



The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 3 of 2019

B E T W E E N:

ALEX WOLFFE

Appellant

- v -

THE QUEEN

Respondent

Before: Clarke, P
Kay, JA
Bell, JA

Appearances: Susan Mulligan, Christopher's, for the Appellant;
Alan Richards, Office of the Director for Public Prosecutions,
for the Respondent

Date of Hearing:

2 March 2020

Date of Judgment:

10 March 2020

JUDGMENT

Robbery and wounding with intent – appeal against sentence

BELL JA:

Introduction

1. On 23 October 2018, in the early hours of the morning, Borislov Angelov was riding his motorcycle in an easterly direction along Harbour Road, travelling from the west, returning home from his employment. Just before he reached the Belmont ferry terminal he became aware of two motorcycles which had been travelling in a westerly direction, but one of which had turned round to follow and catch up with him. Shortly after he realised this, the motorcycle, which

carried both a rider and a pillion passenger, pulled alongside Mr Angelov, and there was an attempt made to grab him by the neck. The rider then tried to push him down with his leg, while both of the men on the motorcycle were screaming at him to stop. Mr Angelov instead sped up, trying to get to his home on Harbour Road in Paget as quickly as he could, taking corners at high speed in his attempt to escape. Just before reaching his house, he slowed down because of a dangerous turn, and the bike carrying the two men then went in front of him. When the rider applied its brakes, the bike slid, and Mr Angelov's bike then hit the bike carrying the two men near its licence plate and muffler. Mr Angelov made a note of the licence number, and it was the damage to the motorcycle and the licence number which eventually led to the Appellant being apprehended.

2. Mr Angelov managed to drive his bike into the yard of his home, but the two assailants followed him there, dismounted and attacked him. The pillion passenger was wearing a red scarf, without a helmet, and was later identified as the Appellant. It was this man who started hitting Mr Angelov in his back, causing Mr Angelov to concentrate his defence on him. The other man, who had been wearing a helmet, then came into the patio area of Mr. Angelov's home carrying a green-handled knife. During the course of the struggle which ensued, Mr Angelov was struck many times with the knife, and the evidence was that he had suffered 13 stab wounds, in consequence of which he spent 11 days in hospital, six or seven of which were in the intensive care unit. The two assailants only departed after Mr Angelov's wife had turned on the outside light, in response to his screams for help.
3. The Appellant was charged with the following four offences :-

Count 1 – Wounding with Intent, contrary to section 305(a) of the Criminal Code

Count 2 – Attempted Robbery, contrary to section 338(1) as read with section 32 of the Criminal Code

Count 3 – Intimidation, contrary to section 322 of the Criminal Code

Count 4 - Intimidation, contrary to section 322 of the Criminal Code.

4. Following his conviction after a trial in which he maintained his innocence, the Appellant was sentenced to 10 years' imprisonment in respect of Count 1, five years' imprisonment in respect of Count 2, and 12 months' imprisonment in respect of Counts 3 and 4, with all sentences ordered to run concurrently. The Appellant appealed against his conviction, which appeal was dismissed by this Court on 9 January 2020, and now seeks leave to appeal his sentence. The grounds for that application are as follows: -

- i) The learned sentencing judge erred in failing sufficiently and properly to take into account the Appellant's youth and good character;
- ii) The learned judge failed sufficiently and properly to consider the Appellant's alleged role in the offences; and
- iii) The sentence imposed was harsh, excessive and not proportionate to sentences imposed on similar offenders who had committed like offences.

The Judge's Sentencing Remarks

5. The judge began his remarks by describing the circumstances of the case as being egregious, stating that in his view they lay at the higher end of the seriousness scale. He indicated that any sentence must therefore reflect the brutality of the attack upon Mr Angelov.
6. The learned judge then referred to the mitigation put forward by Ms Mulligan on behalf of the Appellant, commenting that the only mitigating feature in the case

was that the defendant was a person of good character and that he was a youth at the time of the offence. The judge continued to say that while he took the youthfulness of the Appellant into consideration, he gave it less weight, due to the specific circumstances of the case. He commented that young persons who commit such heinous offences as in this case should be given little credit by reason of age. He commented further that this was not a case of youthful indiscretion, naivety or spontaneity. It was a designed plan by the Appellant and another to rob, and if necessary, cause serious harm to members of the public. In this regard, reference should be made to the existence of two charges of intimidation contrary to section 322 of the Criminal Code. This is because the attack on Mr Angelov followed an unsuccessful attempt by the Appellant and his accomplice to stop another motor cyclist (Mr Mallory) on a different section of Harbour Road a short time before the attack on Mr Angelov, giving substance to the learned judge's characterisation of the attack as a designed plan.

