In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2014: CRIMINAL APPEAL NO: 38

BRUCE COLIN MENZIES

Appellant

-v-

THE QUEEN

Respondent

JUDGMENT
(In Court)

Date of Hearing: June 23, 2015
Date of Judgment: June 26, 2015

Ms. Auralee Cassidy, Kairos Philanthropy, for the Appellant[1]
Ms. Nicole Smith, Office of the Director of Public Prosecutions, for the Respondent

Introductory

1. On January 6, 2014, the Appellant's former attorneys filed a Notice of Appeal against the decision on December 18, 2013 of the Magistrates' Court (Worshipful Khamisi Tokunbo) convicting him of doing grievous bodily harm contrary to section 306(a) of the Criminal Code. The offence occurred on September 8, 2012.

2. The Complainant suffered "*an undisplaced transverse fracture…in the right forearm…compatible with blunt force trauma to a raised forearm held in a defensive position.*" The Appellant admitted kicking the Complainant but asserted he did not realise it was his romantic partner and believed she was an intruder in circumstances where he had woken from sleep, the parties heads accidentally clashed, but he believed he had been attacked.

3. The appeal against conviction was filed before sentencing with the unhappy result (from a speedy justice perspective) that all further proceedings in the Magistrates' Court were stayed pending appeal. After delivering Judgment on December 18, 2013,

[1] Ms. Cassidy did not appear in the Court below.

a social inquiry report was ordered and the matter was adjourned to February 11, 2014. On January 6, 2014, a Notice of Appeal against conviction was filed. And on February 11, 2014 the Appellant was granted bail pending appeal.

4. On November, 2014, the Registry asked counsel for the Appellant to confirm that the appeal record which had been made available was complete and to confirm that it was still proposed to proceed with the appeal. A request was made by counsel to supplement the record although it was pointed out that he was no longer retained. Once the Appellant's contact details were obtained by the Court, a Notice of Hearing for March 31, 2015 was sent out on or about February 10, 2015. On March 24, 2015, one week before the scheduled hearing, the Appellant acting in person filed a Notice of Abandonment of Appeal.

5. On April 2, 2015, the Magistrates' Court very promptly (after a delay of 15 months secured by the Appellant's aborted appeal) proceeded with the stayed sentencing hearing and the Appellant was sentenced to six months' imprisonment and ordered to pay the victim's medical expenses.

6. On April 20, 2015, he applied by Summons in the abandoned appeal proceeding for an order restoring the previously abandoned appeal. The application to restore was heard on May 28, 2015 and judgment was reserved to afford the Crown the opportunity to file written submissions, if so advised, on or before June 5, 2015.

7. Unsurprisingly the Crown was unable to formulate any opposition to the very liberal guiding principles on appeal restorations upon which the Appellant relied. The Appellant deposed that he abandoned his appeal because he did not obtain Legal Aid, his lawyer withdrew and he believed (based on non-legal advice) that he might be sentenced more harshly if he proceeded with his conviction appeal.

8. On June 11, 2015, I declared the abandonment of the appeal was a nullity and further directed that the appeal should be listed as a matter of urgency in light of the shortness of the sentence the Appellant was serving[2].

Grounds of Appeal

9. Ms. Cassidy technically relied upon the restored Notice of Appeal but substantively relied on a refinement of original grounds (i) to (iii) with the addition of a new ground (iv). Her impressive formulation of the legal principles applicable to the various defences raised at trial was not challenged by Ms. Smith.

Did the Learned Magistrate err in law and/or in fact in ruling that the Appellant was not operating under a mistake of fact/acting in self-defence or under provocation?

10. Ms. Cassidy correctly submitted that since the House of Lords case of *DPP-v-Morgan* [1976] AC 182, it has been accepted that the defence of mistake of fact may succeed

[2] *Menzies-v-R* [2015] SC (Bda) 34 App (11 June 2015).

if the accused honestly believed that the mistaken facts to be the case, subjectively, even if his subjective belief was not objectively reasonable. The issue of reasonableness is only relevant to the triers of fact deciding whether or not to accept the accused's assertion as to the nature of the facts as he mistakenly believed them to be.

