The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 8 of 2016

Between:

THE QUEEN

Appellant

-v-

GARTH BELL

Respondent

Before: **Baker, President**
Bell, JA
Bernard, JA

Appearances: Mr. Alan Richards, Department of Public Prosecutions, for the Appellant
Ms. Susan Mulligan, Christopher's, for the Respondent

Date of Hearing & Decision: **14 November 2016**

DECISION & REASONS

Unlawful wounding- level of sentence- list for suspending sentence

PRESIDENT

1. This is an appeal by the Crown against the sentence of 18 months' imprisonment suspended for 18 months' on the ground that it was manifestly inadequate. The appeal is with the leave of the judge. The sentence was imposed by Simmons J on 12 July 2016 following an earlier plea of guilty to unlawful wounding contrary to section 306B of the Criminal Code. The history of the matter is as follows.
2. The offence was committed on 11 August 2014. The respondent was originally charged with attempted murder, but was committed for trial not for that offence, but for grievous bodily harm with intent. He was arraigned on 2 February 2015

and the trial was initially fixed for 18 May 2015. The trial did not take place then because the victim was not available to give evidence. It was suggested that, because his evidence was largely uncontested, his statement of evidence should be read. But that course was not acceptable to the prosecution and the trial was re-fixed for August 2015. That too proved abortive because immediately after the start of the trial a detailed further disclosure was made by the victim which required time for the respondent and his lawyers to consider. In the result the trial was adjourned and the matter next came before the court on 18 January 2016.

3. The Crown then indicated that they would accept a plea to simple wounding contrary to section 306B of the Code, and the respondent pleaded guilty to that offence. There was then an adjournment for a social inquiry report. The case was listed for sentence but there was a further delay because there was dispute about the basis of the respondent's plea of guilty and that was eventually resolved by an agreed statement of facts.

4. The sentencing hearing finally took place on 12 July 2016; one year and eleven months after the offence had been committed. Suffice it, to say that, whatever the cause, a delay of that length is regrettable and something that should, if at all, possible be avoided.

5. The agreed facts are the basis for sentence and appear in the record. They are as follows. The victim is Hurbey Spencer who resides in Kingston, Jamaica. At the time of the attack he resided in 4 Crossland Lane, Pembroke, Bermuda. The victim had known the respondent for several years and is the step-father of the respondent.

6. Their relationship became extremely strained over several years as a result of the deterioration of the relationship between Mr. Spencer and the respondent's mother, and other serious issues that had arisen between them. By the time of the incident, the respondent's mother had long been suffering from Alzheimer's disease and the respondent had made arrangements for her care in Jamaica.

7. On Monday, 11 August, 2014 at 5:15pm the victim was outside his residence picking his clothes off the line when the respondent approached him, and an argument ensued between the two men over Mr Spencer having shut off the water

to the respondent's lower apartment. The argument escalated and explicit language was used which drew the attention of the neighbours. As the argument escalated, the respondent thought it may become physical, so he picked up a mason's hammer from the ground and hit the victim in the area of his upper back and neck causing him to feel cramps and pain as a result of the blow. The victim collapsed to the ground and hit his head and neck on a cement block. During the incident the respondent shouted at the victim to stop messing with him and his mother to "leave us the fuck alone".

8. Following the incident and at the urging of the neighbours who had heard the commotion and were out in their yards, the respondent left the scene on his motorcycle. The neighbours then heard the victim crying out for help and went to his assistance where they found him lying on his back in a pool of blood. The neighbours immediately assisted the victim by using a towel to compress a large wound to his head. They contacted the police and ambulance and reported the incident.
9. The victim was conveyed to the emergency department of King Edward VII Memorial Hospital via ambulance where he was treated for his injuries. The police subsequently commenced an investigation and they attended the Memorial Hospital to interview the victim and gather information about his condition. During the interview, the victim stated he was attacked by his step-son, the respondent, who resided in the lower apartment of his property, regarding the water access to the property.
10. The victim's injuries were serious. They included a wound to his spinal cord causing at least partial temporary paralysis of one leg. He required surgery and extensive treatment and rehabilitation overseas, and still uses a cane for support when he walks.
11. Police officers subsequently made contact with someone at the respondent's workplace in an effort to locate him. He attended later that day at the Hamilton Police Station to assist the police with their investigation. He was informed of the allegation at 9:27pm that evening and arrested, and when interviewed declined to make any comment.

