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CAYMAN ISLANDS

IN THE COURT OF APPEAL

CAYMAN ISLANDS CRIMINAL APPEAL NO. 6/84

BEFORE: THE HON. MR. JUSTICE ZACCA, PRESIDENT
THE HON. MR. JUSTICE TELFORD GEORGES, J.A.
THE HON. MR. JUSTICE KERR, J.A.

PHILLIP RONNIE RITCH

VS.

REGINA

Mr. D.M. Muirhead,Q.C. and Mr. S. McField for the Appellant.

Mr. R. Ground for the Crown.

NOVEMBER 29 and 30, 1984

KERR, J.A.:

In the Grand Court before Hull, J. and a jury the appellant was convicted on the 9th of October, 1984 of the offence of doing grievous bodily harm contrary to Section 190 of the Penal Code and sentenced to two years imprisonment.

We dismissed the appeal and affirmed the conviction and sentence. As promised we set out herein our reasons for so doing.

Walter Lee Guice, an Engineer, and his wife Dr. Joanne Pizzino, both of Houston, Texas, U.S.A. came to the Cayman Islands April 22, 1984, for their "honeymoon vacation." On April 27, they went on a picnic on the beach at East End, Grand Cayman, arriving there about noon. At 4 p.m. while strolling along the beach holding hands they met the appellant. There was a fierce encounter between visitors and citizen. Both Guice and the appellant suffered injuries. The account given in evidence by complainant Guice and wife differed considerably from that given by the appellant. According to

the visitors on their stroll they passed the appellant who had a stick in his hand. He then overtook them, confronted them. He had a towel over his head forming a sort of a mask. He gestured to them and when Guice enquired what he wanted, appellant showed them a plastic bag containing what appeared to be cigarette butts. Guice moved off to pass him when the appellant spun him around, causing the sunglasses Guice was wearing to fall to the ground. Guice handed to his wife what he had in his hands including a diver's knife with blade about eight inches. According to Guice he did so to free his hands, he being trained in Karate. He told the appellant he had no time for him. The appellant then struck him a heavy blow across his face with the stick and then swung it at the wife who parried the blow with the knife. Appellant then gave the complainant several blows with the stick. Complainant in turn picked up a stick and flung it at the appellant. They closed and fell to the ground. According to Guice the blow to the head affected his co-ordination. As they struggled Guice called to his wife for help. The appellant was choking and punching complainant.She responded to her husband's cry by stabbing the appellant - three stabs- one in the back and the others in chest and abdomen. Appellant held on to the knife and all three were involved in the struggle. Appellant got away the knife. The complainant said he kicked him in the face, the knife fell from his hand and the towel from his head. He broke off the encounter as he was apparently unable to continue because of the wound in his abdomen from which his intestines were protruding.

Complainant and wife then went out to the public road where shortly after they were taken by Mr. Frank Conolly in his motor car to the police station and later to the George Town Hospital. The following day Dr. Pizzino accompanied by the police to the beach where certain exhibits - the towel the appellant had, the stick used by appellant and the one flung by the complainant were taken by the police and identified by her.

The appellant in evidence gave an account that differed in important particulars and sequence and raised thereby issues eminently for the jury's determination. According to him that afternoon he went to the beach to fish as he had often done. He parked his motor cycle and walked down to the beach when he saw complainant and wife coming from behind a

juniper tree. He greeted them but got no response and as he passed he received a stab in the back just below the left shoulder. He turned to see Guice who cut at him, the knife cutting the shirt he had over his shoulder. It was then he picked up a stick (smaller than that exhibited in Court) and in defence hit Guice over the right eye. Guice fell and the knife dropped. His wife picked it up while he, Guice picked up a piece of of bamboo and hit him on the the right hand and then pushed him to the ground. Guice pinned his right hand and on his instructions she stabbed and tried to cut his throat but appellant got away his hand and held the knife. All three wrestled for the knife and eventually he got away from them leaving the knife and as he ran into the sea, he heard Guice say "leave the son of a bitch there and make him die." They went away. He mounted his motor cycle and rode towards George Town but on the way lost consciousness. He remembered being in a house sometime after, speaking with the police and being at the George Towh Hospital. In cross-examination he denied (i) having the plastic bag, (ii) having towels over his head and (iii) that he was the aggressor.

