IN THE CAYMAN ISLANDS COURT OF APPEAL

Criminal Appeal No. 49 of 1999
Indictment No. 22 of 1999

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

ATLEE EBANKS

Appellant

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

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

August 14th 2000

REASONS FOR JUDGMENT

ROWE, J.A.

This is an appeal from convictions and sentences imposed by the Grand Court on December 10, 1999 after a very long trial before Graham, J. and a jury. At the completion of the arguments before us, we dismissed the appeal against convictions and confirmed the sentences. The reasons for our decision are set out herein.

The appellant was convicted of six counts on the Indictment, to wit, (1) threatening violence at night on February 4, 1999; (2) threatening violence on February 20, 1999; (3) aggravated burglary on February 25, 1999; (4) assault occasioning actual bodily harm on February 25, 1999; and, (5) & (6) 2 counts of assault occasioning actual bodily harm

both of which occurred on February 26, 1999. On count 1 and 2 the sentence was 6 months imprisonment; on count 3, three years imprisonment; on count 4 – two years imprisonment; on count 5 – one year imprisonment; and, on count 6 – two years imprisonment. All the sentences were ordered to run concurrently. In addition, the appellant was ordered to pay $12,000.00 compensation to the victim and $10,000.00 towards legal costs of the prosecution, which amount was to be deducted from the cash bond which had been posted by the appellant. An application of bail pending appeal was refused.

THE PROSECUTION'S CASE

We will summarise the voluminous evidence which was adduced in this case. In 1988 Ms. Margaret Moulton, known to her friends as "Peggy", and who will be referred to in these reasons for judgment as "the complainant" was a bank officer with Signet Bank in Baltimore, USA. She had been a frequent visitor to the Cayman Islands and when she saw that an officer of the Richmond branch of Signet Bank had the surname "Ebanks" she telephoned him to inquire if he had Cayman connections. The person to whom she spoke was the appellant and they developed a telephone friendship. About October 1990 the complainant and the appellant first met in person. They developed an adult relationship and by 1991, after the appellant had separated from Signet Bank, the complainant and the appellant began living together. A great deal of evidence was placed before the jury as to the course of that relationship which on all accounts had very good moments and some equally unsatisfactory ones. The appellant obtained employment in Grand Cayman early in 1993 and left the USA. Not long after, the appellant resumed

telephonic communications with the complainant which led to mutual reciprocal bi-monthly visits between the parties in the USA and Grand Cayman.

The complainant obtained employment in Grand Cayman in June 1998. She joined the appellant in his Condo. However, having been offered employment in Grand Cayman, in about March 1998 the complainant made arrangements to purchase premises 8 Lakeshore Villas, West Bay, Grand Cayman. She provided or arranged for the complete purchase price and took title in a corporation in which the complainant, her mother and father are the only shareholders. At trial the appellant admitted that he had no equitable or financial interest in that house. Towards the end of July 1998, the appellant, the complainant and the complainant's cat, "Nicholas Andrew", moved into the house at 8 Lakeshore Villas. The complainant had brought her cat from Baltimore. The complainant testified that it was agreed that the appellant would pay to her an amount of $1,500.00 per month as rent and would pay for all the utilities. The last payment which he made was in November 1998.

FEBRUARY 4, 1999

Towards the end of 1998 the relationship between the appellant and the complainant became very strained and the appellant moved from the master bedroom which he had shared with the complainant and started sleeping in the front room. The complainant testified as to the following events on February 4, 1999. She telephoned her mother in Hanover, Pennsylvania and was in the act of complaining to her about certain acts of the appellant, when he entered the house in a rage and ordered her to hang up the telephone.

In answer to the appellant's query, the complainant told him that she was talking to her mother about arrangements for the mother's visit to Cayman in the following week. The appellant was more enraged, said that he had been listening to the conversation outside and that she was a liar. The complainant pretended to hang up the telephone but in fact left it open. Thereafter the appellant abused the appellant for a period of five hours during which he called her "whore", bitch" and "liar'; spat in her face; was frothing at the mouth; hit her in her head several times; pushed her down in the sofa when she tried to get up and threw a glass of water into her face. The appellant ordered the complainant to the balcony and threatened to kill her and her precious "Nick" who would die a slow death. Her mother overheard the commotion and after the phone line was reconnected telephoned the complainant at intervals to determine that she was alright. The appellant would speak reassuringly to the complainant's mother but immediately afterwards would recommence abusing and threatening the complainant. He hit her several times on the back of her head with his fist. The appellant made reference to the complainant's attendance at church and said that he was the devil incarnate and she should pray to him. All these acts and words frightened her terribly. The complainant's mother testified to what she overheard of this conversation in support of the complainant's testimony.

