JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 54/93

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

REGINA vs. EARL SIMPSON

Lord Gifford, Q.C. and Hugh Thompson
for the appellant

Hugh Wildman and Bryan Sykes
for the Crown

May 24, 25; June 29 and July 29, 1994

DOWNER, J.A.:

The appellant Earl Simpson was found guilty of causing grievous bodily harm with intent contrary to section 20 of the Offences Against the Person Act before Courtenay Orr, J. and a jury in the St. James Circuit Court, after a trial lasting two days on April 21 and 22, 1993. The maximum sentence of life imprisonment with hard labour was imposed.

Miss Bernard, the complainant, was the girlfriend of the appellant Simpson. At the time of the incident she was pregnant with his child. She related that she had visited him on July 9 around 8:00 p.m. to collect the proceeds of a loan she had made to him. They went to the back of the house and he returned within. When she was waiting on him she felt a warm stream on her shoulder and her face. The upshot was that she suffered severe burns from acid which he had used to assault her. He took her to the Cornwall Regional Hospital at her request and she was admitted for two months. That is the gist of her story.

In response to this serious allegation, he said he had thought it was a burglar outside and used the acid as pre-emptive

strike as he feared personal attack and an invasion of his house. These were the rival versions of the incident the jury had to resolve, and they were satisfied with the Crown's case and returned a verdict of guilty.

The rejection of Miss Bernard can be explained by the other woman. The appellant had taken up with Barbara Foster and he had told Miss Bernard that she was his Church sister. Barbara Foster explains why Miss Bernard was taken around the back of the house. Miss Foster was within. Another aspect of the case was that there was a fight between the two women on an earlier occasion. This was related to the court by the appellant. In her evidence Barbara Foster said she was in bed with the appellant when she heard a digging at the back of the house which lasted for about twenty minutes. It was in such circumstances, she said, that the appellant poured liquid from a bottle on the victim outside. Foster also said that she accompanied the appellant and the victim to the Cornwall Regional Hospital.

The original grounds of appeal were that there was an unfair trial and that there was insufficient evidence to warrant conviction and sentence. These basics were expanded by Lord Gifford who filed and argued the supplementary grounds. The first ground reads as follows:

> "1. There was evidence available at the trial which was not called on behalf of the Defence because Counsel then appearing for the Applicant took the view (wrongly it is submitted) that it was 'of no evidential value' and 'self-serving'. The Applicant submits that it is necessary in the interest of justice for such evidence to be received and heard by this Honourable Court, having regard to its strong probative value and relevance."

There was presented to us the following letter from Mr. Salmon of counsel to Gifford, Haughton and Thompson:

> "May 10, 1994
>
> Dear Sirs,
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> Re: Appeal Earl Simpson v. D.P.P.
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> I am informed that the above Appeal is set for hearing on Tuesday 24th May 1994.

> "Unfortunately, I have to be off the island on that date because of very important personal matters.
>
> I acknowledge having seen certain photographs of the locus which were shown to me at the trial at first instance but which I did not think were of any real evidential value for the reason that they were self-serving.
>
> I do regret that I cannot be at the hearing of the Appeal but I do wish it success.
>
> Yours truly,
>
> R. A. SALMON
> Attorney-at-law."

In support of his submission to adduce fresh evidence, Lord Gifford cited two cases: **William Thomas Perry and Harry Harvey** (1909) 2 Cr. App. R. 89 at 92 and **Lattimore, Salih and Leighton** 62 Cr. App. R. 63.

As to the first case, Walton, J. delivering the judgment of the Court emphasised the discretion of the court to hear fresh evidence if it was plainly made out that the justice of the case required it. That proposition was stated thus:

> "On the other hand, in my opinion this Court ought not to consider itself bound by any hard and fast rule never to allow further evidence to be called where the fact that it was not called at the trial was due to the mistaken conduct of the case by the prisoner or by his advisers. If it was plainly made out that justice required it, I think this Court would interfere to protect a man from the result of bad management or misconduct of his case at the trial."

While this dictum is applicable to the exceptional case where it was patent that there was a miscarriage of justice, the court expressed the general view thus:

> "We are asked to quash the conviction upon hearing these two witnesses and weighing their evidence against that of the others whom we should not hear orally, unless we did that which, undoubtedly, we have power to do, viz., hear all the witnesses again. But we ought not to substitute a trial by three judges for a trial by jury, unless it is clearly made out that justice requires it. We have no power to order a new trial. The defendant's

> "counsel deliberately elected to abandon this evidence in order to have the last word with the jury, and relying upon the jury seeing the horse."

