JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 89/97

COR: THE HON. MR. JUSTICE FORTE, J. A.
THE HON. MR. JUSTICE DOWNER, J. A.
THE HON. MR. JUSTICE, BINGHAM, J. A.

R. V. PATRICK WATSON

Clyde Williams for the appellant

Brian Sykes, Deputy Director of Public Prosecutions and **Miss Georgianna Fraser** for the Crown

June 25, 26 and November 16, 1998

BINGHAM, J.A.

Arising out of an incident on 30th August 1996 in which the complainant Basil Anderson was seriously injured, the applicant was tried and convicted on 5th June, 1997 in the Trelawny Circuit Court before Karl Harrison, J sitting with a jury for the offence of wounding with intent. He was sentenced to ten years at hard labour.

His application for leave to appeal against conviction and sentence having been refused by the single judge, this application was renewed before us. After hearing the submissions of counsel, we granted the application for leave to appeal and treated the application as the hearing of the appeal. We dismissed the appeal against conviction, allowed the appeal against sentence and set aside the sentence of ten (10) years at hard labour. We substituted therefor a sentence of eight years at hard labour and ordered that the sentence commence as from 5th September, 1997.

At the time of handing down our decision we promised to reduce our reasons into writing. These reasons now follow.

The facts may be summarised as follows: The complainant Basil Anderson and the appellant Patrick Watson lived at Albert Town in Trelawny. They were engaged in farming and operating a cook shop respectively. In June 1996 there was a dispute between the complainant and the appellant over the price of a Jacket which the complainant sold to the appellant. Following this in August 1996 the complainant went to the appellant's cook shop and demanded $200 from the appellant which sum he claimed as being the balance due on the price of the Jacket. When this sum was not paid there was a quarrel between them.

Following this incident the appellant missed a signboard which was hung upon a post by the side of the road near to his cook shop advertising his business. As a result the appellant, from enquiries made in the area, went that same morning to the complainant's home. On reaching there he called to the complainant who came outside to meet him.

The appellant then accused him that he "tek way mi sign and mash it up." The complainant denied doing so. He then enquired from the complainant as to whether "he had any pumpkin for sale?" The complainant searched his field but found none. On returning he told the appellant that he had no pumpkin. The appellant then requested some yam. The complainant went to his kitchen and took the larger of two pieces of yam and carried it to the verandah. At this stage the appellant was left standing in the yard. He requested that the yam be weighed. The complainant returned to the kitchen for his scale. As he was returning to the front door with the scale in his right hand he was met by a blow to his head which cut him over the left eye. The scale then dropped to the floor. He raised both

hands in an attempt to ward off his attacker. He then felt a blow to his left hand. He was now bleeding from injuries over his left eye and left hand. He bawled out for "murder". A male tenant Junior Frater came out of his room with a sheet and tied up the complainant's head. His attacker had by this time left the scene. Given the manner of the attack he was unable to say who was responsible for his injuries. He said that "he did not see where the blows came from. He only felt it". Following the incident at the complainant's home the appellant had made a report to the police of being attacked by the complainant and of injuring him while defending himself.

Shortly after the incident *the* police came to the complainant's home. He was taken by them to the Falmouth Hospital where he was admitted and treated. Also in the jeep on the way to the hospital was the appellant. The complainant spent twenty-two weeks in hospital before being discharged. He has now lost sight in his left eye and is unable to use his left hand.

The appellant gave sworn evidence in his defence. He testified to being a married man, 22 years of age and of having no previous convictions. He operated a cook shop in Albert Town and had erected a sign for attracting customers both travellers and residents alike. In 1996 there was an incident involving the complainant and himself over a jacket. He had paid the agreed price. The complainant came to him *in* August 1996 *requesting* a further payment of $200. Arising from this demand there was an incident in which he was cut on his finger by the complainant with a machete.

Following this the sign was missing from its location. He made enquiries in the area. He then left his home with his machete on his way to chop another post on which to place a new sign. On the way he stopped at the complainant's premises. There was an argument over the sign. The complainant denied mashing

up the sign. He came from his field with a machete in his hand and following his denial, was in an angry mood cursing and going on bad. The complainant rushed at the appellant and chopped at him with his machete. He shifted the blow and chopped after the complainant with his machete. The point of the machete caught the complainant over his left eye cutting it. The complainant continued coming at him with his machete. He again chopped at the complainant with his machete. This blow caught the complainant on his right hand. The machete then fell from his hand. The appellant then ran up the road and stopped a police jeep that was passing. He told them of the incident and where it took place.

