The Court Of Appeal For Bermuda

CRIMINAL APPEAL NO. 13 OF 2006

Between:

HARRON LEE EVANS

Appellant

-V-

THE QUEEN

Respondent

Before: **Hon. Justice Zacca, President**
Hon. Justice Evans, JA
Hon. Justice Stuart-Smith, JA

Date of Hearing: **3rd & 4th March 2008**
Date of Judgment: **19th March 2008**

PRESIDENT:

JUDGMENT

1. On November 8, 2006 the appellant was convicted by the verdict of a jury on the following Counts of an Indictment:

   (1) Wounding with intent contrary to Section 305(a) of the Criminal Code.

   (2) Willful damage contrary to Section 448(1) of the Criminal Code.

   (3) Offensive weapon contrary to Section 315(1) of the Criminal Code.

   On December 13, 2006, the appellant was sentenced:

   (1) 5years imprisonment

   (2) 18 months imprisonment

(3) 18 months imprisonment.

All sentences were made to run concurrently with time spent in custody to be taken into account.

2. On Wednesday, January 5, 2005, at about midday, Kuma Smith (Smith) borrowed a motor cycle from Tieu Basden. He rode the bike to Deepdale East (also known as One Way Deepdale.) He had gone there to see someone. Whilst sitting on his bike with his helmet on, he was talking to this person when he suddenly felt a sharp blow to his right shoulder. He felt it bleeding.

3. Having turned around, he saw one Davon standing one or two feet behind him. He assumed that it was Davon who had wounded him and he grabbed Davon and punched him with his fist. Davon fell to the ground. Smith was about to leave with his bike when he saw Kono and Jamicho coming towards him with machetes. He ran leaving the bike because he was afraid. He eventually ran down Parsons Road. Kono is Akono Parsons who was jointly charged with the appellant and who was also arrested but is not before the Court.

4. Smith saw two bikes coming towards him. Two persons were on one bike and one person on the other bike. One of the bikes was the one he had been riding earlier. He recognized Kono and the appellant on the bikes. He was able to see the appellant's face. He had seen the appellant on the porch from which Kono came off with a machete.

5. Whilst running Smith saw a dump truck traveling down Parsons Road Hill. He attempted to stop the truck and he continued running until he caught up with the truck and attempted to pull himself into the truck and eventually got into the truck. The appellant and Kono forced the driver to stop the truck.

6. The appellant was on one side of the truck and Kono on the other side. The appellant had a hoe and Kono had a machete. Kono swung the machete at him and the appellant swung the hoe at him. He received several injuries from the machete

and the hoe. He received one injury from Kono on the left side of his head and he also saw that his "pinky" finger on his left hand was hanging. The medical evidence revealed that the injuries to Smith included:

(1) Mass multiple lacerations mainly to the left arm.

(2) Superficial lacerations to his right shoulder.

(3) A depressed skull fracture with skull lacerations. The fracture wound had to be washed out and stabilized with a plate.

(4) Lacerations to tendons in his fingers.

(5) Traumatic amputation of his ring finger. The arteries and the veins and the nerves were all severed.

7. Before leaving the scene, the appellant went up to the bike which was in front of the truck and chopped the bike with the hoe damaging it. This was the bike which Smith had borrowed.

8. Smith testified that he had known the appellant for some ten years and would see him around and about once per week here and there in Bermuda. He also said that the appellant used to live in his neighbourhood in St. Georges.

9. Smith was the only eye witness called by the Crown who gave evidence of the attack on the truck. The truck driver, Howard Hayward, whilst corroborating the evidence of the attack by two men, was unable to identify either of them. He stated that the hoe was taken from his truck but that the machete did not come from his truck.

10. Mia Simons testified that she saw Kono and the appellant on January 5, 2005. She witnessed an incident between Smith and Davon. Smith ran and she saw Kono, the appellant and Davon running down the one way which would take you to Two Way Deepdale.

11. The appellant gave sworn evidence in his defence. He stated that on January 5, 2005 at about 2 p.m. he was on the porch at one Michelle's house. Several

persons were there playing dominoes. He saw when Smith drove up. He had known him from playing football in Dandytown.

He witnessed an incident between Smith and Davon. He saw Smith run off and lost sight of him. He remained on the porch playing dominoes. Sometime after he heard sirens waling and he and his friend both walked to the top of the hill to a green house where Zuills lived and he remained there until the evening. He was eventually arrested. Clothes were taken from him and scrapings from under his fingers were taken and his mouth swabbed. Forensic examination was conducted. The hoe which was recovered was dusted for fingerprints. This evidence did not assist the Crown's case in any way. The defence was an alibi and the Appellant denied that he had attacked Smith.

12. Under cross examination by Crown Counsel, the Appellant's evidence was to the following effect in relation to whether he knew Smith:

(Q) You would agree with me that up to the 5th January 2005 Kuma was no stranger to you?

(A) "I knew him, but not to speak to one to one."

He had seen him around and by the 5th January 2005 he knew him by face

(Q) Much so that you are able to recognize him when you saw him on the 5th January 2005.

