docCAYMAN ISLANDS
CRIMINAL FORM 18
RULE 50(1) & 51(1)

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Criminal Appeal No. 16 of 2010
(Indictment No. 4/09)
C#09335/08

Between:

HER MAJESTY THE QUEEN

Respondent

- and -

SHAWN ANDRE DAMION COUSINS

Appellant

NOTIFICATION TO AUTHORITIES OF RESULT OF APPEAL

To: The Attorney General

This is to give you notice that **SHAWN ANDRE DAMION COUSINS** having sought leave to appeal against *his* Conviction passed upon *him* by the Grand Court on the 4th day of June, 2010 as set out below:

Indictment # 4/09

Offence:- **GREVIOUS BODILY HARM**
4 years imprisonment.
Time spent in custody not to be taken into account.

The Court of Appeal has finally determined the said appeals, and has this **29th day of November, 2010** given judgment therein to the effect following:

1. **Appeal against conviction allowed.**
2. **Matter remitted to the Grand Court for retrial. To be listed, if possible, within the next three months.**
3. **Liberty to apply to the Grand Court for a renewed application for bail at the earliest possibility.**
4. **The court reporter (Carol Rouse) to provide a draft transcript to counsel for the appellant as a matter of urgency.**

Dated this 1st day of December, 2010

Registrar

CAYMAN ISLANDS COURT OF APPEAL

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CRIM. APPEAL NO. 16/10

BETWEEN:

SHAWN COUSINS

Appellant

and

THE QUEEN

Respondent

BEFORE: THE RT. HON. SIR JOHN CHADWICK, President
THE HON. JUSTICE I. FORTE J.A.
THE HON. JUSTICE E. MOTTLEY J.A.

Court Proceedings on 29 November 2010

APPEARANCES:

Ms. L. Organ for the Appellant

Mr. T. Ward for the Respondent

THEIR LORDSHIPS' RULING

CHADWICK, President:

On the 23rd of April 2010, the appellant, Shawn Cousins, was convicted following a trial before judge and jury of the offence of causing grievous bodily harm with intent, contrary to Section 203 of the Penal Code. The offence charged was said to have been committed on the 8th of September 2008. Put shortly, it involved injuries from a stone or rock, thrown by the appellant, which struck the victim and inflicted serous injuries. There was a lesser charge of causing grievous bodily harm, simplicitor.

The defence was self-defence. That is to say, Mr. Cousins was asserting that he threw the stone at the victim, Alfred Martin Williams, in circumstances where he thought that his own safety was threatened. The judge, in summing up to the jury, gave a direction which is accepted as being beyond criticism as to the need for the prosecution to establish that the rock was not thrown in self-defence.

In particular, he directed the jury that they should consider whether the defendant himself honestly believed his own safety to be threatened at the time that he threw the stone. But, very shortly before the jury retired, the judge revisited the question what the Crown needed to prove. He said this:

> "The Crown must satisfy you so that you feel sure, one, that self-defence doesn't avail him because if self-defence availed him he is not guilty on either of the two counts. So if you say no, he was not, or he may not have been acting in self-defence you now go onto say well did he have an intention to really cause and he said he didn't. If you say yes you don't go on -- or Count 2, you say no he didn't have any intention you do go onto Count 2."

That addition to his previous direction could have left in the mind of the jury the

possibility that the defence of self-defence would fail if the Crown left the jury in doubt whether or not the appellant may have been acting in self-defence. That, of course, as the Crown now concedes, would have been wrong. It was for the Crown to satisfy the jury beyond a reasonable doubt that the defendant was not acting in self-defence. If the Crown satisfied the jury of no more than that there was a possibility that he may not have been, then the jury could not have been properly directed to convict.

The appeal raises that point; and the Crown concedes that there was, in this case, a misdirection leading to a verdict which must be regarded as unsafe and unsatisfactory. Accordingly, the verdict of guilty must be set aside.

