with, and I am certain Mr. Fewry is well familiar with them. The application is therefore dismissed. There will be no order as to costs.

Application dismissed.

KAMARA v. THE STATE

Court of Appeal (Tejan, Agnes Macaulay and Beccles Davies, JJ. A.): November 8th, 1973
(Cr. App. No. 5/73)

[1] **Criminal Procedure—appeals—appeals against conviction—miscarriage of justice—for purposes of Courts Act, 1965, s.58(2) judge's wrong direction on law or fact justifies quashing conviction unless on correct direction only reasonable verdict is guilty:** When a trial judge has directed the jury wrongly on a point of law or has made a mistake of fact or omitted to mention a point in favour of the accused, the conviction should be quashed on appeal unless the case can be brought within the Courts Act, 1965, s.58(2) on the ground that no substantial miscarriage of justice has occurred since, on a correct direction the only reasonable and proper verdict would be one of guilty (page 420, lines 7—35).

[2] **Criminal Law—wounding with intent—elements of offence—grievous bodily harm means really serious bodily harm:** The meaning of the expression "grievous bodily harm" in the Offences against the Person Act, 1861, s.18 is the ordinary and natural meaning of really serious bodily harm (page 418, line 22 — page 419, line 11).

[3] **Criminal Law—wounding with intent—elements of offence—intent—responsible man committing unlawful voluntary act aimed at complainant taken to intend natural and probable result of grievous bodily harm—proof of actual foresight immaterial:** The test for the intent necessary to convict of wounding with intent is what an ordinary responsible man would have contemplated as the natural and probable result of his acts, so when an accused commits an unlawful voluntary act, clearly aimed at the complainant, of such a kind that grievous bodily harm is the natural and probable result, proof of his actual foresight of the consequences is unnecessary (page 416, line 36 — page 417, line 6; page 417, lines 13—16).

[4] **Criminal Law—wounding with intent—elements of offence—wound—break in continuity of tissues of body caused by application of violence:** For the purpose of the offence of "wounding with intent" a wound means an injury inflicted by violence on the part of the accused causing a break in continuity of the tissues of the body either internal or external (page 415, lines 13—36).

The appellant was charged in the High Court with wounding with intent to do grievous bodily harm contrary to s.18 of the Offences against the Person Act, 1861.

The appellant attacked and injured the complainant after an argument. The injuries were consistent with having been inflicted by a sharp instrument although no witness at the trial gave evidence of having seen a weapon and none was produced. The trial judge directed the jury that — (a) "wound" included any incised wound on the body, any puncture or laceration, any contused wound and the continuity of the normal skin structure must be proved to have been broken; (b) if the jury found that in fact the accused did inflict injuries in the circumstances alleged by the prosecution then they might infer that he had the intention to cause the injury; and (c) "grievous bodily harm" meant such harm as would seriously injure the body of the complainant. The jury found the appellant guilty of wounding with intent and he was sentenced to 12 years' imprisonment.

The appellant appealed against his conviction on the grounds that (i) he was not guilty of the offence; (ii) the implement alleged to have caused the wound was not produced in court; (iii) the evidence of prosecution witnesses was contradictory and should not have been accepted; (iv) the complainant and appellant had not previously been antagonists; and (v) a retrial would be justified. The Court of Appeal held that there was no substance or merit in any of the grounds of appeal, but considered the trial judge's summing-up in relation to the elements of the offence of wounding with intent to do grievous bodily harm, the operation of the Courts Act, 1965, s.58, and the appropriate sentencing policy to be applied.

The appeal was dismissed, but the appellant's sentence was reduced to seven years' imprisonment.

Cases referred to:

(1) *D.P.P. v. Smith*, [1961] A.C. 290; [1960] 3 All E.R. 161, applied.

(2) *R. v. Cohen* (1909), 2 Cr. App. R. 197, applied.

(3) *R. v. Haddy*, [1944] K.B. 442; [1944] 1 All E.R. 319.

(4) *R. v. Smith* (1837), 8 C. & P. 173; 173 E.R. 448, applied.

Legislation construed:

Offences against the Person Act, 1861 (24 & 25 Vict., c.100), s.18:

"Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person, with intent to do some grievous bodily harm to any person or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of an offence and being convicted thereof shall be liable to imprisonment for life."

Courts Act, 1965 (No.31 of 1965), s.58:

(1) The relevant terms of this sub-section are set out at page 419, lines 18—26.

(2) The relevant terms of this sub-section are set out at page 419, lines 28—32.

The appellant appeared in person.

