

IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL NO. 27/2002

Ind. 43/00

BETWEEN JOHN HENRY LUCAS BERNARD APPELLANT

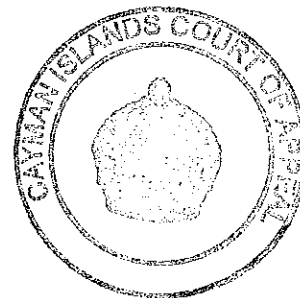
AND HER MAJESTY THE QUEEN

RESPONDENT

**BEFORE: THE RT. HON. MR. E. ZACCA P.
THE HON. MR. I. ROWE J.A.
THE HON. MR. M. TAYLOR JA.**

In the presence of Mr. A. Roberts, Senior Crown Counsel and the Appellant in person.

**HEARD: DECEMBER 2, 2003,
RELEASED: APRIL 30TH 2004**



ZACCA P.

On December 2, 2003 we dismissed this appeal against conviction and promised to put our reasons into writing. This we now do.

The appellant was charged on an Indictment containing four counts:

- (1) Assault occasioning actual bodily harm of Barbara Bernard on December 21, 1999.
- (2) Threatening violence – threatened to kill Everton McHayle on

December 22, 1999.

- (3) Attempted murder of Barbara Bernard on May 2, 2000.
- (4) Grievous bodily harm to Barbara Bernard on May 2, 2000.

Trial was by Judge alone.

After stating the offences for which the appellant was charged, the Learned Trial Judge stated in his judgment at page 6:

“Before coming to any conclusion on the evidence I have considered and cautioned myself on the following –

- (1) Mr. Bernard did not testify in this case. I specifically draw no inference, adverse or otherwise from that, even though I am entitled to do so pursuant to section 18(c) of the Evidence Law, (1995 Revision). Mr. Bernard was unrepresented at trial, although he had different lawyers representing him up to trial and he also had the benefit of Mr. McGrath’s assistance at trial, if he chose to rely on it. Nevertheless, he may not have understood the potential negative consequences of failing to testify and in these circumstances, I will not draw any adverse inference from his decision not to testify.
- (2) No adverse inference was drawn from Mr. Bernard’s decision not to give a statement to the police in May 2000. That is his right.
- (3) In his statement to police in December 1999 he offered certain exculpatory explanations, namely that Mrs. Bernard received her injuries when jumping out of the car. Although that was not given in evidence by Mr. Bernard, I did consider that explanation

given to police by Mr. Bernard, when determining whether I was sure that the injuries sustained by Mrs. Bernard on December 22nd were the result of an assault by Mr. Bernard.

- (4) I have considered Mr. Bernard to be a man of previous good character and therefore entitled to the benefit of that direction to myself. Further, in cross-examination several police and civilian witnesses testified that they were unaware of any previous acts of violence committed by Mr. Bernard. Accordingly, I remind myself that the fact that he is of good character may mean that he is less likely than otherwise might be the case, to commit the crimes alleged.
- (5) During the course of the trial Mr. Bernard's conduct was such, that much of the Crown's case was led in his absence. He would not allow the Crown, its witness or the Court the opportunity to speak, he would simply shout them down. Often he would not stop speaking or shouting. Accordingly he had to be removed from the courtroom. He was provided with a copy of either a transcript or a videotape of all Crown witnesses' evidence as quickly as possible. Also during the course of the trial Mr. Bernard made several remarks to the Court which prima facie are contemptuous. His remarks and conduct will form the basis of a contempt hearing which will follow after these proceedings. I refer to them here, simply to remind myself not to consider his conduct in any way in determining if the Crown has proved each and every element of its case so that I am sure of his guilt."

With reference to the appellant's defence, the learned trial judge at page

8 stated:-

"Mr. Bernard did not call any witness in his defence. I did however understand his defence from his remarks at the beginning of trial and from his suggestions during cross examination of various crown witnesses to be as follows:-

- (1) He is being prosecuted as part of a conspiracy to undermine and defeat the immigration process in the Cayman Islands.
 - (a) That the Chief Justice, Mr. Justice Graham, myself, the police, immigration officials and others are part of this conspiracy;
 - (b) That Mr. Justice Graham has intimidated his previous lawyers into withdrawing and that I refused his adjournment request with the desire to convict him;
 - (c) The police and crown witness have conspired to create a story in order to convict Mr. Bernard.
 - (d) One reason advanced for the motive behind this conspiracy was because he is a black Caymanian and those conspiring against him wanted to allow Mrs. Bernard to keep her Caymanian status by putting a criminal record against Mr. Bernard.
- (2) That he is innocent of the offence charged.