Given the appellant's account of the incident, if accepted as true, in injuring the complainant with his machete he would have been defending himself from a violent attack being made upon him by the complainant, someone with a history of violence who was armed with a machete. In those circumstances the defence of self defence would have availed him thus exonerating him from any responsibility for the charge. A rejection of the appellant's account, however, would have resulted in a finding of guilt on the basis that the complainant's account was the more credible one.

Learned counsel for the appellant sought and obtained leave to argue three supplementary grounds of appeal. Having regard to reasons which will become apparent in the course of this judgment we found ground lto be lacking in merit.

<u>Ground I</u>

> **"The learned trial judge wrongly exercised his discretion not to discharge the foreman of the jury."**

This complaint arose out of a conversation between the complainant and the foreman of the jury at a restaurant during the luncheon adjournment before the

hearing commenced. This conversation related to their family background and their general upbringing. Upon the incident being brought to the attention of the learned trial judge following the resumption, enquiries made of the complainant and the foreman revealed that the entire conversation was an innocent discourse having nothing to do with the case about to be tried. The learned trial judge then exercised his discretion to continue the trial giving as his reason that he saw the matter as being an innocent conversation.

Learned counsel for the appellant submitted that the nature of the conversation was such as to unfairly pre-dispose the foreman to consider favourably the evidence of the complainant. In the circumstances there was a real danger of bias and the foreman should have been discharged.

In our view the proper test in determining the matter is as to whether there is a real danger that the appellant's position has been compromised by the conversation between the complainant and the foreman. The authorities clearly establish that in order for a trial judge to stop a trial in such circumstances his discretion has to be exercised judicially upon the facts as he knows them. See in support ***R. v. Box*** [1964] 1 Q.B. 430; ***R. v. Sawyer*** [1980] 71 Cr. App. R. 283; ***R. v. Spencer*** [1987] A.C. 128.

From the enquiry made, the learned trial judge, in exercising his discretion came to the conclusion that the conversation was an innocent one having nothing to do with the case about to be tried or with the appellant. There was in our opinion no real danger of bias shown hence the conclusion reached on this ground.

Grounds 2 & 3

These grounds which were argued together read:

> **"2. The learned trial judge in giving the direction on the effect of good character wrongly invited the jury to entertain doubt whether the appellant was entitled to the benefit of the good character direction thereby prejudicing the appellant in the jury's eyes.**
>
> **In giving the direction on the unchallenged and uncontradicted character evidence the learned trial judge commented `so, it remains in evidence whether you accept it or not.'**
>
> **3. The learned trial judge was wrong in law in failing to direct the jury that the appellant's good character was a relevant factor to be considered in determining the likelihood of his having committed the offence charged."**

The complaint here was directed at the manner of the learned trial judge's treatment of the evidence of the appellant's character. This came into very sharp focus during the cross-examination of the complainant in which the defence sought to elicit evidence aimed at establishing that the complainant was someone of bad character with a pre-disposition to violence and who by his past conduct therefore was more likely to have been the aggressor during the incident out of which the charge arose.

In this regard the learned trial judge in referring to the complainant in his directions expressed himself in the following manner:

> **"Mr. Foreman and Members of the Jury, if you believe that he has a propensity to be a violent person, then you may believe that on the 30th of August, he did attack the accused man, Patrick Watson. That is what it may lead you to believe, but Mr. Foreman and Members of the Jury, one has to look at the account given by Mr. Anderson and to assess what is called his credibility. In addition to asking questions about his means of knowing things; the opportunity he had to observe things, he may, as in this case, under cross-examination be asked about what is said to be his antecedent or his history.**
>
> **You heard it being said or having admitted that he has been charged two to three times in cases of unlawful wounding. Mr. Foreman and Members of the Jury, as**

> **Counsel pointed out to you, all that has been achieved, if at all, if you accept that - it is for you to decide whether you accept it or not that he admitted that he has been charged. There is no evidence otherwise to say what has become of those charges. The important thing or, I should say, Mr. Foreman and Members of the Jury, it is for you to consider whether or not you, first of all, accept or believe that Mr. Anderson has the propensity to be violent by nature. Therefore, you will say to yourselves, `If he had a propensity, then, surely, he could have done what the accused man is saying he did on the 30th of August,' but Mr. Foreman and Members of the Jury, I must warn you that the purpose of those questions under cross-examination is to try to discredit Mr. Anderson.**

Learned counsel for the appellant relying on the dictum of Lord Taylor of Gosforth C.J. in *R. v. Vye, R. v. Wise and R. v. Stephenson* [1993] 3 All E.R. 241 a decision of the English Court of Appeal submitted that where a defendant is of good character a direction to the jury on the likelihood of the defendant having committed the offence charged is obligatory. In laying down guidelines for English judges the Court said:

> **"In our judgment, the following principles are to be applied:**
>
> **(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.**
>
> **(3) ".**

In *Regina v. Aziz* [1995] 1 W.L.R. 53 in delivering the judgment of the House of Lords, Lord Steyn after reviewing the authorities opined that:

> **"I would therefore hold that a trial judge has a residual discretion to decline to give any character directions in the case of a defendant without previous convictions if**

> **the judge considers it an insult to his commonsense to give directions in accordance with *Vye.***
>
> **This brings me to the nature of the discretion. Discretions range from the open-textured discretionary powers to narrowly circumscribed discretionary powers. The residual discretion of a trial judge to dispense with character directions in respect of a defendant of good character is of the more limited variety. Prima facie those directions must be given. And the judge will often be able to place a fair and balanced picture before the jury by giving directions in accordance with *Vye.* [1993] 1 W.L.R. 471 and then adding words of qualification concerning other proved or possible criminal conduct of the defendant which emerged during the trial. On the other hand if it would make no sense to give character directions in accordance with *Vye.* the judge may in his discretion dispense with them." [Emphasis supplied]**

Learned counsel for the Crown in response submitted that in so far as the appellant was contending that the propensity direction called for in *Vye* (supra) and followed in *Aziz* (supra) as being obligatory, these decisions were wrong. He relied on *R. v. Falealili* [1996] N.Z.L.R. 664, a decision of the New Zealand Court of Appeal to support his contention. He submitted that the absence of previous conviction without more is not evidence going towards proof of good character. He argued that what the House of Lords and the English Court of Appeal were seeking to do was to lay down certain guidelines once evidence of good character was made an issue in the case by the defence. The mere absence of previous convictions is not prima facie ground for a propensity direction to be given. He submitted that there was absolutely no *evidence* of good character coming from any independent source. The very facts of *Aziz* demonstrated the problem of applying a "blanket" rule which makes the need for both directions obligatory.

This submission has much to commend it and is bourne out by the fact that the English Court of Appeal in two separate cases decided since *Vye* have ruled

that a trial judge's residual discretion still exists as to whether to give the propensity direction: vide ***Regina v. H.*** [1994] Crim L.R 205, and ***Regina v. Zoppola- Barraza*** [1994] Crim. L. R. 833. To these decisions may be added ***Berry v. R*** [1992] 3 All E.R. 881 and ***Bernard (Anthony) v. R*** [1994] 45 W.I.R. 296 both Jamaican appeals to Her Majesty's Board Of the Privy Council in which the guidelines were not applied.

From the manner in which the learned trial judge approached the character evidence adduced by the appellant, it was clear that he treated it as being, in the first instance, a credibility issue falling to be resolved on the basis of which of the two conflicting accounts viz that of the complainant or the appellant the jury believed. In determining this question the jury were called upon to consider on the one hand the proven bad character of the complainant on the other hand with the evidence as to the general good character of the appellant.

The question which naturally follows therefore is as to whether in his directions regarding the character evidence of the appellant, a propensity direction was called for in relation to him. Here one needs to be reminded that although the appellant gave sworn evidence attesting to his good character this evidence was directed at the fact that the appellant up to the time of this charge for which he was before the Court had an hitherto unblemished record. There was no evidence adduced from any witness called to give evidence on his behalf during the trial that the appellant was from his conduct unlikely to have committed the offence for which he was charged. Such witnesses as were called followed the verdict and for the purpose of mitigating the sentence to be passed. To call for a propensity direction, there was need for the defence to call some evidence supportive of the known reputation of the appellant. In this event, dependent on the evidence elicited from

the witness the summation of the trial judge would then be tailored to the need for a credibility direction which the appellant's clean record would render obligatory. A propensity direction, at this stage, would only be attempted if the evidence from the supporting witnesses called on his behalf, went towards representing the appellant's character in a more than favourable light. In such a case this evidence would go towards establishing that his account of the incident was the more credible one.

As in this case, the jury were left to determine which of the two accounts was the truth; the issue here was solely a credibility one and no propensity direction was necessary. This was so, as no witness was called to speak to the appellant's good character. Having put his character in issue he was obliged to call some independent evidence to support this claim on his part. In the absence of this evidence the matter fell to be resolved solely on the basis of the accounts related by the complainant and the appellant. The issue here being which of the two versions was the more credible.

There was no complaint being advanced as to the learned judge's directions on the credibility issue. We were of the opinion, therefore, that the circumstances in this case were such as not to call for any direction based upon propensity. This complaint accordingly fails.

It was for these reasons at the conclusion of the hearing we dismissed the appeal in terms of the order set out at the commencement of this judgment.