C.S. Davies, Sol.-Gen., and *Turay, Senior State Counsel*, for the State.

TEJAN, J.A., delivering the judgment of the court:

The appellant in this case was convicted at the Kenema High Court of the offence of wounding with intent, contrary to s.18 of the Offences against the Person Act, 1861, on January 24th, 1973. The facts of the case are in brief as follows: On April 26th, 1972, the complainant who was the headman in charge of Manowa ferry steered his pontoon to the other end of the ferry where the appellant was waiting in his vehicle. This was about 7 a.m. Without waiting for the complainant to call him to enter the pontoon, the appellant drove his vehicle towards it. The complainant told the appellant to reverse his vehicle but he refused to do so. The appellant who was wearing a jacket, came out of his vehicle, put his hand into his pockets and threatened to beat up the complainant if he would not take him across the ferry. The appellant, who had his left hand in his pocket approached the complainant. He took his hand out of his pocket and hit the complainant on his face after he had taken off his jacket. The complainant screamed and fell on a flat concrete surface without any kind of protection. The appellant went on top of him and continued to beat him until Sam Margai was able to remove the appellant from the complainant. The complainant's left eye bled and fluid oozed from it.

He was taken to Kailahun Hospital on the same day and was examined and treated by Dr. Garber. The examination of Dr. Garber revealed that the complainant had (a) lacerated wound on the left eye ball; (b) deep lacerated wound on the left cheek below the eye; and (c) wounds on both knees. In the opinion of Dr. Garber, the injuries were serious and resulted in permanent disability and they were consistent with the penetration of a sharp instrument. The complainant was admitted to the Kailahun Hospital

where he was for five days before he was discharged and referred to the surgeon specialist in Kenema Hospital.

At Kenema Hospital, Dr. Ulric Jones, the surgeon specialist, examined the complainant. The examination revealed that the complainant had a penetrating injury of the left eyeball which was already complicated by infection of the inner layers of the eyeball. As there was a threat to the vision of the right eyeball, Dr. Jones had to remove the left eyeball so as to preserve the sight of the right. The complainant made a slow recovery and was discharged on May 16th, 1972 but was asked to continue treatment as an out-patient. The injury Dr. Jones found on the complainant was consistent with its having been inflicted by a sharp instrument.

During the entire case for the prosecution, no witness gave evidence that he saw any instrument in the hand of the appellant, but the complainant said that when the appellant hit him on the left eye, he thought that an implement must have been used to cause such an impact. He further said that when the appellant removed his hand from his pocket and hit him he merely saw a sudden flash.

In his defence, the appellant relied on his statements which he had made to the police. His first statement was as follows:

> "On Wednesday April 26th, 1972, I left Kailahun early with my vehicle registration No. E.L.320. I was the driver of the vehicle. I arrived at Manowa ferry by 7 a.m. The ferry was over the river towards the Manowa side. There was no other vehicle ahead of me. I sounded my vehicle horn to the ferry men in order to cross. I was going to Segbwema with one Vandy Gobio and Musa. A little after the ferry landed from the other side with three workers. On their arrival, one of them, the complainant said that on that day they would not cross with single light vehicles because the gasoline was insufficient. I went up to them and started to beg them to take me as I was a passenger driver and if I stayed out long I would not get passengers. He told me that he was the headman and what he said was final. I then told him that when he was trying for the work he was humble but when he has got the work, he does not want to do it. He rushed up to me and said that if I repeated it he would beat me. I said that I will not repeat it but I have said it. He told me that I was a *fit-yai* man, and said that I was a dirty driver. I reiterated it to him, he

held my shirt on my neck and started to push me backwards, when I went into a cement gutter and fell in. He jumped over me and fell also into the gutter. In the struggle one of the ferry men came and separated us. After the separation, he told me that I had wounded him on the eye. His hand was on his face. I did not see the wound at the time. I was also wounded on my two feet. I did not hit him with anything on his face. The wound he sustained was when he fell over into the gutter. I left them at the scene and came to Pendembu police post and reported my assault. I have had no previous palava with this man before. I did not use any knife to wound him. This is true."

In his second statement the appellant said: "It is true. I rely on my previous statement to the police."

After the learned trial judge had summed up to the jury, the jury returned a verdict of guilty of the offence of wounding with intent, and the appellant was sentenced to 12 years' imprisonment.

The appellant has now appealed to this court against his conviction on four grounds:

"(1) That I was not guilty of the offence; that the medical report said that the complainant's eye was wounded by an implement which was never produced in court. (2) The evidence of both the second and third witnesses for the prosecution was contradictory and as such should not be accepted. (3) That even before the alleged incident there had never existed any form of contention between the complainant and myself. (4) That I am asking for retrial of this case."