Detective Mark Clarke who accompanied complainant's wife to the scene tendered the following exhibits:

(1) A green towel and a yellow and white towel both blood stained.

(2) The plastice bag and contents

(3) Two pieces of wood

(4) The diver's knife.

The prosecution also tendered two statements given by the appellant to the police. They were not materially inconsistent with the defence presented in Court.

Elizabeth Frederick of High Rock, East End, in evidence said that at about 5:45 p.m. that day she was at home and attracted by the sound of a motor cycle she looked and saw appellant sitting on a motor cycle in her yard about ten to twelve feet from the road. He was without shirt; there was blood on his right arm and his intestines were protruding. To her query, he said "Someone ran me off the road."

Sergeant Michael Gooding, gave evidence of Guice and wife being brought to the Police station at East End and of the wife handing over the knife, of going to the home of Elizabeth Frederick where he saw the appellant who in reply to his questions said, "I was walking on the beach when they attacked me." Gooding said that from the beach at East End, appellant would reach the Police Station before Elizabeth Frederick"s home.

Dr. Gyanendra Kumar JHA gave evidence of eaxmining Guice on the 27th of April, 1984. He found a swelling of the face involving the right side of the cheek bone and the infra orbital region of the same side. Abrasion and bruising of the arm, fingers and knees and an incised wound on right tibia and lacerations of the right tibia. He diagnosed fractures of the right cheek bone and of the zygoma. He considered the injuries grievous or serious and that they could have caused some kind of brain injury.

He also saw the appellant who was taken to the theatre for emergency operation. His injuries were serious and life testing.

The first ground of Appeal argued reads:-

> "That the Learned Trial Judge at the request of the prosecution wrongly directed or caused the jury to leave the Court without the consent or at the request of the defence and accordingly the subsequent proceedings were an irregularity and vitiated the whole trial."

The incident which formed the factual basis for this Ground was protrayed by the Records thus - (p, 26):

> 8th October, 1984
>
> "CROWN COUNSEL
>
> Applies to make submission in absence of jury.
>
> MR. GROUND
>
> Defence questions of Mr. Guice and Dr. Pizzino - quite different line as in lower court.
>
> Quite different line which he acquiesced on.
>
> I may want to seek to cross-examine accused on this if he gives evidence.
>
> Can only do this by re-calling Mr. Guice. Re-examining him and Dr. Pizzino.

I apply for leave to re-call both witnesses to give evidence in chief.

"MR. ALBERGA

Opposes application. Accused is not most educated person. He cannot be expected to stand up and interrupt his counsel.

I am sure there is no precedent for this.

He is seeking to convert questions into evidence against accused.

There is no variation between the man's caution statement and the questions and answer and present line of defendant.

"MR. GROUND: Accused was present. Line of defence was specific.

Both witnesses available tomorrow.

TO COURT: Decision reserved until 10 a.m. tomorrow. In meantime, examination of other witnesses will proceed.

3:50 Jury recalled after absence of approximately 15 minutes.

Witness stood down, subject to liability to be recalled."

(p.29)

"IN COURT

9th October, 1984

10:00 a.m.

10:00 a.m. In absence of jury.

RULING: In cross examining Mr. Guice at the preliminary inquiry, defence counsel evidently suggested that he had met with the accused on some earlier occasion, and that it was Mr. Guice initiated the attack. Defence Counsel also suggested to Dr. Pizzino that she and her husband had met with accused previously.

In cross examining those two witnesses in this

trial, defence counsel has put it to each of them that Mr. Guice initiated attack.

That is a restricted, rather than inconsistent version of the earlier line of questioning.

I rule that at this stage, the Crown's application to re-call Mr. Guice in chief for the purposes indicated by Mr. Ground should be refused. I also rule that at this stage, it is not relevant to put to Dr. Pizzino in re-examination the content of the questions put to her in the preliminary inquiry, in the context in which Mr. Ground seeks to do so.

" The Crown may, if it so wishes, re-examine Dr. Pizzino on any other relevant matter of fact arising out of the cross examination.