While this court has the power to order a new trial in the interests of justice we see no reason to do so where counsel in his discretion refrains from calling evidence which he decided was self-serving. The jury heard evidence that there was digging outside the appellant's house and counsel was correct in deciding that the introduction of photographs was inappropriate in the context of this case. The discretion of the court to call fresh evidence was reiterated in **Lattimore, Salih and Leighton** (supra) where Scarman, L.J. said at page 56:

> "The obligation to receive further evidence imposed by subsection (2) is new law: the obligation did not exist prior to the enactment of section 5 of the Criminal Appeal Act 1966, which it reproduces. The discretionary power is very much older..."

Then Scarman, L.J. repeated the words quoted above in **Perry and Harvey**. Then in illustrating the particularity with which the court examines applications for fresh evidence, the Lord Justice continued:

> "We agree. In the present case, there is no obligation to receive the tendered evidence under subsection (2). All the evidence tendered to us could have been adduced at the trial: indeed three of the witnesses, whom we have heard - the fire experts Mr. Craven and Mr. North, and Professor Cameron, the pathologist - did give evidence at the trial. Nevertheless we have thought it necessary, exercising our discretion in the interests of justice, to receive not only the evidence of these three, but also that of Professor Teare and a written report of Professor Simpson and this course has been justified in the result, for it is upon the strength of their evidence that we think the verdicts of guilty on the counts charging murder and arson at 27 Doggett Road are unsafe and unsatisfactory and must be quashed.
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> We did, however, refuse to receive the third category of evidence tendered to us, that is the evidence of witnesses who, it is said, throw light on the true identity of the killer. We doubt its credibility and its admissibility: but, more significantly, we do not find

> "it necessary to reach any conclusion as to who murdered Confait or set fire to the house."

We have examined carefully the application to adduce the evidence of the photographs and the submissions of Lord Gifford as to the impact that evidence could have on the evidence adduced at the trial. In the light of the principles extracted from the authorities, we do find that we ought not to admit the evidence sought to be adduced.

The other supplementary ground of appeal reads thus:

> "1A. The Applicant was further deprived of a fair hearing because an apparent inconsistency of great significance between the evidence of the Complainant and the medical evidence was not explored by his Counsel in cross-examination of either the Complainant of the medical witness."

This ground of appeal raises the issue of counsel's conduct of the appellant's case at the trial and **R. v. Clinton** [1993] 2 All E.R. 998 was cited to support this ground. We think the principle on which this court ought to act where the allegations are that counsel made the wrong decision in the conduct of a case was at page 1004 of the judgment thus:

> "Most recently **R. v. Wellings** (20 December 1991, unreported), heard in another division of this court, repeated the principle. Giving the judgment of the court Lord Lane CJ said:
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> > 'The fact that counsel may appear to have made at trial a mistaken decision, or has indeed made a decision which in retrospect has been shown to have been mistaken, is seldom a proper ground of appeal. Generally speaking it is only when counsel's conduct of the case can be described as flagrantly incompetent advocacy that this court will be minded to intervene.' "

Earlier on the same page, the court put the matter thus:

> "Subsequent decisions have emphasised that cases where the conduct of counsel can afford a basis for appeal must be regarded as wholly exceptional.
>
> With that we are in full agreement. During the course of any criminal trial counsel for the defence is called upon to make a number of tactical decisions not the least of which is whether or

> "not to call his client to give evidence. Some of these decisions turn out well, others less happily. In **R. v. Gautum** this court concisely explained why such decisions could not generally afford valid grounds of appeal. They held that, provided counsel had properly discussed the case with his client the court would not permit the defendant to have another opportunity to run an alternative defence which had not been run at his trial. In **R. v. Ensor** [1989] 2 All ER 586, [1989] 1 WLR 497 the court considered both **R v Irwin** and **R. v. Gautum** and expressly approved the approach in the latter case subject only to the qualification which had been inserted in an intervening case called **R. v. Swain (note)** [1988] Crim LR 109 that if the court had any lurking doubt that the defendant might have suffered some injustice as the result of flagrantly incompetent advocacy by his counsel, then it would quash the convictions. In the case before them they decided that what was described as counsel's carefully considered decision', even if erroneous, could not possibly be described as incompetent let alone flagrantly incompetent advocacy."

We have examined the transcript of the proceedings and have found no incompetence on the part of counsel. Consequently, we have found no merit in this ground.

SENTENCE

Lord Gifford in his most helpful submission on sentence had argued that the circumstances do not warrant the exceptional punishment of life imprisonment. To assault by throwing acid on a victim is a most serious offence and the frequency with which it occurs is alarming. The appellant has a good record until this incident. He is hardworking, he is a Church-goer and he was gainfully employed. He also had the benefit of a secondary education. The victim has suffered serious injuries and will have to undergo further and expensive plastic surgery for recovery. The evidence is that the appellant was a chemical salesman and the sulphuric acid-based product he used as a weapon was used to clean drains. He had it in stock as part of the samples with which he trades. The special features of this case was that the victim was his former girlfriend and at the time she was pregnant with his child. It is against that background that the authorities will be considered.