We have discussed the evidence with regard to the appellant's grounds of appeal and we have come to the conclusion that there is no substance or merit in any of the grounds. Nevertheless, since the appellant is not represented by counsel, this court called upon the Solicitor-General to address it on certain aspects of the case with regard to the summing-up of the learned trial judge in relation to the charge of "wounding with intent to do grievous bodily harm."

In his summing-up, the learned trial judge said: "To wound as alleged in the first count, is to injure any part of a man's body which may render him in fighting less able to defend him himself or annoy his enemy." This explanation of the word "wound" is obviously incorrect. The explanation of the learned trial judge can only apply to the word "maim". But later in the summing-up, the

trial judge did say that " 'wound' includes any incised wound on the body, any puncture or laceration, any contused wound. . . . The continuity of the normal skin structure must be proved to have been broken."

The medical witnesses described the wounds found on the complainant. According to Dr. Garber, the complainant had lacerated wound of the left eye-ball, a deep lacerated wound on the cheek below the eye, and bruises on both knees. Dr. Jones, the surgeon specialist to whom the complainant was referred, had to remove the left eye-ball so as to preserve the sight of the right eye-ball. Both medical officers agreed that the injuries were consistent with having been inflicted with a sharp instrument.

What preyed on our minds was whether an eye-ball is part of the skin, since wounding involves the breaking of the skin, and to constitute a wound within the Act, the continuity of the skin must be broken. But the evidence of the medical witness proved that there was lacerated wound of the left eye-ball and also a deep lacerated wound on the left of the cheek below the eye. Glaister in *Medical Jurisprudence & Toxicology*, 8th ed., at 213 (1945) states that —

> "all lesions of the body, external or internal, caused by the application of violence may be designated as wounds.
>
> A wound is therefore a solution of continuity of any of the tissues of the body caused by injury."

There cannot be any doubt that an eye-ball is an organ of the body — a part of the body serving some vital function. Even if the eye-ball is considered to be an internal organ of the body, once it is injured, it becomes a wound within the statute on the authority of *R.* v. *Smith* (4). In that case, a blow was given with a hammer on the face which broke the lower jaw in two places; the skin was broken internally, but not externally, and there was not much blood. It was held a wounding within the statute. However, in this case, there was evidence of deep lacerated wound on the left cheek below the eye of the complainant, and we have come to the conclusion that the jury properly found that the complainant's wound was within the statute.

The next aspect of the case which gave us some concern was the "intent." With regard to "intent" the learned trial judge said:

> "When you consider the evidence as a whole, if you find that in fact it was the accused who inflicted the injury in the circumstances as alleged by the prosecution, then you may

infer from those circumstances that he had the intent to commit the injury which the prosecution is saying he did."

The evidence was that when the complainant requested the appellant to reverse his lorry, he refused to do so. Instead, with his hand in his pocket, he approached the complainant, removed his jacket and then hit the complainant on his face. The complainant fell on a concrete surface and the appellant went on top of him and beat him up. As a result of this act of the appellant, the complainant sustained certain injuries. On the other hand, the appellant's explanation was that during his struggle with the complainant, the complainant fell into a gutter and sustained the injuries. The appellant also said that while he was engaged in an argument with the complainant, the complainant pushed him backwards until he fell into a gutter.

In this state of evidence, it can be said that the defence set up by the appellant was two-fold. The first was a tentative defence of self-defence in that the complainant was said to be the attacker. The second defence could be placed in the category of accident — that while the complainant and the appellant were struggling in the gutter and without any further act on the part of the appellant, the complainant came to sustain his injuries.

Referring to the defence of the appellant, the trial judge said in his summing-up:

"The statement of the accused was tendered by the police. The accused elected to rely on his statement. He is entitled to do so in his defence. He is saying that what happened to the complainant was not his (the accused's) act; he is saying that he did not intend to inflict the injuries described and it was merely accidentally that the complainant sustained the injuries."

The trial judge did not, rightly in my view, deal with the tentative and feeble defence of self-defence but in the circumstances of the case the judge's direction to the jury was proper and the jury properly ruled out accident. Once accident had been ruled out, the court thinks that the judge ought to have gone into more detail with regard to intent to do serious bodily harm. It is the law that a man must be taken to intend the natural consequences of his act. The intention with which a man does an act can usually be determined by a jury only by inference from the surrounding circumstances including the presumption that a man intends the natural and probable consequences of his act. The jury then must

make up their minds whether on the evidence the act of the appellant was unlawful and voluntary. The unlawful and voluntary act must clearly be aimed at the complainant so as to eliminate accident. Once the jury were satisfied as to this, it matters not what the appellant in fact contemplated at all, provided he was in law responsible and accountable for his actions. See *D.P.P.* v. *Smith* (1).