I also note that in this trial, defence counsel has not put it to either of these two witnesses that they knew accused before the time of the incident in issue.

10:03 - Jury re-called."

Mr. Muirhead submitted that an improper use was being made by the Crown of the depositions by bringing to the attention of the judge in the absence of the jury, matters deeply prejudicial to the defence. This would have had a most adverse effect on the minds of the jury in that they were being excluded from the proceedings in circumstances where it would appear that the prosecution was attempting to bring out matters adverse to the accused. Further, a case cannot be properly tried if a part of the trial is conducted in the absence of the jury and that any such procedure which results in the jury being directed to leave the Court without the consent or request of the defence is an irregularity which vitiates the whole trial. He cited in support R.V. Anderson (1930) 21 Cr. App. R. 178 and Ajodha V. The State (1981) 2 All E.R.; 3 W.L.R.1. Accordingly, he concluded that in the instant case there was an irregularity which viriated the trial. The flaw in the procedure was of such a

fudamental nature that the conviction must be quashed.

Now in R. v. Thompson (1917) 2 K.B. 630 the accused was charged with gross indecency. The prosecution tendered evidence to prove that at the time the accused was carrying powder puffs and that in his rooms he had indecent photographs. The defence was an alibi and evidence in support was tendered by and on behalf of the accused. At the trial objection was taken to the admissibility of the evidence of the powder puffs and the photographs on the ground that none of these articles were connected to the charge and the evidence could only serve to prove that the accused was of evil character or disposition with regard to boys. After argument the learned trial judge admitted the evidence. On appeal this evidence was held properly admitted as being relevant to identity.

Upon the hearing of the appeal, it was revealed that the learned Judge received counsel in the case at their request in his private room and there heard argument as to the admissibility of evidence because it was thought prejudicial to the defence that the jury should hear the discussion. After the argument was concluded the Court resumed its sitting and the objection to the admissibility was formally taken in open court. Of this procedure Viscount Reading, C.J. in giving the judgment of the Court of Criminal Appeal said (p. 635):

> "No objection was taken upon this appeal to the procedure adopted, but in order to prevent any misapprehension as to this Court's view of the proper course to pursue in such circumstances, we are of the opinion that whenever the judge in his discretion thinks it will unfairly prejudice the defence if the argument should be heard in the presence of the jury, he should direct the jury to retire to their room, and he should hear the argument in open Court so that it may appear on the shorthand note. This course should only be adopted when the judge in the exercise of his discretion thinks that the defence would be unfairly prejudiced, and the question cannot be argued in the abstract, as it frequently may be, when the evidence objected to appears on the depositions."

Although the procedure adopted was at the request of counsel on both sides, there was evident approval of the judge's prudence in

asking the jury to retire in the circumstances.

In R. v. Anderson (supra) the appeal was from a conviction for larceny. At the trial and during the cross-examination of the appellant, counsel for the prosecution asked a series of questions tending to show or suggest that the appellant, a doctor, in dissolving partnership with another signed a statement admitting dishonesty. Despite denials to this oft repeated question no such statement was produced. However, a document was made visible to the jury during the cross-examination and this might easily convey the impression to the jury the existence of the relevant document. After the controversy had arisen in relation to the document, it was suggested that the jury should leave the box and that matters relating to this document should be discussed in their absence. That suggestion was strongly and repeatedly objected to on the part of the defence. Notwithstanding the jury were requested to and did leave the box and various statements were made in their absence.

In giving the judgment of the Court, Hewart, L.C.J. after referring to the general rule that the contents of a written document if they are to be proved should be by the production of the document and to the procedure of cross-examining thereon to prove inconsistency in accordance with provision of the Criminal Procedure Act, had this to say concerning what transpired in the absence of the jury - (pp. 182-3):

> "..... In other words, the matter was enveloped with an air of mystery and suspicion, from which it was at any rate possible that the jury might draw the inference that they had been asked to leave the court because circumstances of a character damaging the accused were to be discussed. It is difficult to imagine any circumstances in which, except at the request or with the consent of the defence, a jury can possibly be asked to leave the box in order that statements may be made during their absence."