11. The relevant provision of our Criminal Code is similar to the way in which the old common law defence was formulated:

> "38. *Without prejudice to any provision of law to the contrary, any person who does any act or makes any omission under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.*"

12. In light of Ms. Smith's declining to challenge the legal proposition that section 38 is under Bermudian law construed in line with the English common law interpretation, I will assume for the purposes of the present appeal that this is the correct legal position.

13. To the extent complaint is made that it was not open to the Learned Magistrate to find that the Appellant was <u>not</u> honestly mistaken, I summarily reject this submission. Mistake was rebutted by the Complainant, whom the Magistrate essentially believed, and asserted by the Appellant, whose evidence on this issue was rejected. The legal complaint is then made that the Learned Magistrate failed to apply the correct legal test in rejecting this defence because he ought to have determined the availability of the defence based on the Appellant's perceptions as to what was happening. The Appellant's counsel relied upon the Judicial Committee of the Privy Council decision in *Beckford-v-The Queen* [1987]UKPC1[3]. In that case, the following Judicial Studies Board direction for juries was approved (at page 9 of the transcript):

> "*Whether the plea is self-defence or defence of another, <u>if the defendant may have been labouring under a mistake as to the facts</u>, he must be judged according to his mistaken belief of the facts: that is so whether the mistake was, on an objective view, a reasonable mistake or not.*" [emphasis added]

14. A jury must be directed, consistent with the burden of proof being on the Crown, that if they consider the accused "*may have been*" mistaken, he must be judged according to his mistaken view of the facts. Just as a jury is entitled to reject any possibility (or reasonable doubt) as to whether the accused was mistaken, and not proceed to

[3] [1988] 1 A.C.130.

consider what consequences flow from that possibility, so is a Magistrate. If the converse were true, as was implicitly suggested here, an accused person would only have to raise the defence of mistake to gain the benefit of it. What the Learned Magistrate clearly found was the following:

> "*I find that he was awake and aware that only he and the Complainant were present in his bedroom after he was awaken*[ed] *by what he calls the explosion in his mouth. I find as a fact that he did spring up suddenly and he and the Complainant's heads clashed in the bed, causing injury and bleeding to his mouth and bruising and a black eye to the Complainant. I find that eh momentarily complained to the Complainant about his mouth injury and knew it was the Complainant to whom he was speaking.*
>
> *He next became angry and pushed her off the bed. On this finding the Defendant was not honestly mistaken as to who was present before him or under the mistaken belief that he was under attack by the Complainant or any other person…I find that he Defendant knew who he was kicking on the floor and that he kicked her more than twice and he was not under any honest and reasonable belief that he was kicking an intruder who had attacked him….therefore there was no self-defence to which the Defendant had to use to protect or preserve himself.* "

15. It is true that the Learned Magistrate did not state how he would have assessed the viability of the defences if he felt that they potentially arose. He did not explicitly say: "I do not find that it was possible that he was mistaken, but had I done so, I would have considered the merits of the defences based how things would have appeared to him." But having clearly found that the mistake-based defences did not arise there was no need for the Learned Magistrate to set out a treatise as to aspects of the law of mistake did not fall for determination. Indeed, as I observed in the course of argument, legally qualified judges are presumed to know the law. As Ward JA pointed out in *Brangman-v-The Queen* [2012] CA (BDA) 13 Crim (18 November 2013); [2013] Bda LR 81:

> "13. *There is no onus cast upon the Magistrate to discuss his treatment of the law applicable to the case in which he is giving his decision and to set out the directions which he gives himself in the making of his decision. He is presumed to know the law. Such a requirement would be unduly onerous and would detract from the speedy determination of summary trials...*"

