DEMBY v THE STATE

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COURT OF APPEAL FOR SIERRA LEONE, Criminal Appeal 25 of 1975, Hon Mr Justice Ken E O During JA, Hon Mr Justice F A Short JA, Hon Mr Justice S M F Kutubu JA, 19 December 1978

[1] Criminal Law and Procedure – Offences against the person – Judge's direction on defence – Defendant denied inflicting injury – Judge's directions in relation to self-defence were irrelevant where defendant did not rely on them and did not admit act – Whether or not defendant committed act was a question of fact that should have been left to jury

The appellant appealed against conviction by a jury for wounding contrary to s18 of the Offences against the Persons Act 1861. The complainant claimed that the appellant had thrown a stone at him and hit him in the mouth, knocking three of his teeth out. The appellant argued that after trying to intervene in an argument between the complainant and another person, he was chased by the complainant, who had fallen over and knocked out his teeth. In his summing-up, the learned trial judge stated, inter alia:

> "The defence of the accused is that he was defending himself when he found himself in the position he was. Now what you have to consider is whether the accused did the act complained of when he was defending himself."

Held, per Short JA, allowing the appeal and acquitting the appellant:

1. The appellant denied throughout that he inflicted the injuries. His defence was a simple denial and a suggestion that if the complainant sustained the injuries during the incident at all, he must have done so by falling into a gutter whilst chasing the appellant. The judge's directions to the jury in relation to self-defence were irrelevant where the accused did not rely on them. Defences such as self-defence and the like are admissions of having committed the acts complained of coupled with a plea of "justification". The trial judge's direction to the jury was a fatal misdirection in the circumstances of this case.
2. The defence of the appellant that the act which caused the alleged injuries to the complainant was not his act was never put to the jury, even though a witness for the prosecution supported that defence and the doctor's evidence about the nature of the injuries was not inconsistent with this. This being a question of fact which went to the root of the case, it should have been left with the jury.

Legislation referred to
Offences against the Persons Act 1861 ss 18, 20

Appeal
This was an appeal by John Abdul Demby against conviction for wounding contrary to s 18 of the Offences against the Persons Act 1861. The facts appear sufficiently in the following judgment.

Appellant in person.
Miss M A C Jones, Senior State Counsel, for the State.

SHORT JA: The appellant was tried in the High Court in Freetown on two counts, that is to say:

1. wounding with intent, contrary to section 18 of the Offences Against the Persons Act 1861; and

2. wounding contrary to section 20 of the Offences Against the Persons Act 1861.

By a majority verdict of 8 guilty and 4 not guilty, the appellant was found guilty on the first count of wounding, contrary to section 18 of the Offences Against the Persons Act 1861. He was "cautioned and discharged." By majority verdict of 8 not guilty and 4 guilty, he was acquitted on the second count of malicious wounding, contrary to section 20 of the Offences Against the Persons Act 1861. Golley J, sitting with a jury presided. The appellant has appealed against his conviction on the first count on the following grounds:

1. That the verdict is unreasonable and cannot be supported having regard to the evidence adduced in court. (a) Mens rea – there was no evidence of an intention on the part of the appellant to inflict the wound referred to in the indictment nor were there surrounding circumstances from which a reasonable inference of such intention could be drawn. (b) Actus reus – no sufficient evidence to disclose at the end of the prosecution's case that the appellant did the act which caused the injuries to the complainant – the complainant's account of how he came by the wound was totally inconsistent with the prevailing circumstances. (c) The evidence of the doctor who treated the complainant did not support the prosecution's case. (d) Evidence adduced in court by three defence witnesses was completely ignored.

2. That in all the circumstances of the case the verdict against the appellant is unsafe and unsatisfactory.

The brief facts of the case in the court below are as follows:

The complainant one Josiah Onyodeh, alleged that on the 17th of October 1974, he was at home with his girlfriend, Marie Demby, who had left his home earlier on that day. It would appear from the evidence that they had been living as man and wife for some years. There had been a quarrel and she left the home. According to the complainant, she returned to collect her property. The complainant refused to let her to do this. Another argument ensued. The appellant appeared at this juncture and, according to the complainant, grabbed him. He was rushed out of the house. The appellant then picked up a stone, shied it at the complainant thereby hitting his mouth and removing three of his teeth. Under cross-examination, the complainant stated that he fell backwards after he had been hit by the appellant from a distance of about three yards. He made another significant admission. He stated:

> "When accused hit my mouth, my mouth was shut. Nothing happened to the outside but there was a cut inside my mouth as a result".