FEBRUARY 5-19, 1999

The complainant testified that the appellant left the house at 8 Lakeside Villas just after 2:00 a.m. on February 5, 1999 and that he had not lived at that house again. The appellant telephoned her office on February 5, 1999 and left a voice mail that he had moved out and she would not be seeing him again. However, on February 6, 1999, at the

appellant's request the complainant drove one of his motor vehicles from her home to his new apartment. The appellant insisted on showing her around his new apartment, then reluctantly drove her home that night. Although the complainant described unacceptable behaviour by the appellant during that drive, there has been so specific charge in respect of February 6, 1999. On Saturday February 13, 1999, the complainant changed the locks on her house, as up to that time the appellant had not returned the keys which he had for her house. The appellant telephoned her incessantly and so the appellant sometimes left the telephone off the hook at nights.

FEBRUARY 19, 1999

About midnight on February 19, 1999, the appellant telephoned the complainant and said he was coming around to wash his car. She considered the request unreasonable but the appellant arrived, washed his car outside the house and requested to be let in. He made no attempt to use his keys. The complainant, whose mother had been visiting since February 8, refused to permit the appellant to enter the house. Soon after he had driven away the appellant telephoned the complainant stating: "You have started a war now. This is it" and "You've started a war. I was going to be nice but I am not going to be nice anymore". The complainant's mother listened to this call on the telephone.

FEBRUARY 20, 1999

The next contact between the appellant and the complainant was on February 20, 1999 at about 10:00 a.m. when the appellant telephoned to say that he wanted to come over to pick up some of his personal articles. The time was inconvenient as the complainant was

expecting workmen. The complainant packed some of the appellant's clothes in a Mazda car which was still on her premises, made a report to the Police concerning the appellant's behaviour and went to lunch. She returned at about 5:00 p.m. The appellant drove up immediately and berated her for keeping him waiting. Just then Mr. Thomas Jefferson, Minister of Tourism, in whose Ministry the appellant worked, drove up and inquired if everything was alright. The appellant and complainant pretended that they were very happy there and Mr. Jefferson drove off. The appellant was insisting on coming into the house. The complainant refused him entry whereupon the appellant said that this was his house and he had a right of entry whenever he wanted, that he had spoken to Sergeant Powell of the Police Department who had two uniformed officers ready to assist his entry. The complainant still refused him entry.

The appellant forced himself past the complainant who was standing in the open door and entered the house. She said he was in a "tirade, menacing, threatening" to have the complainant thrown off the Island and demanding articles. The complainant secretly turned on a tape recorder on which portions of the exchanges between the parties were recorded. The appellant claimed that he had influence with the Immigration Department and could have the complainant summarily removed from Grand Cayman. The complainant brought quantities of clothing from upstairs to the living room. These the appellant threw on the ground. She handed him a box and he hit her with his fist at the back of her head. The appellant pretended to call and speak to a police officer. Thereafter the complainant assisted the appellant to remove his personal effects out of the house and into his vehicles. The appellant drove his van, the complainant drove his Mazda car, and

the maintenance supervisor of the housing complex drove behind them to give the complainant a ride back to Lakeside Villas. The auto-tape which recorded portions of the exchanges between appellant and the complainant was received in evidence.

FEBRUARY 25, 1999

One Mr. Grissett, a friend of the complainant visited Grand Cayman and had dinner with her at the Treehouse out-door bar on the evening of February 25, 1999. They went to her home after the restaurant, remained there for between 45-50 minutes and then the complainant drove Mr. Grissett to his hotel. Just prior to leaving work on that day, the appellant had telephoned the complainant and invited her to dinner. She declined the invitation. The complainant returned home at about 11:00 p.m., opened her door, entered the house and turned her back to lock the door. She described the following scene:

> "As I was closing and locking the door, Mr. Ebanks leaped out of the powder –room in the hallway, lunged at me with a knife in his hand and said, 'I am going to kill you. This your last day alive ---- Within seconds he was in my face with a knife in his hand. He held it in my face and he said: "I am going to kill you. See this knife. It is a Ninja knife. I can cut your heart out and you will never know what happened""

She testified that the appellant cornered her in the doorway then punched her in her face in the area of the eyes and nose. The appellant was enraged, speaking rapidly and viciously. He said that changing the locks could not keep him out and asked: "You didn't expect to see me here, did you? Anybody could get in here". It is common ground that

the appellant had entered the house through a window from which he had removed the screen.

