IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS.

Criminal Appeal No. 5 of 1999.
Indictment No. 29/98.

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

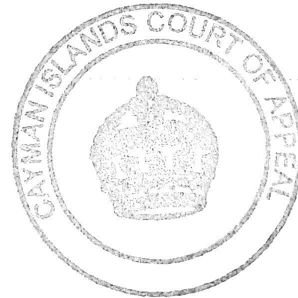
EMILE SIGMOND LEVY

Appellant

BEFORE: The Rt. Honourable Mr. Justice E. Zacca, President.
The Rt. Honourable Mr. Justice P. T. Georges, J. A.
The Honourable Mr. Justice I. D. Rowe, J. A.

Keith Collins instructed by Keith Collins & Company for the Appellant.
Adam Roberts, Senior Crown Counsel, for the Respondent.

May 3, 2000



JUDGMENT

ROWE, J.A.

When this matter first came before the Court on November 17, 1999, we adjourned it to the next session and ordered that legal aid be granted to the appellant. Mr. Keith Collins filed Grounds of Appeal on May 1, 2000. We granted leave to him to argue these grounds and after hearing counsel for the appellant and counsel for the Crown, we allowed the appeal, set aside the sentence and entered a verdict of acquittal. As promised then, we now set out our reasons in writing.

The appellant was convicted in the Grand Court of the Cayman Islands on January 26, 1999 after a two day trial before Graham J. and a jury and he was sentenced on January 27, 1999 to a term of imprisonment of six (6) years and ordered to pay compensation of $17,800.00. The Court did not impose a sanction for default in the payment of compensation but ordered that if compensation was not paid within 9 months, the matter was to be reported back to the Court. An appeal was timely filed against conviction and sentence.

THE FACTS

The appellant was born in Grand Cayman in 1953. He migrated to the United States of America and served for four years in the U.S. Army at postings all over the world before being honourably discharged. At the time of his arrest in November 1997, the appellant was a taxi and tour operator in Grand Cayman. Roy Ebanks, the virtual complainant, was a taxi and tour operator in Grand Cayman. The appellant and Mr. Ebanks had been acquainted for about five years. On an occasion about four months before November 1997, the appellant requested Mr. Ebanks to take some tourists from South Terminal to the beach. There developed a dispute between them as to who should pay the fare. It appears that the appellant maintained that Mr. Ebanks had the duty to collect the fares from the passengers, whereas Mr. Ebanks demanded that the appellant pay him a sum which amounted to $24.00.

As Mr. Collins described it, there was an ongoing dispute between these two men over the $24.00. On the night of November 9, 1997, Mr. Ebanks went to the La Havana bar to watch Boxing. While there he drank nine (9) beers then went over to the Holiday Inn Hotel to get a taxi to go home. He saw the appellant in the lobby of the Holiday Inn, approached him and asked the appellant for his money. The appellant denied owing

money to Mr. Ebanks. There was an argument as a result of which the Security Guard asked the two men to leave the hotel lobby. The appellant left the hotel and went to his taxi which was parked on the right hand side of the driveway in front of the hotel and to the left of the front door as one exits from the hotel. Mr. Ebanks emerged from the hotel and went to the driver's side of the appellant's taxi and resumed his demand for payment which demand the appellant denied.

Thereafter the evidence for the prosecution and the defence diverge. Through Mr. Ebanks, the prosecution says that Mr. Ebanks took his eyes off the appellant for a second or two and then felt a cut on the right side of his face all the way down. Mr. Ebanks said that he was then standing by the edge of a large concrete pavement and he flipped over. He was wearing glasses at the time. The frame and one of the lens were recovered and tendered in evidence. Mr. Ebanks said that when he fell the appellant entered his taxi and before driving off, said: " You got what you want. Hold on to that". Mr. Ebanks received an injury which was described by Dr. Connolly (who did not give evidence but whose statement was read to the jury) as a laceration to the right side of his face which was almost eight inches long. At trial Mr. Ebanks had a scar to his face which the Court assessed to be 5-6 inches long.

