

A

RAM SAMI

v.

REGINAM

B

[SUPREME COURT, 1967 (Mills-Owens C.J.), 21st April, 16th May]

Appellate Jurisdiction

C

Criminal law—practice and procedure—minor cognate offence—conviction for common assault on charge of wounding with intent—Penal Code (Cap. 8) ss.250(a), 253, 256, 270—Criminal Procedure Code (Cap. 9) s.164(2)—Offences Against the Person Act 1861 (24 & 25 Vict., c.100) (Imperial) s.18.

Criminal law—conviction—conviction of common assault on charge of wounding with intent—Penal Code (Cap. 8) ss.250(a), 253, 256, 270—Criminal Procedure Code (Cap. 9) s.164(2).

D

The appellant was charged with unlawful wounding with intent to do grievous harm contrary to section 250(a) of the Penal Code. It was alleged that he had inflicted injuries on the complainant with a knife but the findings of the magistrate indicated that he was not satisfied that they were so inflicted, there being a possibility that they were caused by broken glass; he was, however, satisfied that the appellant attempted to inflict unlawful harm. The appellant was convicted of unlawfully doing grievous harm contrary to section 253 of the Penal Code.

E

Held: 1. It was not open to convict the appellant of doing grievous harm on a charge which averred wounding but not doing grievous harm.

2. On the findings of the magistrate the appellant was clearly guilty of common assault.

F

3. Under section 164(2) of the Criminal Procedure Code it was permissible to substitute a conviction of common assault contrary to section 270 of the Penal Code notwithstanding that the word "assault" did not appear in the charge.

G

Cases referred to: *R. v. Gibson* (1887) 18 Q.B.D.537; 16 Cox C.C.181; *R. v. Howarth* (1926) 19 Cr.App.R.102; *Teper v. R.* [1952] A.C.480; [1952] 2 All E.R.447; *R. v. Finden* (1926) 19 Cr.App.R.144; *R. v. Spooner* (1853) 6 Cox C.C.392; *R. v. Flood* (1914) 10 Cr.App.R. 227; *R. v. Taylor* (1869) L.R.1 C.C.R. 194; 20 L.T. 402; *R. v. Stokes* (1925) 19 Cr.App.R. 71; *Robert Ndecho v. R.* (1951) 18 E.A.C.A. 171.

Appeal against a conviction by the Magistrate's Court.

A. D. Patel for the appellant.

H

T. U. Tuivaga for the respondent.

The facts sufficiently appear from the judgment.

MILLS-OWENS C.J.: [16th May, 1967]—

This is an appeal against conviction, with a cross-appeal by the Crown against sentence. The charge was one of unlawful wounding with intent to do grievous harm contrary to section 250(a) of the Penal Code; the conviction was for unlawfully doing grievous harm contrary to section 253.

The case for the Crown was that the appellant (the accused) lay in wait for the victim in the bush and sprang out to attack him armed with a cane knife; the victim evaded the assault and ran to take refuge in a nearby occupied house where he endeavoured to hold the door against the appellant; the appellant chased him, forced open the door and followed the victim into a room in the house where, as it was alleged, he inflicted injuries upon the victim with the knife. The appellant admitted that he had chased the victim to the house, forced the door and assaulted the victim in a room therein, but denied being armed with a knife; the victim's injuries were caused, according to the defence, either by the use by the appellant of his fists or by the fact that in the struggle a glass lampshade was broken, the victim coming into contact with the broken glass on the floor. It is an admitted fact that the lampshade was broken in the course of the struggle and that the broken glass littered the floor of the room. None of the broken pieces of glass was blood-stained. A knife found at the appellant's home was produced in evidence but was not established to have any connection with the case. The medical evidence as to the victim's injuries was as follows: over the upper right arm a wound $2\frac{1}{2}$ " long by $\frac{1}{4}$ " deep which required seven stitches, and a cut over the outer left eyebrow $\frac{1}{2}$ " long by $\frac{1}{2}$ " deep, requiring two stitches. The medical opinion as to the possible causes of these injuries was equivocal; it admitted the possibility of the wound on the arm being caused either by a knife or by a broken piece of glass, and it admitted the possibility of the cut on the eyebrow being caused by a blow with the fist. The occupants of the house testified that the appellant was armed with a cane knife when he chased the victim into the house and into the room in the house. They gave no direct evidence as to the actual struggle which took place. The victim said that not only was the appellant armed with the knife but that he assaulted him with it, causing both the wound on the arm and the cut over the eye; and, as the victim added, a blow with the knife at the back of his neck, as to which however there was no medical evidence. Obviously, the factual issues to be determined were: how were the injuries caused, and had the appellant the specific intent to cause grievous harm, the crux of the case being whether the appellant was armed with a knife and used it to inflict the injuries or one of them. If the victim's evidence was accepted in toto there was a clear case of wounding, with the necessary intent. Acceptance of the evidence of the occupants of the house would go only part of the way; their evidence would corroborate the fact of the appellant being armed with a knife whilst chasing the victim, but would fall short of corroboration of the precise manner in which the injuries were caused.