The complainant testified that the appellant took her at knife-point upstairs and forced her into her bedroom. The appellant ordered her to lie on her back on her bed. He then punched her several times in her face then used the knife to cut the sweater which she was wearing from the bottom to her neck and stripped it away from her. He pulled up her bra and cut it away in the same manner. He stabbed her with the knife on her right thigh. Later the appellant took the complainant into the bathroom and drew her attention to her face which was covered in blood and tears and caked with blood out of her nose. He asked her to ponder how she would look with 200 stitches in her face. "As to those pretty blue eyes, start thinking about transplants" are the words allegedly used by the appellant and then he cut the complainant on her nose. After these incidents the appellant drove away from the complainant's house and she went to her minister of religion and made a report. The police were summoned. The complainant was examined and treated by Dr. Radovic at 2:45 a.m. that same night.

THE INJURIES

Dr. Radovic found the complainant to be suffering from trauma to the head, face, arm, chest and extremities. These he itemised as:

HEAD:

Haemathoma L sclera

Superficial laceration nose

Infraorbital haemothoma

Haemathoma nose

Upper lip haemathoma

Lower lip haemathoma

Bruising neck

CHEST:

Abrasion chest anterior

Haemathoma L intrascapular

Abrasions and bruisings both breasts

LIMBS:

Stab wound R upper leg lateral aspect

Sutured under local anaesthetic – 2 stitches

Bruising right knee

Haemathoma L lower leg

R little finger superficial abrasion

Bruising L great toe

He prescribed medication and ordered x-rays.

THE DEFENCE

The appellant is a banker and consultant. He had two minor children with his divorced wife for whom he was paying child support at the time he and the complainant began living together. She resented his children, would not permit them to visit him and caused an unpleasant scene whenever she found that he sent them money. The appellant denied that his relationship with the complainant between 1992 and 1993 was a stormy one prior to his relocation to Grand Cayman.

After his relocation in Grand Cayman the complainant visited him at least 30 times between 1993 and 1998. The appellant said that on February 4, 1999 he decided to move out from the house in which he and the complainant lived after there was an altercation about her treatment of a phone call from his son. He said that he told the complainant on February 5, 1999 that he moved.

The appellant said that the complainant kept him waiting for 45 minutes on February 20, 1999 at her home where he had gone, by appointment, to get some of his personal articles. He admitted that there was an altercation about certain personal items including a Linda Roberts painting. The appellant denied threatening or hitting the complainant on that occasion. On February 24, 1999 by arrangement the complainant brought some of his personal effects to him in a parking lot at the Presbyterian Church in West Bay together with some company documents.

The appellant said that he had an arrangement to meet the complainant at her house at 8:15 p.m. on the February 25, 1999, that she was not there when he went and that he returned at 10:30 p.m. She was still not there. He tried his keys in the front door and they would not work. He removed the screen from a living room window and entered the house through that window. He looked at some items which he intended to take and then went to the bathroom. Just as he was completing his use of the bathroom, he heard the front door open and as he stepped out of the bathroom the complainant entered the house. She was startled and fell to her knees. The appellant said he explained to her that he had come for his belongings. She responded that he would get them when she was ready. She made some insulting remarks about his Caymanian children and then slapped him across his face twice. He instinctively returned the slaps. The complainant lunged at him but he held her hands and asked her to calm down. The appellant further said that the complainant said that she could kill herself and so he took his knife which was then in a sheath and offered it to her but she did not take it. He left the knife in the house.

The appellant denied that he threatened the complainant on February 4, 1999 or on February 20, 1999. He denied all the allegations of the complainant as to what occurred during the night of February 25, and early morning February 26, 1999. The defence alleged that the complainant was a violent person and that in all probability she self-inflicted the stab wound to her right leg.

THE GROUNDS OF APPEAL

Although eight grounds of appeal were filed, the arguments before us were concentrated around four central issues, (a) the learned trial judge erred in over ruling the no-case submission; (b) the learned trial judge should have dismissed the jury when evidence was elicited that the appellant had been diagnosed as a manic depressive; (c) the learned trial judge erred in failing to carry out a proper investigation into an allegation that a member of the public had improper contact with the jury, and (d) that the sentence was excessive.

The Indictment charged offences on four separate dates, to wit, February 4, 20, 25 and 26, 1999. The Record did not contain a transcript of the submissions which were made by counsel on the no-case submission but the Skeleton Argument of the appellant carried the submissions of counsel and the ruling of trial judge. We wish to say at the outset that submissions on no-case should always form part of the official record of the trial.

It appears from the ground of appeal that the submissions of appellant's counsel on no-case were directed principally to the third count of the Indictment which charged that on the 25th day of February 1999, the appellant entered 8 Lakeshore Villas, West Bay, Grand Cayman, as a trespasser, with intent to cause grievous bodily harm to Margaret Moulton and at the time of doing so had with him an offensive weapon, namely a knife.