(A) Yes, it is a possibility that Smith could know me. He has known Smith from the streets. He is known as a man to terrorize people.

The Appellant admitted that Davon was his friend and that he knew him for ten to twelve years. They were close friends and he would refer to him as his 'ace boy'. The Crown was alleging that as a result of Smith punching Davon to the ground, the appellant and Kono went after Smith. In his evidence, the appellant was alleging that he was known to Hayward. This was never put to Hayward by defense Counsel.

13. Miss. Victoria Pearman, who appeared for the appellant, relied on the following grounds of appeal:

(1) The learned trial Judge failed to give any or any sufficient consideration to the application for a mistrial.

(2) The learned trial Judge failed to give any or any sufficient consideration to the effect on the fairness of the proceedings of evidence of the appellant's previous convictions and the nature of the same.

(3) The learned trial Judge erred in law in that she seemingly dismissed the application for mistrial on her findings that the evidence had been elicited by counsel for the defense.

(4) The learned trial Judge erred in law when she failed in summing up the case to the jury to indicate by reference to the evidence the weakness of the evidence of the identification of the appellant.

(5) The learned trial Judge misdirected the Jury when she directed them that it was open to them rely on the appellant's previous conviction/bad character to assist them in assessing the appellants credibility.

14. Grounds 1-3

These grounds were argued together. The matter arose in this way. Defense Counsel was questioning Smith as to his knowing the appellant prior to the attack. It was being suggested to him that he did not know the appellant.

Mr. Richardson: I suggest to you didn't know Harron (appellant)

Answer: "Your suggestion is wrong." "He told the police his name was Harron." "I have done time with Harron. I have been to Jail with him."

An application was made by Ms. Pearman for the discharge of the Jury. This was denied by the learned trial Judge. Defense Counsel persisted in cross-examination of Smith as to where he saw him in custody.

Question: Well I am asking you, can you be sure that whilst you were either at the Farm or at Westgate, that Mr. Evans was in one of the other facilities, at the same time?

Answer: I; I can... I can… I can recall that, yes.

Question: And how are you able to recall that

Answer:	Well because I can recall…. I ain't sure if I can say this.
The Court:	Well, he has asked the question.
Witness:	I can, …I can recall a bank robbery going down in '97. It wasn't too much time after that that I was incarcerated so by chance, he could have been in Maximum and I could have been on remand.
Question:	Did you see him in maximum
Answer:	I believe I have seen him.

There was then an exchange between the Judge and Mr. Richardson.

The Court:	But the thing is, though, Mr. Richardson (Sir), you asked him – you asked him – I'll have to go back to the tape, I didn't write it. You said – you asked him a specific question and wanted the explanation.
Mr. Richardson:	Yes, I asked him a specific question, my lady as to how he could be sure.

There was further exchange between the Judge and Mr. Richardson who was seeking to have the Jury discharged.

The Court:	I can't believe that Mr. Richardson – I keep calling you Mr. Richards and Mr. Richardson. Do forgive me. I can't believe you continue to pursue that line of questioning because I saw it coming.
Mr. Richardson:	But my Lady, so did I, that's why I tried to handle it during the voire dire, so I would know.
The Court:	Yes, but then if you handle it during the voire dire, and you continued once you got the answer, instead of leaving the area you just continued and continued and then that came out.

Finally the trial Judge made her ruling:

The Court: Well, Mr. Richardson, I have heard you and I've certainly, you know, given weight, you know, due weight to your submissions, but I am not withdrawing this case from the jury, based on that second comment.

15. It is unfortunate that neither the Judge nor Mr. Richardson thought that the jury could be sent out and in their absence ascertain from the witness what it was he was about to say when he stated " I ain't sure if I can say this" If this had been done, the evidence might have been avoided

16. In his examination in chief, the appellant was asked by defence Counsel about his previous conviction. He admitted that he had been to prison on a charge of robbery. It appears therefore that in addition to what was said by Smith, the appellant put his character into evidence.

17. It was submitted by Miss. Pearman that the jury ought to have been discharged because of the prejudicial effect of the evidence. She submitted that the reason given by the Judge not to discharge the jury was the fact that the evidence was brought out by the defence and that the Judge wrongly exercised her discretion.

18. It is accepted that the law now is that it is in the discretion of the judge whether or not to discharge the jury and that the Court of Appeal will not lightly interfere with the exercise of that discretion. Archbold Pleading Evidence and Practice 2006 pgh 13-103 pg 1432; RvWeaver (1967) 1 ALL ER 277. In *Weavers* case, Sachs L.J. delivery the judgment of the Court said at pg 280:

> "*the modern practice evolved in the light of these cases is that in essence the matter now, as has been often said (see for instance, a passage which appears in R V Parsons(5) is that the decision whether or not to discharge the jury is one for the discretion of the trial judge on the particular facts, and the Court will not lightly interfere with*

the exercise of that discretion. When that is said, it follows, as is repeated time and again that every case depends on its own facts. As also has been said time and time again it thus depends on the nature of what has been admitted into evidence and the circumstances in which it has been admitted….. looking at the case as a whole is the correct course. It is very far from being the rule that, in every case, where something of this nature gets into evidence through inadvertence, the jury must be discharged. This particular case is a quite common type of case. The facts were brought into the cognizance of the Court by questions put by Counsel for the appellants. There was nothing in those particular matter which introduced such a degree of prejudice that it could not be cured by the judge acting wisely in his discretion in the later stages."