12. The judge had the benefit of a social inquiry report which is to be found at p5 of the record. It shows that the respondent is aged forty, of previous good character, has always been employed throughout his adult life, and has worked for the same employer or the last eighteen years. It also indicates that he was remorseful for what he had done and that there were many who knew him who spoke highly of him. The author of the report formed the view that there was a low risk of the respondent re-offending.

13. The learned judge in passing sentence noted the serious and ongoing nature of the injuries to the victim. She thought that the range of sentence for this type of offence, based on the authorities, was between one and three years. And that the starting point for assessing sentence in the present case was three years.

14. Mr. Richards, who has appeared for the Crown on this appeal, does not quarrel with the learned judge's starting point of three years but submits that it might have been somewhat higher. The learned judge then took into account the pleas of guilty and the other various factors in mitigation and concluded that an appropriate sentence was one of 18 months. She then suspended the sentence on the basis that the respondent had established good reason for her doing so and that on the authorities that was the appropriate test for suspending a sentence rather than exceptional circumstances.

15. The Crown's fundamental submissions are twofold (1) that the sentence of 18 months itself was manifestly inadequate, and (2) that the sentence should not have been suspended. The Court has been referred to a number of authorities. In the first place it is necessary to refer to *Jones v The Queen* [2007] Bda L.R p84. In that case *Jones* had been acquitted of the more serious offence of grievous bodily harm with intent and was to be sentenced for the offence of simple wounding. He had one previous conviction for wounding with intent. It should be noted that in December 2004 the maximum penalty for simple wounding was increased from five years' imprisonment to seven years' imprisonment. So the higher penalty prevailed at the time of *Jones*. The maximum penalty of seven years has to be compared with the maximum penalty of five years for the equivalent offence in England and Wales, to which we shall come in a moment. In para 7 of *Jones*, Nazareth JA giving the judgment of the Court said this:

> "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."

This Court firmly endorses those observations.

16. Mr. Richards is anxious for us to give guidelines for the appropriate sentence for this kind of offence. At para 13 (iv) and (v) of *Jones* Nazareth JA continued:

> "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 a 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 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."

That in our judgment is an important factor. He continued:

> "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 exis; for example a relatively minor case which is the defendant's first offence."

17. In *Jones* the Court reduced the sentence imposed by the judge from five years to three years' noting in doing so that the victim's injuries were serious, that the appellant did not intend serious injury, that he had a previous conviction for

wounding with intent from which he received five years' imprisonment and that the conviction followed a trial for wounding with intent for which he had been found not guilty. Mr. Richards invites the Court to make observations about the England and Wales sentencing guidelines for wounding offences. In our judgment there may be some assistance to be gained from considering them, in particular the aggravating and mitigating factors that are referred to therein. However, it has to be observed that some caution is required because the maximum penalty for simple wounding in England and Wales is five years whereas in this jurisdiction it is seven years.

18. Turning to the circumstances of the present case, and bearing in mind the very severe nature of the victim's injuries, in our judgment the judge was correct to take the starting point of three years' imprisonment. Mr. Richards, as we have said, does not seriously argue with this decision of the learned judge. Where he does make strong submissions is that the judge was wrong to discount that starting point by eighteen months to reflect the substantial mitigation including what the learned judge regarded as a plea of guilty at the first opportunity. The circumstances surrounding the plea of guilty were that it was not tendered at the first opportunity but only after there had been an abortive attempt at trial for the more serious offence.