It was urged on the learned trial judge that the appellant had a perfect right to enter the house at 8 Lakeshore Villas because some of his personal effects were there and that he could so at anytime of the day or night through the door or the window as he pleased.

There was an earlier veiled attempt at saying that the appellant had a financial interest in the house but this was denied by the appellant. In R. v. Christopher Smith and John Jones, Cr. App. R. 47, 52, the Court of Appeal was dealing with a case in which a son who was found with two television sets in his motor car in the early hours of the morning. The television sets had been taken from his father's house. He was arrested. The son's defence was that he had his father's permission to remove the television sets and that he though he could do so at any time. Incidentally the father had reported the television sets stolen. James, L.J., reviewed the cases which deal with burglary as a trespasser and said this:

> "[It] is our view that a person is a trespasser for the purpose of Section 9 (2) (b) of the Theft Act 1968, if he enters premises of another knowing that he is entering in excess of the permission that has been given to him, or being reckless as to whether he is entering in excess of the permission that has been given to him to enter, providing the facts are known to the accused which enable him to realize that he is acting in excess of the permission given or that he is acting recklessly as whether he exceeds that permission, then that is sufficient for the jury to decide that he is in fact a trespasser"

In this case there was evidence that the appellant had a key for 8 Lakeshore Villas on February 5, 1999 when he left the premises to live elsewhere. He returned to the house on February 6, 1999 and he was denied entry by the complainant. Between February 5 and February 25, 1999, although the appellant had the keys for this house he did not attempt to use his keys to enter. He came to those premises at 8:15 p.m. on February 25, 1999 when the complainant was not at home. He did not try to use his keys to enter. On

February 24, 1999 when the appellant wanted further articles of personal effects he made an arrangement by telephone with the appellant to collect them in a parking lot away from the complainant's home. Furthermore after February 5, 1999 whenever the appellant wanted to go to the complainant's home for anything he telephoned to make an appointment. On the appellant's own evidence, the first time that he attempted to use his keys to enter the house was at 10:30 p.m. on February 25, 1999, when he discovered that the lock had been changed he entered through a window. There was therefore abundant evidence to be left for the consideration of the jury as to whether the appellant knew that he had no permission whatever to enter the complainant's house or that he acted recklessly not caring whether he had such permission or not.

The third count of the Indictment alleged that the appellant entered with intent to cause grievous bodily harm to the complainant and that at the time of entry he was armed with the Ninja knife, an offensive weapon. The evidence of the complainant was that the appellant literally jumped out of the bathroom with a knife which he had taken away from the house when he left on February 5, 1999, that he used explicit threatening language to her and eventually inflicted the injuries which were testified to by Dr. Radovic. This virtual mountain of evidence was material which the trial judge was bound to leave to the jury for their consideration. In our opinion there was no possibility that the no-case submission could have succeeded and there is absolutely no merit in this ground of appeal.

Mr. Collins submitted that the learned trail judge ought to have dismissed the jury after determining that the complainant had become an advocate in her own cause and had given unsolicited and extremely prejudicial evidence that the appellant had been diagnosed as a manic depressive which evidence he submitted was deliberately intended to prejudice the jury in the outcome of the case against the appellant. This complainant showed an over anxiety to embellish her responses with details and the trial judge in his endeavour to keep all responses relevant admonished the witness on numerous occasions to restrain her loquacity. No fault whatever can be found as to the manner in which the trial judge conducted this trial in that respect.

The complainant was cross-examined by the defence to suggest to her that the appellant and herself had an excellent relationship during the entire period that they lived together in Baltimore and that this excellent relationship continued after they both lived together in Grand Cayman. It was part of the defence that prior to February 25, 1999 when the appellant gave the complainant three slaps, in self-defence, he had never physically abused her. In keeping with this line of defence, the complainant was questioned closely and in the most minute and intimate detail as to the particular activities engaged in between the appellant and herself.

The complainant was being cross-examined about the events which occurred immediately before the appellant left for Grand Cayman in 1993. She was asked more than once about intimate relations with the appellant on that last night. The questions were put to her that she did a lot of counselling and that although the appellant wanted to make a life

with her it was the complainant who did not wish to do so. After the complainant had said that there was a cloud over their relationship just before his departure in 1993, she was asked:

> Q: "So it was him who wanted to make a life with you?
>
> A: We had a mutual, to my understanding, committed relationship, like many couples, had plans and dreams and I'm not trying to paint a picture that it was abusive every day, because in 1992, it wasn't, and he explained to me because of his condition he would have these episodes but, as long as he stayed on his medication he was fine. He knew my background as a therapist. He took some time to explain to me early on that he had been diagnosed as a manic depressive."