16. The same essential complaint is made as regards the rejection of the more subjective version of the defence of provocation in section 255 of the Criminal Code[4], namely,

[4] The general defence under section 254 appears to be an objective one.

that it was necessary to consider whether it was reasonable for the Appellant to have been provoked on his mistaken view of the facts. Section 255 provides as follows:

> "*A person is not criminally responsible for an assault committed upon a person who gives him provocation for the assault, if he is in fact deprived by the provocation of the power of self control, and acts upon it on the sudden and before there is time for his passion to cool:*
>
> *Provided that the force used is not disproportionate to the provocation, and is not intended, and is not such as is likely, to cause death or grievous bodily harm.*"

17. The Learned Magistrate rejected this defence (having previously rejected mistake of fact and mistake-induced self-defence) in the following substantially consistent terms:

> "*She did not give him any provocation in law and he was not mistaken about her identity. In any event if I am wrong on this, I would also find that the multiple kicking of the Complainant to the upper body while she was on the ground was force disproportionate to the provocation the Defendant was acting under, and was intended and likely, to cause Grievous Bodily Harm.*"

18. I find that no misdirection in law and/or fact occurred and reject this broad ground of appeal.

Did the Learned Magistrate err in law and fact by finding that if provocation had occurred, the defence failed because he intended to cause grievous bodily harm?

19. The primary finding on the defence of provocation was that the defence of provocation did not arise on the facts. This was clearly open to him and did not require him to consider whether had the facts been otherwise, the Appellant might have been provoked. The Learned Magistrate's alternative finding does not strictly arise for consideration and perhaps properly may be viewed as a conditional finding which would only crystallize if this Court set aside the primary finding that the defence of provocation was not available. It would not be satisfactory, however, to dismiss this finding on these technical grounds alone.

20. In my judgment it would not properly have been open to the Learned Magistrate in a case where the Appellant was merely charged with "*doing grievously bodily harm*" to make an alternative finding that he intended to cause grievous bodily harm. Had a formal operative finding been made in this regard, it would be liable to be set aside on the grounds that it was not supported by the evidence or had been reached in breach of the rules of natural justice. That 'finding' was, in effect, that an aggravated version of the offence (with which the Appellant had not even been charged) had in fact been proved by the Prosecution. Indeed, there is no suggestion in the Record that the Appellant had an opportunity to meet the argument that the force he used evinced an intention to cause grievous bodily harm. Nor is there any suggestion that such an

allegation even formed part of the Prosecution's case. Ms. Smith's adroit response to the Defence submissions on the law was clearly accepted by the Learned Magistrate, and was recorded in the following terms:

> "*Starting point for the Court is whether there is any mistake of fact,* [if not] *other defences fall away.*"

21. Subject to the above qualifications, I find that no operative misdirection in law and/or fact occurred and reject this ground of appeal.

Were the Appellant's constitutional fair trial rights breached and/or did a miscarriage of justice occur for the purposes of section 18 of the Criminal Appeal Act 1952?

22. Two separate complaints were made in Ms. Cassidy's written Submissions in support of what I will consider as one composite ground of appeal. The first was that the duration of the trial deprived the Appellant of his constitutional right to a trial within a reasonable time. The second complaint was that the judgment of the Magistrates' Court is unsafe having regard to the various inconsistencies in the Complainant's evidence which were not adequately taken into account reflecting a failure to apply the correct burden of proof.

23. The first complaint was neither addressed in oral argument nor supported by authority and can be dealt with shortly. It was asserted without contradiction that evidence was heard on four occasions between February 5, 2013 and April 11, 2013 in relation to an incident which occurred on September 8, 2012. There were then four adjournments between April 11, 2013 and November 25, 2013 when the Defence case was finally heard. Having regard to the comparative simplicity of the matter and the overall timeline of a trial starting within just over 5 months of the offence being committed and concluded just over 15 months after the offence was committed, it is unsurprising that this constitutional complaint was not seriously pursued.