In **Hodgson** [1967] 52 Cr. App. R. 113 at 114 a bench consisting of the Master of the Rolls, Mr. Justice Widgery and Mr. Justice MacKenna stated:

> "When the following conditions are satisfied, a sentence of life imprisonment is in our opinion justified: (1) where the offence or offences are in themselves grave enough to require a very long sentence; (2) where it appears from the nature of the offences or from the defendant's history that he is a person of unstable character likely to commit such offences in the future; and (3) where if the offences are committed the consequences to others may be specially injurious, as in the case of sexual offences or crimes of violence. We think that these conditions are satisfied in the present case and that they justify an indeterminate life sentence."

In **R. v. Picker** [1970] 2 All E.R. Lord Parker, C.J. said at page 227:

> "This was a simple case; it was not murder, it was not manslaughter on the grounds of provocation or diminished responsibility, it was simply manslaughter because no intent either to murder or to do grievous bodily harm had been found by the jury. Quite clearly the appellant had to be punished, and he had to be sent to prison, and it was for the judge, in the opinion of this court, to say what the proper term of imprisonment for this sentence was. The court has come to the conclusion that the proper sentence for the appellant was a determinate sentence of four years' imprisonment."

The principle in this case was applied in **R. v. Dayall Whittaker** [1974] 12 J.L.R. where Graham Perkins, J.A. at page 1642 said:

> "In our view the learned trial judge was clearly wrong. He erred in principle in that he should have awarded a determinate custodial sentence when once he decided to award a custodial sentence at all. There was no evidence before him as to any mental instability in the applicant; there was no evidence before him of circumstances requiring the accused to be removed from society for the rest of his life. In these circumstances this court proposes consistently with authority, (see **R. v. Picker [1970] 2 All E.R.**) **to set aside the sentence imposed and substitute therefor a sentence of imprisonment** for seven years at hard labour. The result is that the appeal as to conviction is dismissed; the appeal as to sentence is allowed. The sentence

"is set aside and a sentence of seven years at hard labour substituted."

It should be noted in **Picker** (supra) that the appellant was just a day over 17 at the time of the incident and in a statement to the police he confessed that there was an altercation and that he had lost his temper, picked up a piece of wood or log and struck the deceased. Earlier in the day after the incident he told a fellow employee, "I don't know what came over me." As to whether any such circumstances existed **Whittaker** (supra) is not disclosed in the judgment.

In **Archbold Criminal Evidence & Practice** 43rd Ed. para. 5-234 the following passage appears:

> "A more recent restatement of the modern practice can be found in the judgment of Lord Lane C.J. in **Wilkinson** (1983) 5 Cr. App. R. (S.) 105, CSP F3.2(a) where Lord Lane C.J. said:
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> > 'It seems to us that the sentence of life imprisonment, other than where the sentence is obligatory, is really (sic) appropriate and must only be passed in the most exceptional circumstances. With few exceptions ... it is reserved broadly speaking ... for offenders who for one reason or another cannot be dealt with under the provisions of the Mental Health Act, yet are in a mental state which makes them dangerous to the life or limb of members of the public. It is sometimes impossible to say when that danger will subside, and therefore an indeterminate sentence is required, so that the prisoner's progress may be monitored by those who have him under their supervision in prison, and so that he will be kept in custody only so long as public safety may be jeopardised by his being let loose at large.' "

This restatement does not ignore the exceptional instances which were stated in **Hodgson** (supra) which this court approves. The learned judge considered the matter carefully for he said:

> "I intend to give you a sentence that will be a lesson to everybody in St. James and to everybody in Jamaica that the Courts will not tolerate acid throwing. Two of my colleagues, I understand have given sentences, one gave eighteen years, and I understand another

> "gave twenty years. My colleague who gave the eighteen years discussed the case with me as it developed and I told him then, that as it is his tendency, I think he was lenient."

While in some cases the appropriate range is fifteen to twenty years, this was an exceptional case and we see no reason to disturb the sentence imposed. The only criticism that could be made of the learned judge's conduct was that he did not follow the recent practice in England that:

> "Where a judge is contemplating the imposition of a sentence of life imprisonment, he should inform counsel and allow him to deal with the matter specifically (see **MacDougall** (1983) 5 Cr. App. R. (S.) 78, CSP F3.2(j); **Morgan** (1987) 9 Cr. App. R. (S.) 201, CSP F3.2(j); **Birch** (1987) 9 Cr. App. R. (S.), CSP F3.2(j)."

It is a salutary approach and we would suggest that it be followed in this jurisdiction.

We have treated the hearing as the hearing of the appeal. The appeal against conviction and sentence is dismissed.