Now the facts in the instant case are plainly distinguishable from the Anderson case but before making a comparative analysis it seems convenient to deal with Mr. Muirhead's general proposition that whenever a question of admissibility of evidence arose, arguments relating thereto if made in the jury's absence without the consent of the defence, there was an irregularity as to render the whole trial a nullity and in such circumstances the conviction must be

quashed. For this, he sought support on a statement in the case of Ajodha v. The State (supra) approving of R.v. Anderson (supra).

In that case the Privy Council was concerned with the procedure when the admissibility of a confession statement was in issue.

In that regard Lord Bridge said (p.13):

> "In the normal situation which arises at the vast majority of trials where the admissibility of a confession statement is to be challenged, defending counsel will notify prosecuting counsel that an objection to admissibility is to be raised, prosecuting counsel will not mention the statement in his opening to the jury, and at the appropriate time the Judge will conduct a trial on the voir dire to decide on the admissibility of the statement; this will normally be in the absence of the jury, but only at the request or with the consent of the defence: Reg. v. Anderson (1929) 21 Cr.App. R. 178."

This terse reference to the Anderson case without adverting to the facts must be interpreted as a general approval of the statement quoted ante but the guarded language of Hewart, L.C.J. seems more appropriate to a sage observation rather than the definitive statement of an absolute rule. In the matter in which the reference was made in the Ajodha case it was clearly not intended to give that statement any greater authority or more general applicability than appears on the face of it. Indeed Lord Bridge made it plain that normally the "trial within a trial" took place in the absence of the jury and went on to indicate some of the considerations which might influence Counsel to desire the unusual course of having this test of admissibility in the presence of the jury thus - (p.13):

> "Though the case for the defence raises an issue as to the voluntariness of a statement in accordance with the principles indicated earlier in this judgment, defending counsel may for tactical reasons prefer that the evidence bearing on that issue be heard before the jury, with a single cross-examination of the witnesses on both sides, even though this means that the jury hear the impugned statement whether admissible or not. If the defence adopts this tactic, it will be open to defending counsel to submit at the close of the evidence that, if the judge doubts the voluntariness of the statement,

> "he should direct the jury to disregard it, or, if the statement is essential to sustain the prosecution case, direct an acquittal."

In this procedure it is worthy of note that the evidence relevant to admissibility, which is a question for the judge, would also be relevant to weight, a matter for the jury. As indicated in this passage in the Ajodha case there may be advantage to the defence in having the test in relation to admissibility in the presence of the jury. Here it is enough to say that in the instant case the arguments on admissibility were concerned with the evidence of the prosecution witness and apparently would be irrelevant to weight.

Accordingly, the Ajodha case could not be said to go so far as to say irrespective of whether or not what transpired could affect the jury in their consideration of the important issues, the conviction must be quashed. Indeed that question did not arise for consideration by the Privy Council. On the other hand, dicta on the same theme as in R.V. Thompson (Supra), are to be found in later cases.

In R. v. Falconer-Atlee (1974) 58 Cr. App. R. at p. 354, Roskill, L.J. said:

> "This court has said again and again that it is very undesirable that this should happen where there is a submission of no case to go to the jury either because the evidence for the Crown is suggested to be insufficient to justify leaving the case to the jury, or because, though there may be some evidence, it is so tenuous that it would be unsafe to leave the case to the jury. It is most undersirable that that discussion should take place in the presence of the jury. Inevitably the judge may express a view on a matter of fact, which is within the province of the jury. The presence of the jury may hamper freedom of discussion between counsel and judge."

In R.v. Sutton, et. al. (1969) 53 C. App. R. 504, during the course of the trial the judge in the absence of the jury heard evidence relating to the alleged misconduct of solicitors representing one of three defendants charged, with regard to notice of alibi.