That he did not assault Mrs. Bernard on December 22, 2000 because she was injured jumping from the moving automobile. That he did not threaten Everton McHayle on

December 23, 2000 and that the injuries were caused by Mr. Bernard when he was trying to defend himself from an attack by Mrs. Bernard.

A summary of the crown case taken from the judgment is as follows:-

Count 1

The appellant was married to Barbara Bernard for some eleven years. She was employed to Plantation Village in December 1999. Mr. Everton McHayle was also an employee at Plantation Village. The appellant became upset and hostile because his wife was seen speaking to McHayle.

On the morning of December 21, 1999 she went to work and greeted two other workers including McHayle. The appellant came up and heard her speaking to McHayle. The appellant spoke to his wife and having left, returned. He became hostile and then left. On Mrs. Bernard arriving home that evening a quarrel ensued. The appellant struck and kicked her several times. He suggested they go for a ride in his car. In the car the appellant accused her of having sex with McHayle. He slapped her several times. Mrs. Bernard opened the car door with the intention of getting out. The appellant stopped the car and she jumped out. The appellant left the scene

in his car. The police arrived. She did not give the appellant's name to the police because she did not want him to get into trouble.

Next morning there was another quarrel. Appellant left and on returning home told Mrs. Bernard that he had been to Plantation Village. The quarrel continued. The police arrived and the appellant was arrested and taken into custody. Dr. Fiona Robertson examined Mrs. Bernard and found facial bruising, including swelling over the left side of her forehead, cheek and around the eye. Also bruising to her right upper arm.

In cross examination by the appellant she admitted that she told the police on December 21, 1999, that she had not been assaulted by the appellant. She did so because she wanted to protect her husband. She denied on cross examination that she had received her injuries when she jumped from the car.

The learned Judge in his reasons for his decision stated that he accepted the evidence of Mrs. Bernard that she received her injuries in the way she described it to the Court.

The trial judge at page 18 of his judgment said:

"In conclusion the crown has to prove so that I am sure, that –

- (1) Mr. Bernard assaulted Mrs. Bernard on the evening of December 21, 1999;
- (2) That he intended to assault her;

- (3) That her injuries were not caused by Mrs. Bernard jumping from a moving vehicle and;
- (4) That she suffered actual bodily harm, as a result of the assault.

I find that the crown has proved all of those elements and accordingly I find Mr. Bernard guilty of Count 1.”

Count 2

The complainant in this case was Everton McHayle. He testified that on the morning of December 21, 1999, Barbara Bernard came to work and she greeted himself and other employee's – “*good morning*”. The appellant drove up and went inside with Mrs. Bernard.

Next morning December 22, 1999 the appellant went to Plantation Village spoke to Mr. McHayle and told him that his wife had previously told him she didn't speak to McHayle but that he heard her speak to him. The appellant then said to McHayle, “*If he loses his wife he is going to kill me*”. McHayle asked the appellant if he was threatening him and the appellant replied “*you can take that as a threat*”. Appellant went into his car, reversed it and said to McHayle “*he was going to come to my house and kill my family*”.

In cross examination McHayle denied that he had threatened the appellant. He suggested that McHayle was in a conspiracy to convict him.

The learned trial judge found the appellant guilty on this count.

Count 3

Mrs. Bernard testified that she had moved out of the matrimonial home on December 23, 1999. In March 2000 she asked the police not to prosecute the appellant because he seemed to have changed. She had seen him several times and had spoken to him by telephone. She suggested that he seek counselling. Mrs. Bernard resumed intimate relations with the appellant but she did not move back home.

On May 2, 2000, appellant invited her to lunch and he picked her up in the Treasure Island parking lot and drove her back to the matrimonial home. He asked her to iron some shirts for him and she agreed. During the drive home he argued with her about her not returning home. She told him she was not coming back to live with him unless he got counselling.

Having got to the apartment he got the ironing board and she began to iron his shirts. He again argued with her about not coming back. The appellant then punched her hard on her face. He grabbed her by her skirt and threw her on the bed and jumped on top of her. He pulled her by her hair and started to punch and kick her. He then went by the bed room door and came back with two knives and a machete. One of the knives was a butcher's knife. He placed the other knife and the machete on the bed and

said to her "*you naw running off your mouth today*". He thereafter inflicted several injuries on her with the kitchen knife. She was screaming and asking him to stop. The appellant replied "*you let the devil take over for four months, well I am letting him take me over today*".