The only issue for this Court, in those circumstances, is whether to direct that an acquittal be entered or to order a retrial. The Crown invites the Court to order a retrial on the basis that this was a serious offence and that serious injuries were in fact caused. We were taken to the guidance given by the

Privy Council in the appeal from Jamaica in R. v. Reid [1978] 27 West Indian Reports 254. In giving the opinion of the Board, Lord Diplock indicated that, among the factors to be considered in determining whether or not to order a new trial, were (a) the seriousness and prevalence of the offence; (b) the expense and length of time involved in a fresh hearing; (c) the ordeal suffered by an accused person on a trial; (d) the length of time that will have elapsed between the offence and a new trial; (e) the fact, if it be so, that evidence which tended to support the defence at the first trial would not be available at a new trial; and (f) the strength of the case presented by the prosecution. See the headnote, and in page 258 between letters (G) and (J).

The Crown urges that this is a strong case and that the offence is serious. It estimates a new trial would occupy some two to three days.

The incident occurred in September 2008. Some two years or more have elapsed since that date. If a trial, a new trial, were held early in the new year, the time between offence and

trial would be approaching 30 months.

The appellant has spent some five months in custody, out of a four-year sentence. Prior to his trial he was on bail, and the Crown has indicated that an application for bail pending a new trial would not be opposed.

An important witness for the defence at the earlier trial was one Levon Dwyer, also known as "Flava". He was able to attend the first trial and give evidence on behalf of the appellant; but with some difficulty. It was necessary to make arrangements for him to be given entry to this island from Jamaica where he now is. Counsel for the appellant says, very fairly, that Mr. Dwyer is still in Jamaica; that she has spoken to him on the telephone; and that he would be happy to return to this Island and give evidence at a new trial if, at the time, he were still in Jamaica and the necessary arrangements could be made. But he has informed her that he is likely to move from Jamaica to Canada in early 2011; and that, once in Canada, he would find it difficult -- and, indeed, would probably be unwilling -- to travel to the Cayman Islands to give evidence.

That would be a powerful factor against ordering a new trial if it were now clear that, by the time that that trial could take place, Mr. Dwyer would not be available to give evidence. But it is not clear that that would be the position if the trial were held early in the New Year.

In all the circumstances of this case we think that it is appropriate to order a new trial. We have in mind the observation of Lord Diplock in Reid that the power to order a new trial is to be exercised in the interests of the public in order to ensure that persons who are guilty of serious crimes should be brought to justice -- and not escape it -- merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury. This is such a case.

But if there is to be a new trial, it is necessary that it takes place as soon as possible: first, in order to reduce to the minimum necessary the delay that will have elapsed from the commission of the alleged offence in September 2008 until the appellant is brought to a new trial; and, secondly, to

avoid the possibility that Mr. Dwyer will not be available to give evidence on behalf of the appellant because he has relocated to Canada.

In those circumstances, we propose to allow the appeal, set aside the conviction and order a new trial; but to direct that that trial be listed for hearing (with an estimate of two to three days) as soon as it can be accommodated by the Grand Court. If possible, it should be listed for hearing within the first two months of next year.

The appellant will have liberty to apply to the Grand Court at the earliest opportunity for a renewal of bail on the conditions on which it was granted prior to his trial; or on such other conditions as the Grand Court may think appropriate. We indicate that it is in the interests of justice that that application for bail should be heard as soon as possible; and that that application should provide an opportunity for the Grand Court to fix a trial date within the window that we have indicated.

39. For those reasons we are satisfied that the Judge erred in law and that his Order of 1 February 2010 should be set aside. We remit the matter to the Grand Court for consideration of the outstanding issues on the appeal from the Chief Magistrate to which reference has been made in paragraphs 37 and 38 of this judgment. Pending further determination of the appeal before the Grand Court, the convictions must be restored.

Chadwick P

Forte JA

Conteh JA