24. As a freestanding constitutional complaint, a formal application under section 15 of the Constitution would have had to be filed after the Appellant had exhausted his appeal rights in any event. As a complaint about the fairness of the trial, in my judgment there is no basis for any concerns that the pattern of adjournments impacted in substantive terms on the fairness of the proceedings in a way which prejudiced the Appellant.

25. While the protracted nature of the trial is far from ideal, the trial was conducted in a substantially reasonable way. The Appellant's own evidence was heard on one day November 25, 2013, and the Judgment was handed down on December 18, 2013, just over three weeks later. The Complainant's evidence was heard on one full day on February 5, 2013, nine months previously. The adjournments were to adduce peripheral Police and medical evidence. Any delay appears to me to have accorded the Appellant an enhanced opportunity to raise a doubt in the Magistrate's mind while the Complainant's evidence was less fresh in his mind. On the other hand, the key

Prosecution evidence, the testimony of the Complainant, was not broken up so that the Court had an opportunity to focus carefully on it.

26. The delay ground of appeal fails.

27. The Appellant further complains that the Learned Magistrate both failed to properly assess the reliability of the Complainant's evidence and to apply the burden of proof. The first limb of this double-barrelled complaint amounts (at the highest) to an invitation to this Court to substitute its views on matters of credibility and (at the lowest) to a complaint that the Learned Magistrate failed to set out in his Judgment each and every inconsistency and why he considered it not to be a material one. Exceptional circumstances would be required to justify this Court interfering on matters of credibility, for instance where there was a serious risk that major inconsistencies were wholly ignored by the trial judge. As Ward JA again opined in *Brangman-v-The Queen* [2012] CA (BDA) 13 Crim (18 November 2013); [2013] Bda LR 81:

> "*12.The issue in this case was one of credibility. The experienced and learned Magistrate believed the evidence of the complainant, MC, and disbelieved that of the Appellant. The Magistrate had the opportunity to see and hear the witnesses and to make his assessment of their credibility. The making of primary findings of fact was his responsibility and it is only in very rare cases that an appellate court, which did not have the opportunity of seeing and hearing the witnesses, can substitute its own findings of fact for those of the learned Magistrate.*
> *Crockwell v Miller (Police Sergeant) 2012 SC (Bda) 47 App.*"

28. In the present case there is no sufficient basis for complaining that important inconsistencies were ignored altogether and none of the matters to which the Appellant's counsel referred appeared to be "earth-shattering" inconsistencies. There is, accordingly, no basis for undermining the following findings on inconsistencies between her statement to the Police and her trial testimony made by the Learned Magistrate:

> "*I have now reviewed all the evidence in this case, including the Defendant's police interview, and recalled the demeanour of all witnesses. The Complainant was found to have given some testimony in Court which conflicted with her police statements. However she was not <u>proven</u> to be inconsistent or conflicting on some substantially material points.*" [emphasis added]

29. At first blush, this passage in the Magistrates' Court Judgment formed the basis of the plausibly legitimate complaint that the Learned Magistrate failed to correctly apply the burden of proof. It implies that he regarded the Defence as being obliged to 'prove' the unreliability of the Complainant as the Prosecution's key witness. Is this a

'smoking gun', comparable to the "Freudian slip" the Learned Magistrate accused the Appellant of making while under cross-examination? Are the final words of the Judgment ("*Accordingly I am satisfied so that I feel sure that the Defendant is guilty of the offence as charged*") merely a hollow ritual incantation? The answer to both of these questions is, on careful analysis, a resounding "no". On any objective and fair reading of the Judgment, the use of the word "proven" must be viewed in context as a 'slip of the pen'. That is because the word appears in a sentence which is followed by a recitation of those "*substantially material points*" supported by the Complainant's evidence which the Learned Magistrate implicitly and properly found the Crown had 'proved':

> "*However she was not proven to be inconsistent or conflicting on some substantially material points. They* [i.e. the substantial material points which were proved by the Crown] *include:…*[the Judgment next lists the various key findings which formed the basis of the conclusion that the Appellant was not mistaken about being attacked]… *In my view I found the Complainant to be a credible witness.*"

30. These complaints are accordingly also rejected.

Is the conviction unsafe because the evidence did not support the "grievous bodily harm" element of the offence?

