IN THE COURT OF APPEAL FOR BERMUDA

CRIMINAL APPEAL NO. 2 OF 2007

Between:

MICHAEL AMERSHAK JONES

Appellant

and

THE QUEEN

Respondent

Before: Hon Justice Nazareth, J.A.
Hon Justice Evans, J.A.
Hon Justice Forte, J.A.

Date of Hearing: **23rd November 2007**
Date of Judgment: **29th November 2007**

Judgment

Nazarath, JA

1. On 26 January 2007 the Appellant, Michael Amershak Jones, was sentenced to a term of five years` imprisonment following his conviction on 30 November 2006 of the offence of causing grievous bodily harm contrary to section 306 of the Criminal Code 1907.
2. We interpose that the Warrant of Commitment dated 26 January 2007 miss-stated the offence of which he was convicted, and during the appeal hearing the Court ordered that the Warrant should be corrected and re-issued.
3. The Appellant been charged with and stood trial for the separate and more serious offence of causing grievous bodily harm with the intention of so doing, contrary to section 305(a) of the Code, but the jury acquitted him of

that charge and convicted him of what is called the lesser offence under section 306.

4. The brief circumstances were that the Appellant who was then aged 24 years assaulted an older man, Willoughby Woolridge, using as a weapon a piece of wood measuring 2 x 4 inches and about three feet long, which was referred to as a "plank". He struck severe blows to the left side of the victim's body, causing him to fall to the ground and fracture his right hip, which necessitated surgery and hip repair or replacement.

5. The consequences of this injury were aggravated for Mr. Woolridge by the fact that he already suffered from an injured left knee. "I already walk with a cane periodically as the result of a pin being placed in my left knee sustained in a motor bike accident. That injury left me walking with a limp." (Victim Statement dated 27 January 2007). The consultant orthopaedic surgeon who treated him for his hip injury reported on 28 March 2006 "The recuperation time for a fracture like this will be about three months, and no future problems are expected from the injury". However, Mr. Woolridge now finds himself crippled from the combined effects of the two injuries, and emotionally damaged by the attack on him.

6. The learned trial judge passed a sentence of five years imprisonment, but on 23 November 2007 this Court reduced this to four years. We now give our reasons for doing so. We were also asked by counsel whether the Court might update the sentencing guidelines for the offence under section 306 following the increase in the maximum penalty from five years to seven years, which took effect in December 2004 and which applies in this case.

7. We accept this invitation with the caution that no judicial "guidelines" can do more than establish general parameters for the sentencing process, which has to be carried out in accordance with the principles established in this jurisdiction by statute (ref. sections 53-55 of the Criminal Code, as amended) and by reference to the particular circumstances of the individual case. Moreover, determining the length of a prison sentence is never a mere mathematical exercise.

8. The leading authority on sentencing before the maximum sentence was increased was Randy Eric Benjamin vs. The Queen decided in this Court on 30 November 1995. There, the Appellant was charged with attempted murder

and in the alternative with unlawful wounding with intent, contrary to section 305(a). He was convicted only of the lesser offence of unlawful wounding and sentenced to four years` imprisonment for that offence, to be served concurrently with the same sentence for the offence of possessing an offensive weapon, a knife. He struck a blow which resulted in the knife blade being embedded 4-5 inches in the victim's skull with only the knife handle protruding from the left temple. In dismissing the appeal against sentence, the Court referred to the Appellant`s "shockingly bad record" and held that there was "nothing manifestly excessive" in the sentence of four years` imprisonment that was imposed.

9. We observe that it is difficult to imagine a more serious case of unlawful wounding (without intent) than that. The Court`s view that a term of four years was not "manifestly excessive" following conviction for that offence, for a defendant with a bad record, could be described as an understatement. It does not mean that a term of close to the maximum could not have been imposed.

10. Miss Christopher`s submissions in support of this appeal relied principally on the authorities which show that the normal range of sentences for the offence of wounding or causing grievous bodily harm with intent is from three to five years, subject always to mitigating and aggravating factors, most recently The Queen v. Gregory Millington Johnson [2004] Bda.L.R. 63. The maximum term for that offence is 10 years` imprisonment, as it has been since 1907.Therefore, she submitted, the equivalent range for the lesser offence of unlawful wounding for which the maximum term is now seven years should be proportionately less than that.