The defence was that the appellant did not owe money to Mr. Ebanks for the passengers which he carried from South Terminal on that day several months earlier as it was the practice for a taxi or tour operator who could not handle the volume of passengers seeking his service to ask other licensed persons to assist and they all knew that fares should be collected direct from the passengers who they transported. Some evidence was introduced by the defence that Mr. Ebanks had issued a threat to harm the appellant if he was not paid, but its character was so suspicious that it does not merit further mention. On the night of November 9, 1997, the appellant was accosted by Mr. Ebanks, who was

under the influence of alcohol, at the Holiday Inn and Mr. Ebanks demanded to be paid by the appellant. The request was denied; an argument ensued, and the appellant after using the men's room in the hotel went to his taxi with intent to drive home.

The appellant said that as he reached the front door of his taxi, (which was a van), he observed Mr. Ebanks emerge from the hotel, go to a flower pot, pick up something, and then approach him. At that time he was standing with one foot on the step of his taxi and the other on the ground. Mr. Ebanks, he said, first slammed the door of the taxi against him, pushing the right side of his body against the left side of the taxi. Then Mr. Ebanks " came down striking after me", said the appellant, who then slid out, grabbed his wrists, and used a "wing clung" martial arts technique which he had learnt in the army against Mr. Ebanks. The appellant said that he put his feet underneath Mr. Ebanks feet, jerked him forward, and Mr. Ebanks then fell down on the concrete. The appellant drove to the police station and made a report. Mr. Ebanks was taken to the hospital where he was treated by a surgeon and received stitches. A photograph of Mr. Ebanks' face was taken at the hospital after his injury was sutured.

The police investigations did not uncover any significant evidence. The appellant made a report to the Police on the night of the incident in which he said he had been attacked by Mr. Ebanks, had tripped him up and Mr. . Ebanks had received injuries in his fall.

THE GROUNDS OF APPEAL.

Although Mr. Collins filed seven (7) grounds of appeal, they were effectively three grounds. He contended that (a) the directions of the learned trial judge on self defence were erroneous, (b) the judge's conduct of the trial as a whole was unbalanced in favor of the prosecution, and (c) the sentence was harsh and excessive both in terms of the

imprisonment and the compensation ordered. Because of the decision to which we have come it is unnecessary for us to say anything about the complaints against sentence.

Immediately after the case was placed in the hands of the jury by the Clerk, the judge gave some preliminary and salutary instructions to the jury. Then he called upon Crown Counsel for a copy of the photograph which had been taken of Mr. Ebanks at the hospital.

Crown Counsel then commenced her opening speech to the jury in the course of which she told them that the Crown was alleging that the appellant had taken a sharp implement and had cut Mr. Ebanks straight down his face causing an injury. She then asked that Mr. Ebanks be called as the first witness for the prosecution. At that stage the learned trial judge told counsel that he wanted to have the issues clarified and addressed counsel for the defence:

> "The Court: Mr. Hampson, you don't have to answer this question, but it may be that you will feel able to do so. The issue is self-defence, is that right?
>
> Mr. Hampson: It is my Lord".

The issues identified by the Court in this exchange, and further discussion with defence counsel, were self-defence and whether the injuries amounted to grievous bodily harm.

The learned trial judge then directed that the photographs which showed the injury to Mr. Ebanks be passed to the jury. After this was done, the learned trial judge addressed the jury:

> "The Court: So ladies and gentlemen, to boil it down, now you have the

> photograph. Was that caused by falling against a concrete curb or was it caused by a knife? That's one of the questions you will have to answer. Yes".