31. Ms. Cassidy relied on the ruling of Greaves J in *R-v-Symonds* [2014] SC Crim (Bda) 96, and the authorities cited therein, in support of her client's most compelling ground of appeal. Her central submissions supported by reference to these authorities were the following:

> "*80. Rosyln Bascombe-Adams was the emergency physician who attended to the Complainant when she was treated at the Hospital. She was admitted as an expert witness for the purposes of this case…Her observations were that then Complainant sustained a blunt force trauma. Typical healing time of four to six weeks. The skin was not cut or deformed. The injury was treated with a backslab or commonly known as a half cast, which is used to stabilize the fracture site. If advised backslab to be moved a week later then the fracture clinic surgeons are satisfied that the injury [is] of the nature of an undisplaced fracture…*
>
> *82. The injury sustained to the Complainant, which while serious, it is respectfully submitted does not pass the threshold required for grievous bodily harm…*
>
> *88. It is respectfully submitted that the injury of an undisplaced fracture to the Complainant's forearm does not amount to grievous bodily harm an don the evidence constitutes no more than actual bodily harm, which is defined in law as any injury that interferes with health or comfort (section 3 of the Criminal Code).*

89. In the case of Symonds (2014) the level of assault for Actual Bodily Harm is defined as broken teeth, temporary loss of sensory functions/consciousness, extensive multiple bruising, displaced broken nose, minor fractures and so on."

32. In *Symonds*, the accused applied to quash an indictable charge of grievous bodily harm with intent. He was the Respondent in certain divorce proceedings and was accused of a vicious attack on his ex-wife's lawyer following a Chambers hearing in the precincts of Sessions House. The application was heard by Supervising Judge of this Court Original Criminal Jurisdiction, Greaves J. He firstly described the nature of the alleged offence and the injuries sustained by the complainant in that case:

"*2…The DPP, on the evidence he considered disclosed in the depositions, indicted the defendant on charges of grievous bodily harm with intent to do grievous bodily harm and unlawful deprivation of liberty, contrary to the same sections.*

The evidence in the depositions is that the defendant was the respondent in certain divorce proceedings and the complainant was the attorney for petitioner. The defendant failed to comply with an ancillary order and upon further application by the complainant on behalf of the petitioner, the judge, in chambers, granted an order that the respondent pay to the petitioner, a sum of $60,000 within a number of days or the judgment was to be satisfied against a house owned by the respondent in an overseas jurisdiction. Apparently a further order was also sought or made for the defendant to pay costs of $35,000.

Upon demitting the judge's chambers, the defendant, upset by the result of the proceedings, attacked the complainant. He grabbed her by the neck, choked her, threw her to the ground, straddled her, hit her head against the ground and with his fist, delivered several blows to her, including to her face, until he was pulled off her by several witnesses. She was shortly thereafter taken to the hospital by ambulance where she was attended by a physician.

The complainant, in a statement, bearing a certificate in accordance with the Indictable Offences Act, made the same day, said she was diagnosed with multiple facial contusions, left side peri-orbital hematoma, soft tissue injury to her left upper chest, sprained left wrist and massive headache.