Defence counsel immediately said that he had never asked her that.

As the extract from page 311 of the record shows, the response was not elicited by the prosecution and it came only after very invasive cross-examination. Mr. Roberts summed up the position to the trial judge admirably when he said that in the course of the cross-examination it had been forcefully suggested to the complainant that it was inconceivable and incomprehensible that she would have remained with the appellant in such an abusive relationship and it was in those circumstances that she offered the explanation that the appellant had told her that he had been diagnosed as a manic depressive and that when he took his medication he behaved appropriately.

The trial judge was troubled with the relevance and possible prejudicial effect of this evidence and invited the defence to address him on the matter in Chambers in the absence of the jury. Counsel for the defence did not at any stage request the trial judge to discharge the jury. This evidence was never used by the prosecution as proof of the truth of the assertion and in the circumstances in which it was introduced it was not so prejudicial as to taint the entire trial. The judge sternly warned the witness not to volunteer evidence and in his summing up the trial judge gave a precise direction to the jury in relation to that disclosure. He said at p. 1864-65:

> "Now ladies and gentlemen, I want to be clear about this. The relevance of that is this: It goes to her state of mind. She said because she knew he was vulnerable she was attached to him in that way. It does not demonstrate and you must not assume even for one second that he would be more likely to commit an offence because of that; do you understand that? Is that clear? It is very important.
>
> Ladies and gentlemen, if one is suffering from a condition – and many people are – manage, if they keep on their medication, to live perfectly normal lives. For all I know there may be many judges who suffer from a condition. So put that out of your mind. It is relevant only because she was asked about it and she was to say that is why she was more tolerant than otherwise she would have been. Judge that as you – be very careful about that and do not even fall into the trap that he is more likely to be doing the kinds of things alleged because of it. Is that clear?"

In our view that was an impeccable direction to the jury in the circumstances. Whatever prejudice may have been engendered by the inadvertent introduction of this evidence was cured by the strong direction by the trial judge. We take into consideration, too, that the defence never once asked the trial judge to dismiss the jury although this evidence was

elicited early in the morning of October 27, 1999 and the trial continued until November 10, 1999.

At one stage of the trial the complainant was not permitted to attend sessions of the Court. One David Conolly who is said to be a friend of the complainant began attending Court and he sat near the door through which the jurors entered and made their exit from the Court. He was observed to be opening the door when the jurors were entering or leaving the Court and to be smiling at them. This matter was brought to the attention of the Court. Mr. Conolly was called but he was not then present at Court and never appeared afterwards. The complaint before us on the part of the appellant was that the trial judge should have held an investigation to determine if any of the jurors knew Mr. Conolly and if his presence and activities in the courtroom had any effect on them. The officer of the Court who brought the matter to the attention of counsel and to the Court is the very Marshall who ought to have ejected Mr. Connolly if he had observed Mr. Connolly doing anything improper. At the time of his observation he did not think the acts of Mr. Connolly were in any way improper but at a later time he saw Mr. Connolly and the complainant sitting next to each other. The complaint is trivial. From his vantage-point the trial judge had a view of the entire courtroom. He observed nothing unusual. To have stopped the case at that advanced stage of the trial for the investigation of a collateral and highly questionable complaint would have been an improper interference in the conduct of this strenuously contested case. An investigation as suggested by counsel for the appellant would have distracted the jury from their primary functions to determine the case according to the evidence. Had Mr. Connolly been

present when the trial judge received the complaint and had he permitted Mr. Connolly to remain in his accustomed seat that might have been a matter for complaint. This was not the case and the trial judge had shown from the outset of the case that he would not tolerate even the suggestion of interference with the jury. There was no merit in this ground of appeal.

It was also argued that the trial judge erred when he permitted a paper knife which was not an exhibit in the case to be sent to the jury room when the jury retired. One of the allegations of the defence was that the knife, the property of the appellant which was produced in evidence, could not had inflicted the injury to the thigh of the complainant. We have been assured that the knife itself was sent to the jury room and we are unable to understand the purpose of sending an object, not an exhibit, to the jury. We had the opportunity to see the knife and there is absolutely no doubt in our minds that the jury could not have been affected or misled by the presence of the imitation knife.

The learned trial judge placed considerable restraint upon himself during the trial of this case and at the end imposed sentences which were moderate having regard to the egregious nature of the abuse which the complainant was made to suffer especially on the night of February 25, 1999. We found no reason to disturb the sentences imposed.