She was crying and asked him to take her to the hospital. He initially refused and after several hours, she told him that she would move back with him if he took her to the hospital and that she would tell the doctor that some girl had stabbed her. He then drove her to the hospital. There she told the nurse and doctor that a girl had stabbed her. Before reaching the hospital, the appellant told her that if he got arrested, he would get bail and buy a gun and kill her and all the members of her family. After the appellant left the room, she told the police that it was he who had injured her. Mrs. Bernard received the following injuries:

- (1) chest wound which went down to the bone. The left lung had collapsed;
- (2) clinical shock;
- (3) severe blood loss;
- (4) large 8cm laceration to the right side of her face;
- (5) a 5cm laceration to the right of her right eye and her skin was hanging off;

- (6) a 5 cm deep laceration on the back of her head (down to the bone);
- (7) a 7 cm wound on the dorsal aspect of her right hand – it was very deep and severed the tendons;
- (8) numerous small lacerations to the palm of her fingers which were superficial;
- (9) a deep laceration through the left hypothenar eminence of the left hand extending into the wrist.

In cross examination of Mrs. Bernard the appellant suggested to her that it was she who had attacked him and he was defending himself. This she denied.

In response to questions to the court she admitted that she had lied to the police and the medical staff when she told them that she had been stabbed by a girl.

Sgt. Evans testified that he arrived at the hospital at about 6.30 p.m. – 7.00 p.m. on May 2, 2000 where he saw Mrs. Bernard in the trauma room and the appellant in the corridor . The appellant told him that she was injured by a lady on the street and the reason was because Mrs. Bernard had been fooling around with her man. The appellant said he was at home and when his wife knocked at the door she was already injured.

Sgt. Evans went to the appellant's home and in the house observed blood stained clothing on the stairway, blood stained rug and floor mat outside of the upstairs bathroom, blood on the bathroom basin, blood stained clothing and bed sheets in the master bedroom. He also recovered a butcher knife.

In cross examination of Sgt. Evans, the appellant suggested that Sgt. Evans was involved in the conspiracy because he had arrested the appellant several years earlier for knocking down a child with his motor cycle. Sgt. Evans could not recall such an incident.

In his judgment the learned trial judge said at page 40:-

“Even though there were some inconsistencies in her evidence and she admitted telling lies to the police and others, I am satisfied so that I am sure that she was telling the truth on every material issue before me. Mr. Bernard in cross examination was forceful and aggressive, but it did not, in my judgment impair her credibility in any way. The inconsistencies in her evidence and contradiction with other evidence were either explained to my satisfaction, were on insignificant matters or explained by the simple frailties of one's memory. But as I have said on all material matters, I am satisfied, so that I am sure, that her memory of the events she described was accurate and her evidence truthful”.

And at page 57:

“I do not have any reasonable doubt, on the evidence that at the time he struck the first blow to her chest and the subsequent blows to her face and

head that he intended to kill her. Accordingly I find him guilty on Count 3”.

Count 4

The count was in the alternative to count 3. The learned trial judge quite correctly, having convicted the appellant on count 3, did not enter a verdict on count 4.

The learned trial judge found that there was no evidence to support the appellant's suggestion of a conspiracy to convict him.

Before this court the appellant stated that he did not have an attorney and wished to argue the appeal on his own behalf.

The grounds of appeal on which the appellant relied were :-

- (1) The trial judge refused to allow the appellant a legal representative. He was also refused an adjournment on March 25, 2000 when the trial began.
- (2) The trial judge was guilty of abuse by putting him out of court and bringing him back repeatedly.
- (3) The trial judge threatened to handcuff the appellant and to have his mouth taped.

- (4) The trial judge unfairly assisted the prosecution in the presentation of their case.
- (5) The trial judge refused to recall two witnesses who had left the island.
- (6) It was the complainant, Barbara Bernard, who attacked the appellant. She had made several inconsistent statements and was not a credible witness.

Ground 1

On March 25, 2000, the case was set down for trial. The appellant was not legally represented and he requested an adjournment. The offences for which the appellant was charged occurred on December 21 and 22, 1999 and May 2000, some two years before the trial date. The case had been adjourned at the request of the appellant on at least four or five occasions to allow him to obtain legal representation. These were all trial dates. The appellant had the services of five counsel prior to March 25, 2002. They had either withdrawn or been fired by the appellant. Although the appellant had informed the court that he was again attempting to retain an attorney, he was never able to do so. He had been offered legal aid but the attorneys had withdrawn from the case or were fired.

On refusing the adjournment on March 25, 2000, the trial judge at p.

83 of the record said:-

“This is the fourth or fifth time that this case has been adjourned and I am satisfied that the primary cause of the adjournment has been the withdrawal of lawyers at or near the time of trial. In each case that it had previously been requested, the adjournment had been granted, although I am advised by Mr. Bernard with great reluctance on the last occasion when Mr. Justice Graham adjourned it.

My very grave concern is that if we adjourn this matter yet again we will simply be faced with the same problem that we have today which is that Mr. Bernard will still be unrepresented, and we will be no further along in assisting him in obtaining legal advice.