Se also R V William Richard Palin [1969] 53 CR. APP R 535.

In our opinion having regard to the facts and circumstances in this case, it cannot be said that the learned trial judge wrongly exercised her discretion in not discharging the jury.

19. Ground 4

Ms. Pearman submitted that the identification of the person who attacked Smith was in issue as the only witness who had identified Kono and the appellant was the witness Smith. The appellant denied that he was one of the men who attacked Smith. It was therefore incumbent on the trial judge to give careful direction on the issue of identification. These included specific directions to the jury, pointing out to them the strengths and weaknesses of the identification evidence. She argued that the trial judge failed to do so. Whilst not challenging the general directions given by the judge on identification evidence, it was submitted that the

failure of the judge to point out the weaknesses of the evidence amounted to a misdirection or a non-direction.

20. Ms. Pearman pointed to the following matters which she said could be regarded as weaknesses in the identification of the appellant.

(1) Hayward's evidence that the attackers were wearing crash helmets. Smith's evidence was that they were not wearing crash helmets.

(2) Smith accepted that his attention was drawn between the two attackers, one on the left and the other on the right. He concentrated more on the man with the machete.

(3) A police witness stated that having received certain information whilst in mobile patrol, he went to Glebe Road where he saw Smith bleeding profusely. Smith spoke to him and he moved toward the East and he saw four young men walking at a fast pace. One of them looked back and he was in possession of a hoe in his right hand. He approached the men, shouted to them to stop. The man with the hoe escaped. He described the man with the hoe as tall with ginger-brown hair. He never got a chance to see his face. This event was subsequent to the attack and the hoe could have been in the possession of someone else at the time. It was submitted that the appellant does not have ginger-brown hair.

21. Ms. Pearman referred the Court to Edwards V The Queen [2006] U.K. P.C. 23. Lord Carswell at p. 29 stated:

> *"The prosecution case on identification had sufficient strength to be left to the jury, which may well have been entitled to accept it as sufficiently proved, despite its weaknesses. It was incumbent on the judge, however, to give careful directions to the jury, setting out fully the strengths and weaknesses of the identification, linking the facts to the principles of law rather then merely rehearsing those principles. Their Lordships do not*

consider that the directions given by the judge were as clear or full on the case required."

The weaknesses identified in *Edward's* case were such as to cause concerns which led their Lordships to conclude that the conviction could not be regarded as safe. These weaknesses were such that the identification evidence was compromised.

22. In the case before us, it cannot be said that the weaknesses relied on by the appellant were such as could lead the Court to say that the recognition of the appellant was in difficult circumstances. The appellant had stated that he knew Smith and that Smith knew him.

The prosecution's case on identification was sufficiently strong. The jurors were aware of the evidence which was rehearsed by the trial judge and would have considered whether this evidence would lead them to say that they were in any doubt as to the identity of the attackers. There was therefore, no error on the part of the judge.

Ground 5

23. Ms. Pearman submitted that the trial judge misdirected the jury when she told them that they could rely on the appellant's previous conviction to assist them in assessing his credibility.

24. Mr. Field, Director of Public Prosecution, submitted that defence Counsel brought out the evidence of the previous conviction during the evidence of the appellant and put the character of the appellant in issue. Defence Counsel had also elicited the evidence as a result of persisting in the cross-examination of Smith. The character of both Smith and the appellant were in issue.

25. In her summing up, the learned trial judge at page 65 said:

> *"What is the relevance of the defendant's conviction in this case? The only reason why you have heard about this previous conviction is that knowledge of the character of the defendant may assist you to judge the truthfulness of his evidence when you come to consider this matter.*
>
> *You must not automatically assume either that the defendant is guilty or that he is not telling the truth just because he has previous convictions. His convictions are not relevant at all to the likelihood of his having committed the offence. Nor are they evidence that the defendant committed the offence for which he now stands trial? They are relevant only as to whether you can believe him. You do not have to allow these convictions to affect your judgment. It is for you to decide the extent to which, if at all, his previous convictions help you about that."*

The learned trial judge also directed the jury that they could consider the previous conviction of Smith in assessing his credibility.

26. The trial judge made it clear that the evidence of the previous conviction only related to the issue of credibility of the appellant. RV Khan, [1991] CR. L.R. 51. RV Vickers [1972] Crim L.R. 101.

27. In our view it cannot be said that the directions of the trial judge amounted to a misdirection.

For these reasons, we concluded that the grounds of appeal failed.
The appeal is dismissed and the conviction affirmed.

Signed

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Zacca, President

Signed

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Evans, JA

Signed

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Stuart-Smith, JA