, hit me on me foot. I had to protect meself. Self-defence." He ran away. It is true that he said that he ran to the police station later on but during the interval of time, what happened during the interval.?"

It was submitted that in making those comments the learned trial judge was at that stage not only casting a burden on the accused to stop at the nearest port or police station but inviting the jury to draw unfavourable inferences or disbelieve the defence.

A trial judge is required to assist the jury in their evaluation of the evidence and he is entitled to express his views, even strongly, on the evidence, provided he leaves the inferences of fact and finding of facts to be determined by the jury. We do not find that in making these comments the learned trial judge went beyond the bounds of propriety. The fact is that the appellant did not go to the police station immediately after he ran off. He complained that his radio/cassette recorder was smashed by the complainant, but when he arrived at the police station to lodge his complaint Corporal Clunis who gave evidence for the defence described it as being in one piece but pieces of it had been broken off and held together.

We now turn to consider the second ground of appeal. The defence to the charge was self defence and the learned trial judge dealt with the statement from the dock made by the appellant and the evidence of the two witnesses he called. In reviewing the evidence for the defence, he dealt in detail with the injuries the appellant received, as found by Dr. Allison, and observed by Corporal Clunis. He reminded the jury that in the doctor's opinion they were consistent with infliction by a blunt object such as a stick, which was consistent with the statement of the appellant. This treatment of the evidence was fair. The jury then had to decide the questions of fact and were left with a choice between the account given by the prosecution witnesses and that by the defence.

The learned trial judge gave directions on self defence pursuant to Beckford v. R (1987) 3 ALL ER 425 when the circum-

stances admit of an "honest belief" of an impending or threatened attack, and in addition, he dealt with the situation where there was an actual attack. In the latter event, he said with particular reference to the defence as led:-

> "If even you find that a stick was used you would have to decide whether in your view to retaliate or use a knife to deal with a man who has hit you with a stick, who you claim had hit you with a stick, to stab such a man in his back three times is excessive force because if excessive force is used, then self-defence does not apply.
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> Bear in mind, Mr. Foreman and members of the jury, that the onus remains throughout on the prosecution to show that self-defence did'nt apply and if after you consider all the evidence you are left in doubt whether the wounding may or may not have been self-defence, the proper verdict in those circumstances would be one of not guilty. I would remind you again, Mr. Foreman and members of the jury, that even if you reject every word of what the accused person has said by way of his unsworn statement you will still have to turn back and examine the case of the prosecution, and it is only if you are satisfied to the extent that you feel sure of the guilt of the accused that you can properly return a verdict of guilty."

In his submissions on the comments of the learned trial judge, Mr. Cruickshank said that he could not challenge the directions on the statement made by the appellant from the dock.

The learned trial judge at page 5 of the record said:

> "The fact that he has elected to remain in the dock, as I said, is not to be construed as an indication of his guilt. As intelligent persons you may well wish or consider to yourself to have heard him give evidence from the witness-box, in which event learned counsel who represent the prosecution would be entitled to cross-examine him. Had

> "you had that privilege, perhaps you would have been in a better position to assess the quality of what he has said by way of defence; but since he has made his unsworn statement your duty is to consider that statement which he has made from the dock and give it the weight which you think, in the circumstances, it merits; but bear in mind, Mr. Foreman and members of the jury, that the unsworn statement has not been tested in cross-examination and it cannot carry the same weight as evidence which is given on oath and which is subjected to cross-examination."

These directions followed the guidance given by Lord Salmon in Director of Public Prosecutions v. Walker (1974) 21 W.I.R 406 at page 411. The terms used were "homely Jamaican language". In R. v. Cedric Gordon SCCA 109/89 delivered 15th November, 1990, objection was taken to words used by the learned trial judge in his charge to the jury which were similar to those employed above. There Carey, J.A., in delivering the judgment of this court said at page 14:-

> "In our view, the whole thrust of these guidelines is to satisfy the natural curiosity an intelligent juror would have, where an unsworn statement is being made. Lord Salmon suggests that a possible thought which would arise in such a juror's mind - what had he to fear? In Jamaican terms, what was there to hide? Was he hiding from taking the oath, from cross-examination or from unfair questions? In our judgment, the learned trial judge founded himself squarely on the guidelines as enunicated by Lord Salmon. Parliament, we trust, will one day abolish this vestigial tail of the law of evidence."

It only remains for us to observe that this vestigial tail still wags. Parliament has not taken heed and in the meantime comments by trial judges on the statement made from the dock by accused persons continue to be challenged on appeal.

We have not been able to find anything to support the submissions of Counsel for the appellant. The issues the jury had to resolve were simple and they were ably assisted by the fair treatment of the evidence by the learned trial judge.