It was argued relying on R. V. Reynolds (1950) 34 Cr. App. R. 60 that the learned judge was wrong in allowing evidence to be heard on oath during the course of the trial in the absence of the jury regarding matters which were not concerned with the admissibility of statement by one of the defendants. In delivering the judgment of the Court of Criminal Appeal Fenton Atkinson, L.J. said (pp. 509-10):

> "As regards the case of Reynolds (supra) which is relied upon it is worth reading the headnote, which is quite short: 'Apart from evidence on the question whether an alleged confession is admissible or not, the giving of evidence in a criminal trial in the absence of the jury should be regarded as most exceptional. Where, therefore, on a charge of indecent assault on a girl aged eleven, a question arose whether the child was fit to be sworn, or was of sufficient intelligence to justify the reception of her evidence unsworn, and in the absence of the jury a school attendance officer gave evidence of the mental capacity of the child: Held, that an irregularity had occurred which necessitated the quashing of the conviction.' The judgment of the Court was given by Lord Goddard C.J. and at 34 Cr. App. R. 64 he made it quite clear that the reason for allowing this appeal was that the evidence given in the absence of the jury was in fact very relevant evidence for their consideration of the value of this child's evidence. He went on to say: 'It should be regarded as most exceptional that any evidence should be given in a criminal trial in the absence of the jury' subject to the well-known exception when it is a question of whether a confession was properly obtained. In the circumstances of the present case, the evidence from the lady from the solicitors' office did not touch in any way on the guilt or innocence of Stapleton or either of the other two accused; the jury had gone home, they knew nothing of it; it was perhaps unfortunate that Stapleton should hear the solicitor acting for him being attacked in the way in which this young lady was, but it seems to us that Reynolds (supra) is quite a different case and that here it was not in truth evidence being given in a criminal trial; it was really an independent investigation by the judge into the conduct or supposed misconduct of this firm of solicitors. We think it would have been very much better that, if any such investigation by the judge into the conduct or supposed misconduct of this firm of solicitors. We think it would have been very much better that, if any such investigation was to be made, it had been left to the end of the trial

> "and not taken place at the time when it did, but, in our view, that incident can provide really no ground at all for quashing the conviction of Stapleton or either of the other two of his co-accused."

Now the grounds upon which an appeal may be allowed are as defined by Section 6 (1) of the Court of Appeal Law which reads:

> "(1) Subject to the provisions of section 9 the Court on any such appeal against conviction shall allow the appeal if the Court considers that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before which the Appellant was convicted should be set aside on the ground of a wrong decision on any point of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal with or without mitigation of sentence:
>
> Provided that the Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant dismiss the appeal if the Court considers that no substantial miscarriage of justice has actually occurred."

Section 9 is concerned with powers of the Court (i) to vary sentence, (ii) return alternative verdicts, (iii) in relation to special verdicts and is here not relevant.

Mr. Muirhead quite frankly conceded that it is not every irregularity that will result in rendering a trial a nullity but only such as may be considered material and fundamental.

Now although it may be difficult to categorise the cases dealing with irregularity they are nevertheless illustrative of the approach that Appellate Courts have taken in certain circumstances.

In R.v. Pink (1971) 55 Cr. App. R. 16, an irregularity occurred in that notwithstanding that the accused was unrepresented and did not give evidence or call witnesses, a second speech was made for the prosecution. After considering a number of cases in which a similar irregularity occurred Megaw, L.J., in delivering the judgment of the Court said at p. 21:

> "In the view of this Court, Mondon (Supra) did not lay down any rule of practice in relation to the application of the proviso in such a case. The test is the test which is described in the proviso itself in the words which have already been read: '..... the Court may ... dismiss the appeal if they consider that no miscarriage of justice has actually occurred.' The test is

> "this:
> If the irregularity had not occurred, if no second speech had been made in this case on behalf of the prosecution, would a reasonable jury necessarily and inevitably have brought in a verdict of Guilty?"

In R.v. Berkeley (1969) 53 Cr. App. R. 524, the jurors were sent out of Court after arraignment and plea during a discussion between the judge and counsel. When they returned, they were sworn without the defendant having been informed of his right of challenge. At the time the defendant's solicitor and counsel were present and made no objections.