The learned Magistrate found as a fact that the appellant had a knife. As he said in his judgment, no-one besides the appellant and victim knew what took place in the room. Admittedly the glass was broken and scattered on the floor, and the victim received his injuries whilst in the room. The Magistrate referred to the medical evidence and went on to give judgment in the following terms —

A "A man's intent can often be correctly inferred from the natural results of his actions. The wound was grievous, but nothing was said as to its possible danger, and it was said it could be caused by a fist. The jumping out from the bush which I accept, would indicate a deliberate attempt to waylay and inflict unlawful harm. On the other hand, complainant's wife said accused called at her home with a knife in his hand, and there was no harm done. (This refers to another occasion, it should be noted). Only the two parties know what happened in the room. There was a conflict in religious beliefs that accounted for part of the ill-feeling of accused towards complainant.

B I do not consider injustice will be done to anyone if I hold the Crown have not proved the intent beyond reasonable doubt. The accused was probably guilty of housebreaking also, having committed a felony in the house. I accordingly convict accused and find him guilty of offence under section 253 P.C."

C The appellant was sentenced to 6 months' imprisonment.

Mr. Patel, for the appellant, argued, inter alia, the following ground of appeal —

D "(a) The learned trial Magistrate erred in admitting inadmissible evidence which was materially prejudicial to the appellant."

E This ground refers to evidence given by one of the occupants of the house to the effect that: "When accused went away, from his house he sent his wife over to us to tell us if Police Constables come to our place, to tell them that Indar's arm was injured by glass of light. I see woman here today: Mrs. Ram Sami enters: that is woman". Similar evidence was given by another occupant. Counsel for the appellant stated that this evidence was deliberately introduced, and that it was persisted in notwithstanding an objection taken by him to its admissibility, and he submitted that it was damning in its effect; in *R. v. Gibson* (1887) 16 Cox C.C. 181 a conviction was held bad on the ground of the admission of such evidence notwithstanding that there was sufficient evidence otherwise to support a conviction. He referred also to *R. v. Howarth* (1926) 19 Cr.App.R. 102; *R. v. Finden* *ibid* p.144; *Teper v. R.* [1952] 2 All E.R. 447 P.C., and *R. v. Spooner* 6 Cox C.C.

F Crown Counsel felt bound to concede that the evidence in question was inadmissible. In my view it very clearly was inadmissible, as it did not form part of the *res gestae*, or otherwise fall within any exception to the hearsay rule. Crown Counsel in effect invites me to conclude that nevertheless no substantial miscarriage of justice occurred. In the circumstances referred to below I do not find it necessary to reach a decision on this submission.

G Counsel for the appellant also pointed out that whilst the charge was one of unlawful wounding with intent to do grievous harm, the conviction was for unlawfully doing grievous harm, contrary to section 253; if there was evidence of the wounding but not of the intent, the conviction should have been for unlawful wounding contrary to section 256; the charge did not aver grievous harm. This must, in my view, be correct.

H As it appears to me the judgment was in the nature of a compromise verdict. The learned Magistrate said that he accepted that the appellant

had a knife in his hand. But in finding that the intent had not been proved, he must surely be taken as not being satisfied that the injuries were caused by the use of the knife. The passage from his judgment quoted above lends support to that view. Further, the medical evidence admits of the possibility that the injuries were caused by the broken glass. In the circumstances the only conclusion that emerges clearly, without any question or doubt, is that the appellant was guilty of a common assault. As is pointed out at pp. 99-100 of the supplement to *Adams' Criminal Law and Practice in New Zealand*, the case of *R. v. Flood* (1914) 10 Cr. App. R. 227 is not to be taken as deciding that a compromise verdict is bad in all circumstances; the question is whether the verdict indicates uncertainty of guilt. Here there is no doubt that the appellant was guilty of a premeditated and determined assault, but, as it must be held, without using a weapon. This conclusion is an unsatisfactory one, but in the circumstances, as it appears to me, it is the only one open on the appeal.

The question remains whether it is possible on the appeal to substitute a conviction for common assault. In *R. v. Taylor* L.R. 1 C.C.R. 194 it was held permissible to convict of assault upon an indictment for unlawful wounding, or for inflicting grievous harm, although the word "assault" did not appear in the indictment. But in *R. v. Stokes* (1925-26) 19 Cr.App. R. 71 it was held that there is no such power where the indictment charges a wounding with intent contrary to section 18 of the Offences against the Person Act, 1861 which is similar in its terms to section 250 of the Penal Code. The reason for that decision, however, is that according to common law it is not permissible to convict of a misdemeanour on an indictment for felony. No such limitation appears in section 164 of the Criminal Procedure Code, dealing with conviction for minor offences. Subsection (2) of section 164, in particular, provides: "Where a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it". That appears to me to fit the present case, bearing in mind that common assault is a cognate offence (*vide Robert Ndecho & Anor. v. R.* (1951) 18 E.A.C.A. 171). Accordingly the appeal is allowed to the extent that a conviction for common assault contrary to section 270 of the Penal Code is substituted. The circumstances, in my view, warranted a sentence of imprisonment and I substitute a sentence of 3 months' imprisonment. The cross-appeal is dismissed.

Appeal allowed — convicted for common assault substituted.