11. There is a dearth of reported cases on sentence for the lesser offence, due perhaps as Miss Christopher suggested to the fact that such cases are usually heard in the Magistrates` Courts. However, she referred us to the record of The Queen v. Marwon Keshon Bean (Supreme Court 2006 No.41), after the maximum was increased, where the sentence was three years` imprisonment followed by two years` probation. The offence involved a knife which the defendant plunged into the victim`s chest with such force that the tip emerged from his chest. Miraculously, the injury was not fatal, and the

victim was released from hospital five days after admission. This is the only reported case where the new seven-year limit applied.

12. In the present case, counsel for the DPP, Mr. Graveney Bannister, submitted that the minimum sentence should be three years, but that reflected the old limit rather than the new. The learned judge suggested that "an appropriate range for similar offences is two to five years" and she determined that the top of the range, five years, was appropriate in this case. She had been the trial judge at which the Appellant was acquitted of the more serious offence under section 305(a). He had not pleaded guilty to the lesser offence, nor indicated that he would do so if charged with that offence alone.

13. We make the following observations –

(A)The Court sometimes has to pass sentence for the offence of unlawful wounding in circumstances where it is difficult to understand how the defendant could have committed the act which caused serious injury unless he intended that that should be the result. That can give rise to the predicament in which the trial judge found himself in R.v.Ajit Singh [1981]3 Cr.App.Rep. (S)180. The appeal was allowed because the judge had sentenced the Appellant on the basis of facts which would clearly establish that he was guilty of the more serious offence. The Appellant had stabbed the victim repeatedly with a knife, inflicting many wounds including a deep cut on his right eye and one on his forehead. The Court of Appeal held that the judge "had a difficult problem in finding a logical basis in passing sentence and at the same time giving effect to the jury`s verdict." The same difficulty arose in this jurisdiction in Benjamin, and perhaps also in Marwon Keshon Brown where the guilty plea to unlawful wounding was accepted by the Crown and the charge of unlawful wounding was allowed to remain on the file (both cases referred to above).

(B)That difficulty does not arise here. Indeed, the jury`s verdict presents no logical difficulty because, as Miss Christopher submitted, the injuries directly caused by the blows to Mr. Woodruffe`s right side did not amount to grievous bodily harm, and the jury was not satisfied that the Appellant intended to cause the right hip injury, which did. The Appellant therefore has to be sentenced for serious injury which was caused by his assault on Mr. Woodbridge, but where he had no intention of causing serious injury to him.

(C) The offence of unlawful wounding is committed when serious injury is the unintended consequence of unlawful conduct. Both the seriousness of the injury and the nature of the unlawful conduct must be in the forefront of the judge`s mind, together with of course whatever mitigating or aggravating factors may be present in the particular case.

(D)The learned judge indicated that a sentencing range of two to five years` imprisonment might now be regarded as appropriate for this offence, subject of course to mitigating or aggravating factors as stated above. We agree with her that, given the statutory maximum of seven years, a sentence of more than five years must be reserved for extreme cases, most probably ones where substantial aggravating factors are present or where for some other reason a sentence approaching the maximum is justified. However, even in cases where the facts point to a substantial sentence and the mitigating factors are of little weight, the judge must always bear in mind that the defendant did not intend that serious injury should result.

(E) We have some reservations, however, with regard to indicating that a sentence of two years` imprisonment, or any other figure, is at the lower end of the range, even for normal cases if they can be identified as such. It is always necessary for the judge to consider first whether a custodial sentence is justified, and where the offence is unlawful wounding the answer may be that it is not, even where no special mitigating factors exist; for example, a relatively minor case which is the defendant`s first offence. (The situation is different when the offence is the more serious one of wounding with intent, for then a custodial sentence is likely to be justified, subject to mitigating factors present in the individual case. Therefore, it is possible to speak of a lower end to the ‘normal range’.) With regard to the lesser offence, we can agree that if a custodial sentence is justified and the circumstances can be described as “not unusual”, a sentence of two years` imprisonment may properly be regarded as an appropriate starting point, subject always to mitigating factors in the particular case. This does not mean that a sentence of less than two years has to be justified by special mitigating factors. The previous good character of the defendant, for example, could well mean that a sentence of less than two years will suffice.

14. In the present case, the Appellant was convicted of the lesser offence by the verdict of the jury. The victim`s injuries caused by the attack were serious and the assault on him was a violent one, but the Appellant did not intend that he should suffer those or any other serious injury. The Appellant`s record includes one conviction for unlawful wounding with intent, for which he was sentenced to five years` imprisonment in December 2000. This Court concluded that the appropriate sentence for the lesser offence in the present case is one of four years` imprisonment, and to that extent, the appeal is allowed.

I agree

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Nazareth, JA

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Evans, JA

I also agree

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Forte, JA