On the assumption that the appellant was accountable for his actions, the question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result. The Lord Chancellor, delivering the judgment of the House of Lords in *Smith's* case, said ([1961] A.C. at 327; [1960] 3 All E.R. at 167) that "the only test available for this is what the ordinary responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result. That, indeed, has always been the law. . . ." The evidence before the jury was that the appellant struck the complainant on his face with his fist after the appellant had removed his jacket and removed his hand from his pocket. The complainant, when he felt the blow, had the impression that an instrument had been used to administer the blow and that when the appellant hit him, he merely saw a sudden flash.

Having excluded accident as explained by the appellant in his statement, the jury no doubt considered the evidence carefully as was requested by the trial judge. There is no doubt that the act of striking the complainant was unlawful. There was no evidence of pressure or duress so as to render the act of the appellant involuntary. There was also no evidence that the appellant was insane within the McNaghten Rules or that he was suffering from diminished responsibility to render him incapable of forming an intent.

The Lord Chancellor in the same case quoted the following passages from *The Common Law* by Holmes, J. ([1961] A.C. at 327; [1960] 3 All E.R. at 167):

> "'The test of foresight is not what this very criminal foresaw, but what a man of reasonable prudence would have foreseen. . . . But furthermore, on the same principle, the danger which in fact exists under the known circumstances ought to be of a class which a man of reasonable prudence could foresee. Ignorance of a fact and inability to foresee a consequence have the same effect on blameworthiness. If a consequence cannot be foreseen, it cannot be avoided. But there is this

practical difference, that whereas, in most cases, the question of knowledge is a question of the actual condition of the defendant's consciousness, the question of what he might have foreseen is determined by the standard of the prudent man, that is, by general experience'."

The appellant in this case unlawfully and voluntarily struck the complainant with an instrument as believed and inferred by the jury. He could not say it was not his intention to cause serious injury to the complainant, since he ought to have foreseen as a prudent man that striking a blow on the face of the complainant with an instrument was certain to cause or likely to cause serious injury to the complainant — the law is that as a man is usually able to foresee what are the natural consequences of his acts, so it is as a rule reasonable to infer that he did foresee them and intend them.

With regard to the trial judge's explanation of the expression "grevious bodily harm," he said that "grievous bodily harm must be given its normal natural meaning, that is in law, to do such harm as would seriously injure the body of the complainant. That is what grievous bodily harm means." The meaning given to the expression "grievous bodily harm" by the trial judge is obviously inaccurate. Authority for the meaning of "grievous bodily harm" can be found in the judgment in the case of *D.P.P.* v. *Smith* (1). It was said in this case that "grievous bodily harm" on a charge of murder or an offence under the Offences against the Person Act, 1861, should be given its ordinary and natural meaning of really serious bodily harm and it is inadvisable to attempt any further definition of it. In his judgment in *Smith's* case, and with regard to "grievious bodily harm" the Lord Chancellor said ([1961] A.C. at 334; [1960] 3 All E.R. at 171):

"My Lords, I confess that whether one is considering the crime of murder or the statutory offence, I can find no warrant for giving the words 'grievous bodily harm' a meaning other than that which the words convey in their ordinary and natural meaning. 'Bodily harm' needs no explanation, and 'grievous' means no more and no less than 'really serious.' In this connection your Lordships were referred to the judgment of the Supreme Court of Victoria in the case of *Rex* v. *Miller*. . . . In giving the judgment of the court, Martin J., having expressed the view that the direction of Willes J. could only be justified, if at all, in the case of the statutory

offence, said: 'It is not a question of statutory construction but a question of the intent required at common law to constitute the crime of murder. And there does not appear to be any justification for treating the expression "grievous bodily harm" or the other similar expressions used in the authorities upon this common law question which are cited above as bearing any other than their ordinary and natural meaning.' In my opinion, the view of the law thus expressed by Martin J. is correct and I would only add that I can see no ground for giving the words a wider meaning when considering the statutory offence."

In the summing-up of the trial judge, there are directions given to the jury which this court regards as unsatisfactory. The judge also omitted to give directions in certain aspects of the case. But having considered the entire evidence carefully, this court considers that s.58 of the Courts Act, 1965 ought to be applied in this case. Section 58(1) of the Courts Act provides that

"subject and without prejudice to subsection (2) the Court of Appeal on any such appeal against conviction shall allow the appeal if they think 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 whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal."

