JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 122/93

BEFORE: THE HON MR JUSTICE RATTRAY, P
THE HON MR JUSTICE GORDON J A
THE HON MR JUSTICE WOFLE J A

R v BARRINGTON SIMPSON

Anthony Pearson for Applicant

C. Malcolm for Crown

July 5, 6 & October 24, 1994

GORDON J A

The applicant was convicted in the Home Circuit Court on 8th December, 1993 on the 2nd of two counts on an indictment which charged in the first count causing grievous bodily harm and in the second inflicting grievous bodily harm. He was sentenced by Harrison J (Ag.) to imprisonment at hard labour for two years. The application for leave to appeal against conviction was refused. The application for leave to appeal against sentence was treated as the hearing of the appeal. The sentence of imprisonment was set aside and a sentence of a fine of $1000.00 or 3 months hard labour substituted.

The facts in the case may be briefly stated. About 12.30 a.m. on 21st December, 1992 a fuss developed between the appellant and the complainant one Nicole Spence in a dance at Black Moses Lawn in Kingston. The appellant accused the complainant of "carrying news to his baby mother." The complainant's case is that the appellant pushed her, she pushed him and he struck her in her left eye with a bottle. She fell and was rushed to the Kingston Public Hospital. She bled from her left eye and now suffers from the after effects of the blow thus:

> "Sun and light affect me; smoke also affect me because of the left eye. Eye also run water when I read."

In defence the applicant said the complainant sprayed him with the contents of a bottle she had, he rushed at her and in running away she crashed into a gate and fell. He denied striking her with a bottle. He admitted he pushed her when he held a bottle in his hand.

Mr. Pearson urged two grounds of appeal:

> "1. The learned trial judge misdirected the jury, by failing to adequately give directions as to intent in the offence of Inflicting Grievous Bodily Harm.
>
> 2. The verdict was unreasonable and/or cannot be supported having regard to the evidence."

The learned trial judge's direction challenged in ground I is stated thus:

> "So in the second count that he is charged with inflicting bodily harm, the prosecution is not obliged to prove any intention at all. Although it is less serious, the prosecution must still satisfy you that the accused man did some act which inflicted harm to the person of Nicole Spence. So although it is less serious, the prosecution must still satisfy you through the evidence, that you will find that the accused man did inflict serious injury to this complainant."

Mr. Pearson submitted that the learned trial judge's direction given above would have left the jury with the impression that to establish the charge the jury had only to find an injury to the complainant caused by the appellant. The jury, he urged, if properly directed, had to consider the defences raised by the appellant. They ought to have been directed to consider whether the appellant foresaw that in pushing the complainant, bottle in hand, he was likely to cause her some harm.

Regina vs. Savage [1991] 2 WLR 418 was prayed in support of these submissions. In this case the appellant was convicted on indictment for wounding the former girlfriend of appellant's husband, on the Crown's case the appellant threw a glass and its content on the complainant in a pub. The glass shattered and the complainant was cut. The appellant in defence admitted depositing the contents of the glass on the complainant but denied releasing the glass from her grasp.

The appellant appealed on ground that the conviction was **unsafe and unsatisfactory** in the light of the Recorder's direction on unlawful wounding. The Court of Appeal (Gledewell L J Ian Kennedy & Fennell JJ.) allowed the appeal and substituted a conviction for assault occasioning actual bodily harm. The court held that "the question as to whether she foresaw that her act was likely to cause some harm other than wetting with beer was a question they (the jury) should have been asked to consider."

The case of Savage is distinguishable from the one under consideration. In the first instance "unsafe and unsatisfactory" is not a ground of appeal recognized by the Judicature (Appellate Jurisdiction) Act, in the second the appellant Savage admitted throwing the contents of her glass on the complainant but denied releasing the glass so that it splintered and cut the complainant. The appellant herein denied any overt hostile act against the complainant. He denied striking her with the bottle in hand. It therefore became a question of fact whether the injury was sustained in the manner described by the complainant or the appellant and to that end the learned trial judge directed the jury thus:

> "So Madam Foreman and members of the jury, what in effect he is saying, is this, as I have already indicated to you, that having this confrontation and she ran off and got herself injured in this gate column, it is she - as far as he is concerned, he is not responsible for her injury

> "in any way. He did not inflict them. So at the end of the day, it is going to be a matter for you to decide whether you accept his evidence, or you reject it. Whether you are going to accept what the prosecution says, that the accused man used a beer bottle to hit the complainant in the eye, as against what he is saying: She ran off and caught up herself in the gate column, causing injury to her eye."

We found that this direction was adequate and the jury found that the action of the appellant was deliberate. Implicit in the verdict is a finding that a deliberate blow with a bottle struck by the appellant in the eye of the complainant was an act which the appellant must have foreseen was likely to cause some harm. That is the mens rea found in this charge.

For these reasons we refused leave to appeal the conviction. A review, however, of the circumstances in which the injury was inflicted; a domestic dispute between the parties and the previous good record of the appellant led us to consider whether instead of the imposition of a sentence of imprisonment, the appellant could be dealt with appropriately in any other manner provided by Law.

We concluded that a non-custodial sentence would sufficiently meet the ends of justice and set aside the sentence of imprisonment and substituted therefor a fine of $1,000.00 or three months hard labour.