It was submitted on behalf of the appellant that failure to inform the accused of his right should be treated as if he had been refused the right to challenge and that it was not necessary for the accused in such circumstances to be able to show that he would in fact have exercised that right or that the failure to exercise that right has prejudiced hin in any way. The Court did not accept this proposition. In giving the judgment of the Court Megaw, L.J., said at P. 526:

> ".....This Court is satisfied that it would be wrong to say that there is prejudice to the appellant or that there has been any miscarriage of justice as a result of this irregularity, if irregularity it be."

In R.v. Alexander (1974) 58 Cr. App. R. 294, after the jury retired to consider their verdicts, one juror, unaccompanied by the bailiff returned into Court to collect an exhibit which he required. No one spoke to him and a message was immediately sent to the jury to bring back the whole of the jury into Court. The judge was informed of what happened and no application was made to discharge the jury. The trial proceeded and the appellant was convicted. On appeal, James L.J., in delivering the judgment of the Court, referred to a number of cases in which after summing-up a juror had departed for a time from his colleagues, including Ketteridge (1914) 11 Cr. App. R. 54, Neal (1949) 33 Cr. App. R. 189 and said at P. 302:

> "That there was on the facts of this case an irregularity we have no doubt. One juryman

> "separated himself from the others, and from the jury bailiffs. On the facts he did so for a perfectly innocent purpose, he did so in circumstances in which he was observed immediately coming into the courtroom again, and on the facts there was no communication with him and no attempt to communicate with him in relation to the matters that the jury had to decide. There can be no doubt at all in our mind that there was no prejudice caused to the accused by this incident."

And later:

> "Without doubt in our mind there was no irregularity which went to the root of the matter and which would require that we should say that this conviction should fail."

In R.v. Goodson (1974) 60 Cr. App. R. 266, after retirement of the jury, one jury separated himself from the other eleven, and accompanied by the bailiff went into the hall of the Court building and used a public telephone - the telephone conversation was not communicated to the other jurors, the trial judge ordered that the juror who had left the jury room should be discharged and that the trial should proceed with the remaining eleven jurors; the appellant was convicted. It was held that the separation of the juror from his fellow jurors was an irregularity which went to the root of the trial and that the trial judge should have discharged the whole jury and ordered a new trial. The conviction was, therefore, quashed.

In delivering the judgment of the Court, James, L.J. said (p.268):

> "..... We are faced here with what is conceded on all hands to be a material irregularity. Such an irregularity occurred in the case of Alexander (1973) 58 Cr. App. R. 294. In that case the Court, finding an irregularity, decided that it was so minimal and trivial as not to justify any interference with the verdict of the jury.
>
> In this case when one looks at the facts, as has been pointed out in the course of argument, this is clear: that the appellant was deprived of the voice of the one juryman in the jury room in the consideration of the verdict from which the appeal is made.
>
> From what has been said in argument it is quite clear that there is abundant room for speculation and where there is room for speculation there is, we think, room for possible injustice, possible injustice to the appellant in respect of this conviction."

The Alexander and the Goodson cases were both concerned with a juror separating from his peers after retirement. Yet the consequences were different. However, what they do illustrate is that not every irregularity will necessitate the quashing of a conviction.

It is therefore necessary in every case to consider the nature of the irregularity to determine whether or not it is likely to prejudice a fair trial or is so minimal as not to justify interference with the verdict of the jury.

The facts of the instant case are clearly distinguishable from those in the Anderson case and in the following important aspects:

(i) In the Anderson case it was the appellant who was being cross-examined and the conduct of counsel for the prosecution created the prejudicial impression that despite the appellant's denial there was in existence a document contradicting him whereas in the instant case the cross-examination of the prosecution witness had been completed and Prosecution Counsel was seeking to open a new line of examination.

(ii) In Anderson's case when the jury retired enough had transpired to create an air of suspicion against the appellant whereas in the instant case the nature of the application was not disclosed. There was therefore no basis for unfavourable conjecture.

(iii) While in the Anderson case, the directions for the jury to withdraw were given against the strong and repeated objections of defence counsel; in the instant case there was no objection from the defence.

Now the obvious concern of the trial judge was to avoid matters prejudicial to the accused being discussed in the presence of the jury. The nature of the application justified the prudent course taken. This was not a matter requiring the personal express consent of the accused. Accordingly, it is fair to conclude that the jurors were sent out with the approval and for the benefit of the defence; therefore there can be no real cause for complaint.