In a further statement some days later, not bearing the certificate, she added that she continued to suffer pain and suffering, her left eye had been completely closed for a number of days and was now opening again and was very painful, the side of her face was bruised, swollen and very painful, her jaw was so painful, it required her to eat soft food for days, her neck and throat were so inflamed and sore it made it painful to swallow, her lower chest was very painful, deeply bruised, left wrist very sore, due to his twisting and bending of them when he attempted to break her arm, her right shoulder was bruised and banged, the most painful was her head and headaches which remained a constant feature, for which she took codeine and advil. These all day headaches were emanating from her neck and shoulders up through her back and skull and also from her left temple and eye to the front of her head, with no feeling over her right temple. Her

left arm was so painful she was unable to lift it above her waist without pain. She continued to suffer flashbacks and will seek counselling to deal with these post-traumatic stress symptoms. She continues to be afraid of the defendant whom she said has a long history of violence. She provided no expert report relating to her mental stresses.

The emergency physician's report diagnosed her with bruising around the left eye, bruising with tenderness on the left side of face, abrasion on the occipital area (back of scalp), tenderness on palpation over the left upper chest, small bruise over the distal part of the left forearm. A cat-scan of the head showed no bony or internal injuries and a chest X-ray was normal. She was treated with analgesia and advised to follow up with her general practitioner if any further developments.

Some days later, a medical report from another doctor diagnosed her with residual issues from the assault, including, on-going left eye, face, jaw, neck and left shoulder pain, headaches, reduced movement of the left shoulder, presently unable to lift heavy objects with her left arm, neck muscles still in spasm. She was treated with diazepam."

33. Looked at in the round, it is clear that the cumulative nature of the injuries sustained by the victim in *Symonds* was more serious (and unarguably no less serious) than those suffered by the Complainant in the present case. Greaves J secondly summarised the main submission advanced and the relevant provisions of the Bermudian and Queensland Criminal Codes:

> "3. *Counsel for the defendant submits that the above injuries do not constitute grievous bodily harm and on the evidence constitute no more than actual bodily harm, which should lead to a charge of assault occasioning actual bodily harm, contrary to section 309 of the Code.*
>
> *4. Section 3 of the Code, defines bodily harm as meaning, any bodily injury which interferes with health or comfort. Section 309, entitled, assault occasioning bodily harm, provides that, any person who unlawfully assaults another and thereby does him bodily harm, is guilty of a misdemeanour, and is liable upon conviction…on indictment to imprisonment for four years.*
>
> *There is no dispute that upon the above facts, such an offence would be satisfied. Section 305(a), provides that, any person who with intent to do some grievous bodily to any person, unlawfully wound or does any grievous bodily harm to any person by any means whatsoever is guilty of a felony, and is liable to imprisonment for ten years.*
>
> *Section 3, defines grievous bodily harm as meaning any bodily harm of such a nature as seriously to interfere with health or comfort.*
>
> *5. The Bermuda Code was taken from the Queensland Criminal Code and it is often useful to find guidance therefrom but in this instance this latter definition is quite different to the definition of grievous bodily harm at section 1 of the Queensland Code.*

There, it is defined as meaning, (a) the loss of a distinct part or an organ of the body; or (b) serious disfigurement; or (c) any bodily injury of such a nature that, if left unattended, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health; whether or not treatment is or could have been available.

6. It would seem therefore, as the prosecutor suggests, that on the face of the section in the Bermuda Code, the threshold for Grievous Bodily Harm appears to be lower than that in the Queensland Code. On the other hand, when a careful analyst is done of the Bermuda definition and the common law cases it may appear that there is no real difference between the Queensland definition and that intended by the Bermuda Code."

34. He then summarised the UK '*Charging Standards Guidelines*' upon which Ms. Christopher for the accused in *Symonds* relied:

"7. ..She also referred *She also referred to the UK Charging Standard Guidelines, of 1996 agreed between the Crown Prosecution and the police. These guidelines lay out a policy and practice regarding the types of injuries normally attracting a charge of actual bodily harm, grievous bodily harm, wounding, and other assaults, with a caution to avoid over charging where the circumstances or the degree of injury do not merit it.*

