The Court of Appeal for Bermuda

CRIMINAL APPEAL No 7 of 2014

Between:

NATALIE SIMPSON

Appellant

-v-

THE QUEEN

Respondent

Before: **Zacca, President**
Evans, JA
Baker, JA

Appearances: Mr. Marc Daniels, Charter Chambers Bermuda, for the Appellant
Mr. Rory Field, Director of Public Prosecutions and Ms. Takiyah Burgess, Department of Public Prosecutions, for the Respondent

Date of Hearing & Decision: **14 November 2014**

Date of Reasons: **21 November 2014**

REASONS FOR DECISION

Baker, JA

1. These are our reasons for allowing the appeal of Natalie Simpson and reducing her sentence from 2 years imprisonment to one of 16 months imprisonment. On 27 May 2014, having pleaded guilty to one offence of unlawful wounding, contrary to section 306(G) of the Criminal Code 1907 she was sentenced by Simmons J to 2 years imprisonment. Her application for leave to appeal was refused by the single judge but renewed before us and granted.

2. The circumstances of the offence were these. In the early hours of New Year's Day 2014, Alexandra Wheatley, aged 31, was attending a champagne party at Pier 6, Lower Level in the City of Hamilton. She was standing near the bar talking to the appellant's boyfriend whom she had just met. The appellant who was at the same party, but did not know her, asked Ms. Wheatley why she was talking to him and threw a drink in her face. Precisely what happened next is not entirely clear but it appears that Ms. Wheatley punched the appellant on the chin and the appellant then threw her champagne glass at Ms. Wheatley, hitting her in her face and smashing, causing a deep laceration to the face and deep lacerations of both lips. She required numerous stitches. She is left with scarring and numbness of the lower lip.

3. After the assault, a bystander asked the appellant why she had done it to which she replied "I didn't mean to do it, I didn't mean to do it. I am going to go to prison." Despite efforts to detain her, the appellant left the party without her boyfriend, later leaving the island on a pre-arranged trip with him to New York. She contacted the police on her return and was arrested at her home. When interviewed she admitted the attack and throwing the glass. She also admitted having had 10 glasses of champagne and 5 shots that evening. She said "I immediately knew it was wrong and left the place."

4. The maximum sentence for unlawful wounding was increased from 5 years to 7 years on 3 December 2004. It might be said the appellant was fortunate not to have been charged with the more serious offence of wounding with intent to cause grievous bodily harm. The difference between the offences lies in the perpetrator's intention. By accepting a plea of guilty to the charge of unlawful

wounding the prosecutor accepted the appellant did not intend to cause really serious injury albeit she intended to cause some injury.

5. The judge rightly said that the appellant's assertion that she did not intend to cause the severe injuries did not negate them. What was done could never be undone. The severity of the injuries is relevant in assessing the appropriate length of sentence but not to the extent that it would have been on a sentence for the offence requiring the specific intent.

6. The Crown submitted that the appropriate range of sentence was two to four years. The judge referred to the serious harm to Ms. Wheatley and high culpability on the part of the appellant. She described the offence as in the highest category on the facts saying the glass was either thrown with a great deal of force or used with, as she put it, full contact.

7. The judge referred to the following aggravating factors, the fact the offence occurred in a public place, that Ms. Wheatley was left with permanent scarring and numbness, that the appellant was under the influence of alcohol, and that she ran away from the scene and left the island. The starting point for sentence she said was four years before taking account of any mitigating factors.

8. The mitigating factors were an early plea of guilty, previous good character and the appellant's age, 25. The judge fixed the sentence at 2 years.

9. We turn to the authorities on length of sentence in unlawful wounding cases. In *Jones v The Queen* [2007] Bda LR 84 the appellant was sentenced to 5 years imprisonment following conviction for causing grievous bodily harm under the same section, section 306 of the Criminal Code 1907. He had been acquitted by the jury of the more serious offence of causing grievous bodily harm with intent

under section 305. He was aged 24 and had assaulted an older man with a plank of wood about 3ft long. The victim fell and fractured his hip; he was crippled from the combined effect of this and a previous injury. The Court reduced the sentence to 3 years imprisonment and gave guidance following the increase in maximum penalty from 5 to 7 years in December 2004.

10. Nazareth J.A giving the judgment of the Court observed that guidelines can do no more than establish a general parameter for the sentencing process and that the exercise must always be carried out in accordance with the statutory principles and the particular circumstances of the individual case. He also made the point, which we emphasize, that determining the length of a prison sentence is never a mere mathematical exercise.

11. In the guidelines, the judge pointed out that the offence of unlawful wounding is committed inter alia when serious injury is the unintended consequence of the unlawful conduct but that the seriousness of the injury and the nature of the unlawful conduct must always be in the forefront of the judge's mind together with whatever aggravating or mitigating factors may be present. Sentencing of over 5 years had to be reserved for extreme cases. He added that 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.

12. Reading the judge's sentencing remarks as a whole, we are not convinced that the judge gave due weight to the fact that the appellant did not intend that serious injury should result from throwing the glass.

13. In *Jones* the trial judge had spoken of a range of two to five years imprisonment but this Court said it had reservations about indicting two years or any other figure was appropriate even for normal cases if they could be identified as such. Nazareth J.A said at para 13 v:

> "With regard to the lesser offence (unlawful wounding) we can agree that if a custodial sentence is justified and the circumstances can be described as "not unusual" a sentence of 2 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. A noteworthy factor in *Jones* was that the defendant had a previous conviction for wounding with intent some seven years before the index offence for which he had received a sentence of five years imprisonment.

15. We were referred to a number of other authorities, none of which in our judgment adds anything to the guidance of Nazareth J.A in *Jones*. In some instances the offence, or the more serious offence was wounding with intent.

16. We endorse the guidelines of the Court in *Jones* which remains appropriate today. Offences of unlawful wounding vary in gravity greatly, according to their particular circumstances. The present case was not a "glassing" case in the ordinary sense of the expression where the defendant breaks a glass and then uses the broken glass to injure the victim, often in the face, where the offence is likely to involve an intent to cause really serious injury. In the present case the glass was thrown at Ms. Wheatley, hit her in the face and regrettably caused

serious injuries. Any provocation, as the judge pointed out, did not justify the appellant's conduct which seems to us to have been caused by the greatly excessive amount she had had to drink.

17. In our judgment the judge was in error in saying this case was in the highest category on the facts and that a sentence of four years imprisonment was warranted before taking into account mitigating factors. Absent an intent to cause really serious injury this was a bad case but not one that warranted a sentence of four years imprisonment after a trial. In our judgment the starting point for the judge in this case before taking into account mitigation was in the region of 2 ½ years. There was, however, strong mitigation. The appellant's early plea of guilty warrants the full discount of 30%. She was of previous good character, remorseful and accepted full responsibility for her behaviour. There were positive references from her employer and others. We concluded that the appropriate sentence was one of 16 months imprisonment and allowed the appeal accordingly.

18. There is one other point to which we should refer. Under section 70P of the Criminal Code, a prisoner is ordinarily eligible for consideration for parole having served one third of the sentence. We are told that this does not in practice apply to foreign nationals who are required to serve two thirds of their sentence before release. This question was not explored before the Court which did not consider the criteria under which the Parole Board operates. The appellant is a British national who we were told will be required to leave the island upon release after serving two thirds of her sentence. Whether or not she might receive parole and her likely date of release is not a matter for the sentencing court to take into

account in determining the appropriate length of sentence. We were not invited to do so.

Baker, JA

Zacca, P

Evans, JA