There are three very serious errors in relation to what occurred as shown at pages 16 to 17 of the record. There is no rule of criminal procedure for the defence to state the nature of the defence at the commencement of a trial. It is a dangerous innovation for the defence to be called upon in a criminal case to state the defence. When the defendant has pleaded not guilty, he places every fact in issue, which has not been properly admitted in pretrial proceedings. If there are statutory provisions whereby the defendant can admit facts, the court can have regard to such admissions. If there are statutory provisions which require the defendant to give notice to the prosecution of its intention to raise certain so-called defences, then the defence must conform to those statutory provisions. In a civil case there are pleadings and the defence should be clearly set out in those pleadings. However, in a criminal case, where the defendant is not required to give advance notice to the prosecution of the defence, it is impermissible for the court to request counsel or an unrepresented defendant to state his defence at the outset of the case.

The second error is that the Court permitted the photograph of the injuries to Mr. Ebanks to be shown to the jury before the photograph had been marked for introduction into evidence or had been tendered as an exhibit by the prosecution. Although counsel for the defence did not object, only admissible evidence should be put before the jury. The prosecution had not requested that this photograph be shown to the jury at that stage. It was not an exhibit and it was a fundamental error for this document to be placed in the hands of the jury. From what occurred at page 24 of the transcript, it appears that the learned trial judge was deeply moved by what he saw in the photograph. The record

shows that Mr. Ebanks was giving evidence in chief and he said he felt a cut on the side of his face. Crown Counsel had not yet asked about the nature of the injury which was important to the prosecution to prove an element of grievous bodily harm, when the Court intervened and said to Mr. Ebanks concerning the injury:

> "The Court: Well, you needn't tell us because we've got a photograph. The next thing I felt was a cut on my face, and you showed us. We have a photograph here. I'm not going to ask you to look at it."

This photograph was not yet in evidence, nevertheless the Court was treating it in the presence of the jury as a speaking document. Furthermore, the inference to be drawn from the comment that the photograph would not be shown to the witness is that it would be damaging to his sensibilities.

A third error identified by us is that there was prejudice to the defence through the instructions which the trial Judge gave to the jury at page 17 of the record before a single witness had been called by the prosecution. In that passage quoted above, the learned trial judge introduced into the case "a knife". Counsel for the prosecution had been careful to use the phrase "a sharp implement" in opening the case to the jury. However, the trial judge in what can only be described as a "further opening speech" of the prosecution's case, introduced "a knife", but it was impermissible for the court itself to narrow down the "sharp implement" alleged by the prosecution to "a knife".

The appellant contends that the trial judge erred in his instructions to the jury in relation to the issue of self-defence. The trial court was faced with two discrete scenarios in this case. The first was that the appellant used a sharp instrument to cut Mr. Ebanks in his face when Mr. Ebanks was unarmed and although he was annoying the appellant, he was

not attacking him in any way. The second scenario was that the appellant was being attacked by Mr. Ebanks with a shiny object, that he had slammed the door of the taxi against the appellant and was striking down at the appellant at which time the appellant used a martial arts technique known to him to trip and throw Mr. Ebanks off balance, that Mr. Ebanks fell on the concrete pavement and in that manner sustained his injuries. It was never the case for the defence that the appellant used a sharp cutting implement to inflict an injury upon Mr. Ebanks because he believed that Mr. Ebanks was about to do him serious bodily harm.

In instructing the jury on self-defence, the learned trial judge told them at page 188 of the Record that:

> "The Court: So, I say the critical question will be, Ladies and Gentlemen, - and I repeat it - did the defendant or may have the defendant honestly believed that a knife or sharp object was coming in his direction? Because if he did or may have done, it would have been lawful for him to produce the weapon and inflict the damage upon the assailant. But, ladies and gentlemen, if that is something that he has invented, then self-defence goes out of the window, doesn't it?"

In this passage where the learned trial judge is directing the jury as to the critical question in the case, he put forward a scenario which was not the defence raised by the defence. From the night of the incident when the appellant went to the Police station and made a report to the Police and consistently to the date of his trial the appellant had been saying that he had used his martial arts technique to trip and bring down Mr. Ebanks and that Mr. Ebanks sustained his injuries when he fell. That was his defence. It was not that he

feared injury from Mr. Ebanks and used a knife to cut him in self-defence.