It will be of some interest to quote some material pieces from the evidence of the doctor who examined the complainant after the alleged incident 'Dr' Pratt in his evidence in the Court below stated, inter alia:

> "On further examination I found that three incisors on the lower jaws were removed. There were abrasions on both knees and fore arms. ... The abrasions could have resulted from a struggle."

Throughout the trial in the court below the appellant persistently protested his innocence. He denied inflicting the injuries complained of or any injury at all. He gave evidence on oath. His narrative was that upon the receipt of certain information he went to the residence of the complainant, Josiah Onyodeh where he found him quarrelling with his (the appellant's) sister, Marie Demby, who had previously lived with the complainant as man and wife. The appellant stated that he intervened and was attacked by the complainant. He said he ran away and was chased by the complainant. It was during the process of chasing the appellant that according to

his evidence, the complainant fell. The appellant's evidence was supported by Police Constable No 2325 Kposowa. He stated, inter alia:

> "Accused took to his heels. PW1 (ie the complainant) ran after him and he fell down in the gutter in front of the house. He got up and continued the chase. He later got entangled in a barbed wire fence and fell down."

Another defence witness Marie Demby, who was the central figure in the whole incident, gave evidence that the complainant chased the appellant and later fell down shouting "my teeth."

This evidence might not have commended itself to much weight because of the likelihood of bias in favour of her alleged brother, the appellant. But a witness for the prosecution, Marie Kamara, when confronted had told the Investigating Magistrate as follows:

> "I also said that PW1 (ie the complainant) attempted to hit him (the accused) with a chair. I also said that PW1 chased the accused but did not catch up with him."

The complainant denied throughout his evidence that he attempted to hit the appellant with a chair and that he ran after the appellant. He also denied falling whilst chasing the appellant.

In his summing-up, the learned trial judge stated inter alia:

> "The defence of the accused is that he was defending himself when he found himself in the position he was. Now what you have to consider is whether the accused did the act complained of when he was defending himself."

No such defence was ever raised in the court below or at the preliminary investigation. The appellant denied throughout that he inflicted the injuries. His defence was a simple denial and a suggestion that if the complainant sustained the injuries during the incident at all, he must have done so by falling into a gutter whilst chasing the appellant. The judge then directed on the law relating to battery in defence of a relation. The legal principles enunciated are good law but quite irrelevant to this case where the accused, quite properly did not rely on them. In ground 1(b) of his grounds of appeal under the heading, "Actus Reus", the judge states:

> "No sufficient evidence to disclose at the end of the prosecution's case that the appellant did the act which caused the injuries to the complainant."

Defences, such as self-defence and the like, are admissions of having committed the acts complained of coupled with a plea of "justification". The learned trial judge's direction to the jury was a fatal misdirection in the circumstances of this case. In the event, the defence of the appellant that the act which caused the alleged injuries to the complainant was not his act was never put to the jury, even though a witness for the prosecution supported that defence – in so far as a fall by the complainant was concerned. Even the doctor's evidence about the nature of the injuries is not inconsistent with the story of the defence. This being a question of fact which went to the root of the case, it should have been left with the jury.

Towards the end of his summing up, after telling the jury that "the defence of the accused is that he was defending himself when he found himself in the position he was", the learned trial judge went on:

> "If you fail to get him on the first one you can find him guilty on the second one which is based on section 20 of the Act. If you fail in this and you are not happy and that you feel sure in your mind that the prosecution has failed to discharge its duty under section 20, there is still another alternative open to you to bring him under, and this alternative is common assault."

The language used by the learned trial judge is, with respect, rather infelicitous and gives the impression that the accused had to be found guilty on one or other of the counts charged or the alternative.

In these circumstances, and for the reasons given, the conviction and sentence on the first count are set aside and a verdict of 'not guilty' substituted. The appellant is acquitted and discharged accordingly.

Reported by Anthony P Kinnear and Victoria Jamina