Sub-section (2) of s.58 states that:

"on an appeal against conviction the Court of Appeal may, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

The provisions in s.58 sub-ss.(1) and (2) are the same as s.4 of the English Criminal Appeal Act, 1907. "Substantial miscarriage" was discussed and considered in the case of *R.* v. *Cohen* (2). Giving the judgment of the court, Channell, J. said (2 Cr. App. R. at 207):

"We have had an opportunity of carefully discussing this case, and we have arrived at our conclusion. Under the statute only one judgment is delivered, and we have, therefore, put into writing our judgment upon the construction of sect.4(1) of the Criminal Appeal Act."

Having read this section, the learned judge said in his judgment: "This section has been considered in almost all the cases which have come before this Court, but these precedents are of little use in subsequent cases because of the varying circumstances of each particular case. Although, therefore, the principle is quite clear, we desire to express it again. Taking sect.4 with its proviso, the effect is that if there is a wrong decision of any question of law the appellant has the right to have his appeal allowed, unless the case can be brought within the proviso. In that case the Crown has to shew that, on a right direction, the jury *must* have come to the same conclusion. A mistake of the judge as to fact, or an omission to refer to some point in favour of the prisoner, is not, however, a wrong decision of a point of law, but merely comes within the very wide words 'any other ground,' so that the appeal should be allowed according as there is or is not a 'miscarriage of justice.' There is such a miscarriage of justice not only where the Court comes to the conclusion that the verdict of guilty was wrong, but also when it is of opinion that the mistake of fact or omission on the part of the judge may reasonably be considered to have brought that verdict, and when, on the whole facts and with a correct direction, the jury might fairly and reasonably have found the appellant not guilty. Then there has been not only a miscarriage of justice but a substantial one, because the appellant has lost the chance which was fairly open to him of being acquitted, and therefore, as there is no power of this Court to grant a new trial, the conviction has to be quashed. If however, the Court in such a case comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice within the meaning of the proviso, notwithstanding that the verdict actually given by the jury may have been due to some extent to such an error of the judge, not being a wrong decision of a point of law."

The above principles were adopted by Humphreys, J. in his judgment in the case of *R.* v. *Haddy* (3). In the present appeal, we have considered the evidence in relation to the principles enunciated by Channell, J. and in our opinion, it would be wrong to set aside the verdict. To do so would be to render s.58(2) as serving no practical purpose. The evidence for the prosecution in the case

was overwhelming and so strong that it is quite impossible to say that the verdict was unreasonable. We are agreed that there has been no substantial miscarriage of justice, and the appeal is therefore dismissed.

The offence in this case is a serious one, and it is necessary for a heavy sentence to be imposed as a deterrent. As far as the record goes, the appellant is not a member of the professional criminal class. There are no previous convictions against the appellant. Having regard to this, although the appellant has not appealed against sentence, nevertheless, we think that the sentence was too severe. Accordingly, we quash the sentence passed by the trial court, and in substitution therefore, sentence the appellant to seven years' imprisonment to run from the date of the original sentence.

Appeal dismissed; Sentence reduced.

NABIEU AMADU v. AIAH SIDIKI, AIAH SIDIKI v. NABIEU AMADU

Judicial Committee of the Privy Council (Lord Diplock, Viscount Dilhorne and Lord Salmon): December 5th, 1973
(P.C. App. No. 14/69)

[1] **Bailment—custody—effect of illegality—courts will not enforce transaction if possession of subject-matter is illegal:** If it is illegal to possess certain goods and such goods are made the subject-matter of a bailment, a court will not enforce the transaction (page 423, lines 29—33).

[2] **Civil Procedure—pleading—defence—illegality—must be pleaded if illegality not at root of claim but only derived from surrounding circumstances:** Although failure to plead the defence of illegality is of no consequence where the illegality is at the root of the plaintiff's claim, in a case in which the illegality is not relied upon to support the plaintiff's claim, but is present in the surrounding circumstances only, the defence must be pleaded so that the plaintiff may have adequate warning of it (page 424, line 41 — page 425, line 16).

[3] **Civil Procedure—pleading—matters which must be specifically pleaded—illegality as defence—must be pleaded if illegality not at root of claim but only derived from surrounding circumstances:** See [2] above.

The plaintiff brought an action against the defendant in the then Supreme Court claiming the return of a diamond or its value. The plaintiff allegedly found a diamond on the road and gave it