In any event, if, however, on a highly technical view an irregularity may be said to have occurrred, it was too minimal to justify an interference with the verdict of the jury.

Next there was complaints concerning the learned trial judge's directions on self-defence based upon the following grounds:

> "That the learned Trial Judge failed to direct the jury adequately or at all as to the issue of self defence and more particularly as to the conduct of the complainant, Mr. Guice and or Dr. Joanne Pission jointly and or separately in their attack on the appellant and as to whether their said attack was or was not capable of being legitimate self defence or defence of a relative or was by way of revenge or punishment or retaliation or pure aggression and was accordingly such as to deprive the alleged initial assault of the appellant as justification for their/the said or any attack on the appellant.
>
> The Learned Trial Judge failed to direct the jury adequately or at all as to circumstances in which legitimate self defence ceased and aggression began.
>
> That the evidence established that the conduct of the compalinant and or his wife Dr. James Pizzino constituted and injustifiable aggression on the appellant and was such as to render the appellant not guilty of the said charge and or to deprive the complainant of the alleged right of inflicting injury by way of alleged self defence or otherwise or at all on the appellant and constituted an assault on the appellant."

Mr. Muirhead submitted in effect that the directions on self-defence were totally inadequate because, assuming that the jury accepted that appellant initiated the attack, he, himself became the victim of a vicious attack totally disproportionate and unnecessary in the circumstances. The directions should therefore be in keeping with and as advocated in Palmer v. R. (1971) 1 All E.R. at p. 1088 - in the following passage:

> "In their Lordships' view the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend on the particular facts and circumstances.

> "Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence. Of all these matters the good sense of a jury will be the arbiter. There are no prescribed words which must be employed in or adopted in a summing-up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self-defence. If there has been no attack then clearly there will have been no need for defence. If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self-defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence." (Per Morris of Borth-Y-Gest).

In our view this passage presents a useful exposition of the nature and elements of self-defence and advised that the jury should be adverted to certain matters that often arise in cases where the defence was raised and which were relevant to the determination of the issue. However, Lord Morris of Borth-Y-Gest was careful to point out that "no formula need be employed ..... everything will depend upon the particular facts and circumstances."

In the instant case the learned trial judge concisely summarised the important issue thus - (p.45):

> "Now, what is in issue of course, and this is the crux of the matter, is how the struggle started. I think to put it simply and to paraphrase it at this stage, Mr. Guice and Dr. Pizzino say that they were accosted by Mr. Ritch on this beach and they say that he made an unprovoked assault - attack - on them, and that in the course of that he caused the injuries to Mr. Guice's face, and they say that the injuries received by Mr. Ritch were received because Mrs. - I'm sorry - Dr. Pizzino, came to her husband's aid by way of self defence - lawful, reasonable self defence, and that is how he came to

"receive his injuries. Of course on the other hand, Mr. Ritch says that in this encounter it was Mr. Guice and Dr. Pizzino who made the unprovoked attack on him. You will remember his evidence was that after he had first encountered them, one of them struck him, stabbed him on the left shoulder with the knife and his evidence also was that when he looked around he saw the knife and then that Mr. Guice slashed him with the knife damaging the shirt he said he had on him; and his evidence is that he struck the blow against Mr. Guice with a stick in self defence against this attack and that thereafter they pursued their attack against him - the one they had initiated - and that he was stabbed twice more by Dr. Pizzino. And so this case is that is the issue, that is the crucial issue in this case, who started the struggle and who was acting in self defence and who was not acting in self defence, that's what has to be resolved in the case."

And later - (pp.50-1):

"Once again let me remind you that the case is that Ritch did not attack Guice or Dr. Pizzino, that on on the contrary they initiated an attack against him. They stabbed him once with a knife, he defended himself with a piece of wood, but despite that was stabbed twice more by Dr. Pizzino, and that the attackers eventually broke off and left him seriously injured on the beach. As I said before, he doesn't dispute that he struck Mr. Guice in the face, in that part of the face with the piece of wood, but what he is saying is that he did so in self defence against a serious attack.