For example, upon a choice between assault and actual bodily harm, assault maybe preferred where there are grazes, scratches, abrasions, minor bruisings, swellings, reddening of skin, superficial cuts, a black eye; actual bodily harm may be preferred in cases of loss or broken tooth or teeth, temporary loss of sensory functions/ consciousness, extensive multiple bruising, displaced broken nose, minor fractures, minor not superficial cuts requiring medical attention, stitches, psychiatric injury more than fear, distress or panic, proved by expert evidence; grievous bodily harm and wounding would include injuries resulting in permanent disability or permanent loss of sensory function, injuries more than minor, permanent visible disfigurement, broken or displaced bones, limbs, fractured skulls, compound fractures, broken cheek bone, jaws, ribs, etc, injuries causing substantial loss of blood causing transfusions, injuries requiring lengthy treatment or incapacity, psychiatric injuries proved by appropriate expert evidence.

8. These guidelines are merely directory but they provide a useful assistance to this court in its determination."

35. Greaves J then crucially made the following findings:

"*8….Both counsel refer to some passages from Blackstone's Criminal Practice 2012 at page 257. There, it is recognised that, grievous bodily harm is not defined by the 1861 Act but was interpreted as meaning no more and no less than really serious harm. DPP v Smith [1961] AC290; Cunningham [1982]AC566;cf. Saunders[1985] Crim LR230. Accepting that a number of*

minor injuries may collectively constitute grievous bodily harm, Birmingham [EWCA] Crim. 2608, Blackstone asserts that where the seriousness of the injury is questionable, the judge may withdraw a charge of grievous bodily harm from the jury.

Archbold 2009, 19-206, citing the same authorities cited by Blackstone, in defining grievous bodily harm says, it should be given its ordinary and natural meaning of really serious bodily harm."

36. Ms. Smith for the Respondent in the present case did not seek to persuade me to decline to follow the carefully reasoned decision of an *eminence grise* of criminal law, Justice Carlisle Greaves. However she did invite the Court to consider the implications of the fact that this Ruling was delivered on December 5, 2014, over a year after closing submissions at the end of the trial in the Magistrates' Court on November 21, 2014.

37. A judicial decision on the meaning to be attached to a statutory provision merely declares the law, and does not in any strict sense change the law. In the criminal context at least, the offender is entitled to receive the benefit of more favourable declarations as to the law even if the relevant judicial decisions are handed down long after their trial. This is why offenders sentenced to minimum terms of imprisonment before being eligible for parole in excess of 25 years have been permitted to apply to be sentenced afresh in light of the Privy Council's decision in *R-v-Selassie; R-v-Pearman* [2013] UKPC 29; (2014) 83 WIR 74.

38. As I am minded to follow the decision of Greaves J in *Symonds*, it follows necessarily that the conviction of the Appellant for doing grievous bodily harm contrary to section 306(a) is unsafe because the injuries proved to have been sustained appear to fall short of grievous bodily harm while they clearly fall within the ambit of assault occasioning actual bodily harm contrary to section 309 of the Code.

39. This ground of appeal succeeds and the conviction recorded in the Magistrates' Court is liable to be set aside on the grounds that a substantial miscarriage of justice has occurred.

Disposition of appeal

40. This conclusion engages the jurisdiction conferred on this Court by section 18 of the Criminal Appeal Act 1952:

"*(2) Subject as hereinafter provided, the Supreme Court, if it allows an appeal against a conviction, shall quash the conviction and direct a judgment of dismissal of the information to be entered:*

Provided that where an appellant has been convicted of an offence by a court of summary jurisdiction and that court could, in respect of the information before it, have convicted him of some other offence, and on the

finding of the court of summary jurisdiction it appears to the Supreme Court that the court of summary jurisdiction must have been satisfied of facts which would have justified his conviction of that other offence, then in any such case the Supreme Court, instead of allowing or dismissing the appeal, may substitute for the conviction by the court of summary jurisdiction a conviction of that other offence, and may impose such sentence in substitution for the sentence imposed by the court of summary jurisdiction as may be allowed in law for that other offence so, however, that unless the appellant has appealed against the sentence imposed on him by the court of summary jurisdiction, any sentence imposed by the Supreme Court under this subsection shall not be a sentence of greater severity than the original sentence…