At page 219-220 of the Record, the learned trial judge introduced to the jury what he characterized as the key piece of evidence which he had deliberately left for the last, to wit, the photographs and the glasses. At page 193 of the Record, the learned trial judge had reminded the jury that Mr. Ebanks had told them that he had fallen by a "large concrete pillar", and at page 220, the judge told the jury that they could interpret the photographs without expert evidence, meaning the evidence of a medical practitioner. The learned trial judge then commented as follows:

> "The Court: We can see, can't we, the sort of injury which took place. Is that the kind of injury, Ladies and Gentlemen, which was caused against a rough surface like concrete? Would it cause the cutting through of the lip so that the teeth could be seen? Remember, this is sewn up. That is what the defendant says it is. Or was it caused by a slash? was the circumstance that Mr. Levy and Mr. Ebanks had - if I may use the phrase - fallen out that night and that Mr. Levy was sick to death of Mr. Ebanks and decided to teach him a lesson and produced <u>a knife or a razor either from his pocket or from the taxi or from somewhere</u> and slashed in a downward motion, Ladies and gentlemen, beginning there (INDICATING) and deepening as the contours of the face raise. And, ladies and gentlemen, is it of any significance for you to judge that there is a cut - not a breaking of the whole thing, but a cut at the top, which may or may not depending on your judgment, begin there where the first nick is at the level of the eyebrow? Are those facts of any use to you in deciding whether or not it is true that Mr. Levy

> slashed Mr. Ebanks so (INDICATING) or is Mr. Levy right that he used the most minimal force when under attack or believing himself to be under attack and that unhappily Mr. Ebanks fell to the ground and in some way received that injury which laid his face open." (emphasis added).

In that passage the learned trial judge invited the jury to say that the injury to Mr. Ebanks could not have been caused by a fall to the concrete and must have been caused by a slash from a knife or a razor. The trial was drawing to a close and here the trial judge was himself introducing into the case " a razor" which could have but one effect to inflame the passions of the jury. The prosecution had not introduced a razor into the case. The judge did. The appellant had given an elaborate explanation of the martial arts technique which included the using of the assailant's force against himself, the twisting of the wrist and then the tripping and falling the person to the ground. The learned trial judge characterized the appellant's acts as "the most minimal force" thereby unduly disparaging the defence.

At the point when the learned trial judge was giving specific instructions on the law of self-defence and when he gave what he termed the critical direction, he put forward a defence which the appellant had not advanced. At the only point in his summation when the learned trial judge made mention of what was the real defence of the appellant he disparaged it in such a way that the jury could not have given it any serious consideration.

At no point in his summation did the trial judge say to the jury that the defence of the appellant was that having been attacked by a man who had a shiny object, who had slammed him against the door of his taxi and was striking down at him, and having used

his skill to trip the man to the ground the man received an injury to his face from an object of which he has no knowledge. It should have been obvious to the learned trial judge that the defence was saying that Mr. Ebanks fell while still holding a shiny object in his hand. The defence was not required to say how Mr. Ebanks got his injury. It was for the prosecution to prove that the appellant injured Mr. Ebanks without any justification.

The learned trial judge failed to identify and place before the jury the defence raised by the appellant in a balanced manner and misdirected the jury as to what he considered to be the defence of the appellant.

CONCLUSION

In our opinion this trial was unsatisfactory. The attempt at the start of the trial to narrow the issues has no basis either in a Law or in any clearly defined rules of procedure. It is likely to prejudice the accused, as the trial judge appears to have realized by offering defence counsel the option of not answering.

Documents can be admitted into evidence only after they have been identified and produced from proper custody. The prosecution may well be unable to fulfill these prerequisites. Making a document available to the jury as was done in this case and inviting them to consider it was a serious impropriety.

As we have stated, the complaints raised against the manner in which the trial judge left the appellant's defence of self-defence were well grounded.

For these reasons we allowed the appeal, quashed the conviction and set aside the

sentence.

Zacca, P.

Georges, J.A.

Rowe, J.A.