I'd like at this point to come back to what I said earlier on, on matters of law, I want to come back to the general question the burden of proof. It is particularly important in relation to the defence of self defence. A person who acts - you recall I said that to prove that somebody has unlawfully inflicted grievous bodily harm you have to prove among other things that he acted unlawfully. Well, the significance of the defence of self defence is this, that a person who does something reasonably in self defence is not acting unlawfully, and when a person, in this case by raising the defence of self defence the defendant has raised an apect of his plea of not guilty, he is saying he is not guilty because he was not acting unlawfully, he was acting in self defence. And the consequence of that is that the Crown must prove beyond all reasonable doubt that he was not acting in self defence. The burden is on the Crown to prove beyond all reasonable doubt that he was not acting in self defence, and that's something you must bear in mind particulary in weighing up the defence."

And lastly - (pp. 53-54):

> "The other point, the final point that I would make in reviewing his evidence is that Defence Counsel is saying that, looked at overall and in proportion, the fact of the matter is that the defendant in his statement to the Police, his questions and answers to the Police, the following day in the hospital and in subsequent statements, in essence gave the same account - that he was attacked on the beach. The Defence is saying that he has always given that as his explanation since. Well that is for you to weigh.
>
> As I said earlier on, this case has matters in it which are not in dispute and the case really comes down to creibility - who do you believe? - bearing in mind always that the Crown must prove its case beyond reasonable doubt."

In our view the learned judge accurately identified the vital issue - who was the aggressor? It was therefore made clear to the jury that they were faced with two diametrically opposed alternatives, namely whether as the prosecution witnesses, complainant Guice and his wife, aver, the appellant, without justification or excuse struck the first blow causing serious injury to the complainant and that the appellant received his injuries subsequently from Guice's wife as he was beating the wounded man or whether as the appellant alleged he was first attacked and wounded by Guice and wife and while under attack in defence he hit Guice with a piece of stick causing the injury to his face. Both appellant and complainant received serious injuries. Accordingly, the determinant issue was not the adequacy of the force used on either side but who started the battle. The question whether in defending her husband Dr. Pizzino used more force than was reasonable necessary would only be relevant if she had been charged. It was astute argument attractivelypresented but not applicable to the vital issue in the case. We are of the view that the learned trial judge identified with clarity that issue and, in a manner easy to comprhend, adverted the attention of the jury to the evidence and the submissions presented and urged on behalf of the defence and gave them directions appropriate to the particular facts and circumstances of the case.

To these Grounds the following was argued as a supportive addendum:

> "That the Learned Trial Judge failed to warn the jury that the evidence of Dr. Joanne Pizzion - the wife of the complainant Mr. Guice - was evidence which may be tainted in that she had an interest to serve and accordingly her evidence should be approached with great care and/or that the usual warning as regards corroboration should be given."

Neither as a matter of law nor of practice is a trial judge required to give a warning as regards corroboration in a case of this nature. Mr. Muirhead's submission clearly did not rest upon the existence of any such proposition. What he urged in effect was that having regard to the relationship of the complainant Guice and the witness Dr. Pizzino, and having regard to the fact that the appellant received serious injuries, they would be concerned to give evidence tending to justify the infliction of these injuries on the appellant. Accordingly, he submitted, they had an interest to serve and therefore a warning of relying on uncorroborated testimony should have been given in the particular circumstances of the case.

In our view a jury must be presumed to be comprised of persons of reasonable intelligence. In the instant case, they could not be unaware that Guice and his recently wedded wife would tend to support each other. The learned trial judge in simple and clear language told them that the case came down to a matter of credibility with the burden of proof on the prosecution to satisfy them beyond reasonable doubt as to the guilt of the appellant.

In the circumstances, the directions were fair and adequate. Accordingly this ground of appeal also failed.

With respect to the appeal against sentence we considered inter alia, (i) the appellant had no previous convictions; (ii) that he is twenty-three years of age and (iii) that he is married and the father of three children ages 1 - 11 years.

However, having regard to the serious injuries inflicted on the complainant we are of the view that the sentence was by no means excessive.

For these reasons we dismissed the appeal and affirmed the conviction and sentence.