(4)Where it appears to the Supreme Court that an appellant who is appealing under section 3 against his conviction though not properly convicted of some offence or part of an offence, has been properly convicted of some other offence or part of an offence, then in any such case the Supreme Court may either affirm the sentence imposed by the court of summary jurisdiction in respect of the conviction, or impose such sentence (whether more or less severe) in substitution for the original sentence, or may otherwise deal with the appellant, in such way as may be allowed in law with respect to the conviction of that other offence, and which appears to the Court to be just:

Provided that unless the appellant has appealed against the sentence imposed on him by the court of summary jurisdiction, the sentence imposed by the Supreme Court under this subsection shall not be a sentence of greater severity than the original sentence."

41. These provisions empower this Court to quash the conviction for grievous bodily harm and either confirm the sentence of six months imprisonment or (because the Appellant has not appealed against his sentence) substitute a more lenient sentence.

42. Ms. Smith ambitiously invited the Court to consider substituting a conviction for attempting to commit grievous bodily harm, based on the alternative findings which I have disapproved above made by the Learned Magistrate in this regard. It is an essential element of an attempt that it be proved that the accused "intended" to commit the offence (section 31 of the Criminal Code). The trial below was focussed on what the Appellant did and whether he knew he was kicking the Complainant, not what he intended. This alternative conviction is not properly open to this Court.

43. What was admittedly proved was the offence of assault occasioning bodily harm and that is the conviction which I substitute for the offence of grievous bodily harm for which the Appellant was originally convicted.

44. Ms. Cassidy forcefully argued that it would be an affront to justice if the sentence of six months imprisonment was not reduced to a penalty more commensurate with conviction for a lesser offence. I agree, despite Ms. Smith's plea to leave the sentence undisturbed. She rightly pointed out that offences of domestic violence are prevalent and that the Court should not be seen to be trivialising the present serious offence. The maximum sentence on summary conviction for assault bodily harm (2 years imprisonment) is only one third of that for grievous bodily harm (three years). On the other hand, Ms. Cassidy's plea for a non-custodial sentence at this juncture was unrealistic.

45. The Appellant was prior to this offence a man of previous good character and is now in his mid-forties. He is now understandably concerned about the implications of a custodial sentence on his record for his future life. He deserves all the assistance he can get in the future to facilitate the resumption of his life as a productive citizen. All the evidence before the Court suggests that this offence was out of character and attributable to a momentary loss of self-control under trying circumstances. It is perhaps remotely possible that had he pleaded guilty to even grievous bodily harm at the outset, he might have escaped an immediate custodial penalty. It is even less likely still that he would have been spared prison following a trial, though, which may well explain why he attempted to put off the 'evil day' of sentencing by filing a premature appeal against conviction.

46. In my judgment the Appellant is in no position today, having delayed his sentencing, abandoned and restored his appeal against conviction and succeeding only in securing a conviction for a lesser offence, to obtain as dramatic an alteration of his sentence as his counsel tenaciously sought on his behalf. In my judgment the appropriate sentence for the lesser offence of which the Appellant now stands convicted is in the region of four months imprisonment, a proportionate reduction of sentence based upon the difference in maximums between the more and less serious offences. This would reflect the sentence he would likely have received in the Magistrates' Court on April 2 had he been convicted of assault occasioning actual bodily harm in the first instance.

47. Although he was sentenced to six months' imprisonment on April 2, 2015, I was told that his likely release date is presently August 1, 2015, an actual term of 4 months. Had he been sentenced from the outset to 4 months imprisonment, he would now most likely be already eligible for release.

48. Accordingly, I quash the sentence of six months imprisonment and substitute such sentence as will result in the Appellant's immediate release from prison.

Dated this 26th day of June, 2015

IAN R.C. KAWALEY CJ