19. It appears that it was at the suggestion of the Crown that the appellant might consider pleading guilty to the lesser offence, and in January 2016 a decision was made that he should do so, having been given that invitation. It is pointed out by Mr. Richards that earlier the respondent had been defending the more serious offence of grievous bodily harm with intent on the basis of self-defence and it appears also provocation. It was not a case where from the earliest moment he was contending that he did intend to cause the victim some injury albeit not serious injury.

20. We have been referred to the observation of Keith J in *The Queen v Jones* [2001] EWCA Crim 2630, a decision of the Court of Appeal Criminal Division in England. Ms. Mulligan, for the respondent, said that in reality the plea was at the first practical opportunity and that in the circumstances he should have been given the full discount. Suffice it to say that we think that the respondent was perhaps

fortunate that the judge was prepared to approach discount on the basis that she did and to reduce the sentence from the starting point of three years to one of 18 months. That said, however, its plain that in this case there was a great deal of strong mitigation quite part from the plea of guilty. There was substantial provocation from the victim, the respondent is a man of previous good character, there is a very low risk of re-offending, he shows substantial remorse for what he has done and he has attended counselling sessions to make sure that he controls his temper in the future.

21. The sentence will have a very serious effect not only upon him but on his wife and two young children and a matter of great significance is that there has been a very considerable delay between the commission of the offence and the date of sentence and now the date of the appeal, and that through no fault of the respondent.

22. Accordingly, in our view, the learned judge might have concluded that a sentence a little higher than eighteen months would have been appropriate in the circumstances of this case, but she did not do so and any difference does not fall into the category of making the sentence that she in fact passed manifestly inadequate.

23. The remaining issue in this case relates to the suspension of the sentence. The governing provision is section 70K of the Code. This section provides:

> "If a court sentences an offender to imprisonment for five years or less it may order that the term of imprisonment be suspended in whole or in part during the period specified in the order ("the operational period"), which period shall not exceed five years, if the court is satisfied that it is appropriate to do so in the circumstances."

That has been the law since 2001. The previous provision was section 56A of the Code which read as follows:

> "…a court which passes a sentence of imprisonment for a term of not more than two years for any offence may order that the sentence should not take effect unless, during the period specified in the order, being not less than one year and more than two years from the date of the order, the offender commits in

> Bermuda another offence for which he is sentenced to imprisonment, and thereafter a court having the power to do so orders under section 56B that the original sentence take effect."

24. The legislation changed to allow suspension of sentences up to five years rather than two and applied a new test of appropriate in all the circumstances. The old practice had been to treat exceptional circumstances as the criteria for suspending a sentence. The Court in its judgment in *Kirby v Durham* said this Court at p6:

> "So far as the statute is concerned, within the parameters of subsection (1) and 56A, the discretion of the court to suspend a custodial sentence is not fettered in anyway. But in practice, it is only in exceptional circumstances that a court should consider suspending such a sentence."

As this court there indicated that was the practice that was followed.

25. *Johnson* was an appeal to this Court (see [2004] Bermuda Law Reports page 63). At para 20 Evans JA, giving the judgment of the Court, said:

> "It could not be said that 'exceptional circumstances' existed in the present case. The judge erred, in this Court's view, in holding that certain mitigating factors which undoubtedly are present enabled him to suspend the sentence of three years' imprisonment which, absent those factors, he regarded as appropriate for this offence. Rather, having determined that the sentence of imprisonment was inevitable, following the guidance given by sections 53 - 55 of the 2001 Act, he should have fixed the period of imprisonment, taking all of the circumstances both of the offence and the offender, into account. Only then was it necessary to consider whether the sentence should be suspended, and it was immediately apparent that there were no special or exceptional circumstances which could justify that course."