My sense, although I don't know if I can make this a finding of fact, but my sense in having seen Mr. Bernard on two or three occasions when the case is brought forward for mention and this morning, is that Mr. Bernard is an extremely difficult person to deal with. I can understand, given his personality, that lawyers have in the past withdrawn and he has not seen eye to eye with them on how his defence should be conducted.

I am concerned about crown witnesses being brought in. I am concerned about the delay that the crown faces. But most importantly, I am concerned with the fair administration of justice. I think the fair administration of justice in this case requires that the trial proceed.

Accordingly, Mr. Bernard, I am not going to grant you adjournment”.

The hearing of this appeal was listed on July 31, 2003. The appellant was offered legal aid which he refused. The hearing was adjourned to the November session to allow him the opportunity to obtain a legal representative. When the appeal came up for hearing on December 2, 2003, the appellant still had not retained a lawyer. He informed the court that he would proceed with the appeal in the absence of counsel.

In our view the appellant was given every opportunity to be legally represented over a long period of time. Each time he was assigned a lawyer, the lawyer was either dismissed or had to withdraw. The judge described the appellant as a difficult person. In order to safeguard the interest of the appellant, the learned trial judge appointed an experienced attorney, Mr. McGrath to act as *amicus curiae*. He was present during the trial.

The judge did not err in exercising his discretion not to allow a further adjournment. Justice delayed is justice denied. There must be justice not only for the accused but also for the victim.

The delay in this case was caused solely by the reluctance of the appellant to proceed with the trial. There is no merit in this ground of appeal.

Ground 2

The appellant was continuously boisterous and abusive to the court so that on occasions it was necessary for the appellant to be removed from the court. He himself on occasions asked to be taken out of court. The trial judge went out of his way to assist the appellant and had all of the evidence transcribed and video taped. These were made available to the appellant. He created such a disturbance that he had to be removed from the court. *R v Berry* [1997] 104 L.T.J. 110. is such a case.

The appellant was at first reluctant to cross examine the crown witnesses. At the close of the crown's case, the trial judge recalled the crown witnesses except for one who had left the island. The appellant was given a second opportunity to cross examine all the witnesses for the crown. He did so extensively.

Before this court he ably presented his submission and seemed an intelligent person. We are unable to say that he suffered any injustice from being removed from the court as a result of his misbehavior. He was presented with a video recording of the proceedings and was allowed to cross examine the crown witnesses extensively.

Ground 3

The appellant informed this court that his mouth was not taped. This was obvious from the record which showed his frequent contemptuous, abusive behavior. The record does not disclose that he was handcuffed. It would be unusual for an accused person to be handcuffed in court but an occasion could arise where this might be necessary.

We find no merit in this ground of appeal.

Ground 4

The record does not disclose that the trial judge in any way unfairly assisted the crown in the prosecution of their case. The court has not been referred to any such circumstance.

Ground 5

The witness Melsaida Jackson had already left the island when the application was made to the trial judge to have her recalled for cross examination. When she gave her evidence in chief, the appellant failed to cross examine her. It cannot be said that he was denied the opportunity to cross examine her.

The trial judge correctly exercised his discretion in not allowing her to be recalled under these circumstances. It would have meant having the trial adjourned to have her brought back to the Island.

Ground 6

The case against the appellant was a very strong one. It was a matter for the judge sitting as judge and jury to accept or reject the evidence of the witnesses. Although suggestions were put to the complainant as to how the injuries were inflicted, these were denied by her. The appellant, as was his right, did not give evidence or call any witnesses. The court was left with the evidence of the crown witness. The evidence against the appellant was overwhelming. It cannot be said that the evidence was such that no jury, properly directed, would have come to any conclusion contrary to the judges decision.

The judge properly directed himself on the law and the facts.

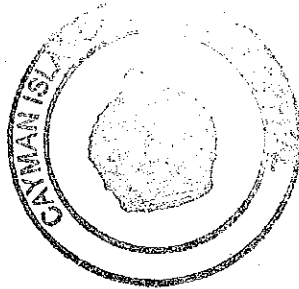
It cannot be said that the verdict of the trial judge was unreasonable or unsafe having regard to the evidence. There is no merit in this ground of appeal.

We desire to say that the behavior of the appellant during the trial of this case was uncalled for. He made very serious accusations against the trial Judge, other Judges in the jurisdiction, Crown Counsel and the system of justice in the Cayman Islands. All these without any foundation. They amounted to mere abuse and the trial judge should be commended for his patience and the way in which he conducted the trial. It was a difficult time

for him and he went out of his way to assist the appellant in the conduct of his case.

It was for these reasons we dismissed the appeal and affirmed the conviction.

E. Zacca, P.



M.R. Taylor, J.A.

[The late Mr. Justice I.D. Rowe participated in the hearing and concurred in the decision on this appeal but passed away before completion of the above reasons.]