26. Mr Richards argued that, despite section 70K, the law still to be applied is that the test is exceptional circumstances. He relied on the decision of *Jones* to show that, that test has survived the change in the law. However, its pertinent to point out that the point does not appear to have been argued in *Jones* whether

exceptional circumstances was still the test, and indeed there is no indication that the court was ever referred to section 70K. What is plain is that on the facts of that case, exceptional circumstances did not exist. Therefore, insofar as that authority was being regarded as authority for the proposition, that exceptional circumstances still survive it should not, in our view, be followed.

27. This subject was considered at some length by the Chief Justice in the case of *Miller v Crockwell*, which is [2012] Bda LR p56. At para 35 the Chief Justice said:

> "The statutory restriction on the part to suspend sentences of imprisonment no longer exists in the United Kingdom as another case placed before the Court by Crown Counsel, *R v Carneiro* [2007] EWCA Crim 2170, makes clear. Toulson LJ (giving the judgement of the English Court of Appeal described the proper approach to the decision to suspend a sentence of imprisonment in the following terms:
>
> > 'There is no absolute embargo on a judge suspending a sentence for an offence of this kind if there is proper ground to do so, nor is there any statutory requirement that there should be exceptional circumstances. However, once it is recognised that ordinarily the appropriate sentence for an offence of this kind does involve immediately custody, there has to be some good reason for the judge to act differently in a particular case for simple reasons of consistency.'"

28. Mr Richards argues that the law in England and Wales is different, there was a statutory requirement there at one time of exceptional circumstances that has now gone and this court has no business, in these circumstances, to follow the English authority.

29. The Chief Justice continued at paragraph 37:

> "It is true that such cases can be read as suggesting, more broadly, that exceptional circumstances are always required to justify suspending a custodial term. But in my judgment such an interpretation of those cases is not supported by straightforward construction of section 70K of the Criminal Code; nor is it supported by more recent and highly persuasive English Court of Appeal authority."

Accordingly he said:

> "I find that the suspension test erred in section 70K(1) of the Criminal Code-whether "it is appropriate to do in the circumstances"- is not a ridged test at all but depends on the circumstances of the case. If the offence is one for which an immediate custodial sentence is the only appropriate sentence irrespective of standard mitigating circumstances, then exceptional circumstances are required for suspending the expected sentence. Thus in *R v E* [2008] EWCA Crim 91, the English Court of Appeal found that for offences in relation to which a custodial sentence was "inevitable", exceptional circumstances must be found to justify a suspension (paragraph 18). If, on the other hand, the offence falls into the category of offence where an immediate custodial sentence is appropriate (but not essential) and the sort of sentence which ordinary would be imposed, then "there has to be some good reason for the judge too act differently in a particular case for simple reasons of consistency": *R v Carneiro* [2007] EWCA Crim 2170."

Putting it another way, the more serious the offence, the less suspending the sentence is likely to be justified.

30. The requirement for exceptional circumstances to suspend the sentence was never a statutory one in Bermuda, although it was applied in practice by the Bermuda courts for a number of years. Having considered the authorities, we are satisfied that such a gloss should not be put on the interpretation of section 70K. The section says the Court can impose a suspended sentence if it is satisfied it is appropriate to do so in the circumstances. We adopt the words of Toulson LJ in *Carneiro* which seem to us to be equally applicable in this jurisdiction.

31. There was, in our judgment, good reason for the judge to suspend the sentence in the present case. In particular, there was little likelihood of the respondent re-offending; it was two years since the offence had been committed and he had shown himself to be leading a good and law abiding life since then and the offence itself, albeit serious, a very much one off incident.

32. Whilst 18 months' was on the lenient side and two years might have been justified, we do not think that a sentence of 18 months' is manifestly inadequate. The words are manifestly inadequate and they mean what they say and do not

justify interfering with a sentence as being unduly lenient unless it falls far outside the appropriate bracket.

33. In these circumstances this appeal is dismissed.

Signed

Baker, P

Signed

Bell, JA

Signed

Bernard, JA