7. The learned judge concluded that in relation to his previous good character and the character references given by others on the Appellant's behalf, he took those into consideration but regarded them of limited value. The judge also noted that the Appellant had not shown any degree of regret or remorse. The judge described the nature of the attack, both with reference to the stabbing by the Appellant's companion and the fact that the Appellant himself had pointed what appeared to have been a gun at Mr Angelov and had threatened to shoot him. He noted that following the attack, both the assailants had left, leaving Mr Angelov bleeding profusely from his injuries. One of the matters put forward in mitigation by Ms Mulligan was based on the evidence of one of the Crown witnesses, Troy Woods, a jailhouse informant. Woods' evidence was that while he and the Appellant were on remand at the Westgate prison facility, the Appellant had confessed to the crime for which he was ultimately convicted. Part of the confession involved the Appellant asserting that he had tried to stop his companion from stabbing the victim but had ended being cut himself, showing Woods where he had been cut. The learned sentencing judge commented that

whether or not the Appellant had tried to stop the other from stabbing Mr Angelov was “*neither here nor there, given the totality of what he did do.*”

8. Finally, the sentencing judge reviewed the various authorities to which he had been referred, to which I will refer to in due course.

The Appellant’s Youth and Good Character

9. As Ms Mulligan pointed out in her submissions, the relevant statutory provision is contained in section 55(2) of the Criminal Code Act 1907, which requires the court, when sentencing an offender, to have regard to the offender’s good character and youth. Having quoted from the learned judge’s sentencing remarks on the subject, Ms Mulligan contended that it was not for the judge to determine that because the crime was serious (as this crime undoubtedly was) the offender should be entitled to less mitigation due to his youth than Parliament intended. The difficulty with this argument is that pointed out by Mr Richards, namely that the relevant sections of the Code do not require credit to be given in any particular amount.
10. We agree. It is quite clear from the judge’s sentencing remarks that he had these two mitigating factors in mind, because he said so in unequivocal terms early on in his remarks, saying “really the only mitigating feature in this case is that the Defendant is a person of good character and that he is a youth.” So it is clearly the case that the judge did indeed have regard to those two factors. The fact that the judge carried on to give the Appellant’s youth less weight than might otherwise have been the case was because he understandably regarded the offences of which the Appellant had been convicted as so heinous (the judge’s word) that he should receive little credit by reason of age. He described the assault, pointing out that this was not a case of youthful indiscretion, naivety or spontaneity; it was a designed plan by the Appellant and another to rob and, if necessary, cause serious harm to members of the public.

11. The judge took a similar view of the character references speaking to the Appellant's previous good character. While he took them in to consideration, he found them to be of limited value. He was entitled to take that view. As Mr Richards submitted, in some cases these factors (youth and good character) will be very significant, and in others almost immaterial. The judge clearly regarded the case as being towards the latter end of that range. He heard the evidence, and particularly he heard Mr Angelov give his evidence, and in sentencing no doubt had in mind that throughout the assault upon him, Mr Angelov had been fighting for his life, the description the judge himself used.
12. Finally, in regard to this ground, the judge referred to the fact that the Appellant had not shown any degree of regret or remorse. The victim had been left bleeding profusely from his multiple stab wounds. As the judge commented, this case was very near to the borderline of being classed as attempted murder.

The Appellant's Alleged Role in the Offences

13. The heading for this ground was intended to have regard to the evidence of Troy Woods, who had given evidence that the Appellant had described to him how he, the Appellant, had tried to stop the other assailant from stabbing Mr Angelov. The argument from Ms Mulligan was that the Appellant was entitled to be sentenced on the basis of the Prosecution case, and it was not open to the judge to ignore parts of that case for the purposes of sentencing. This argument seems in one sense incongruous, as demonstrated by an extract from Ms Mulligan's cross-examination of Woods, when she put to him the detail of the conversation between the Appellant and Woods (which the Appellant denied had happened) to the latter, saying "And I'm going to suggest to you that what he actually told you, he's trying to stop the guy from stabbing him." But Ms Mulligan nevertheless argued that the Appellant was entitled to some credit for this part of the Prosecution case.

14. Mr Richards argued that the judge was entitled to scrutinise the evidence with care and to reach his own assessment of the weight to be attached to such factors in the context of the case as a whole, pointing out that there was nothing in the evidence of Mr or Mrs Angelov to confirm any effort by one assailant to restrain the other. Against the background of a determined joint enterprise by both assailants, Mr Richards submitted that the judge was not required to discount the sentence on the basis of an exculpatory remark never accepted by the Appellant, the internal truthfulness of which was not supported by any other evidence.
15. The judge doubted that Woods' evidence represented the Crown's case in this regard, but carried on to say that even if it was, it did not diminish the Appellant's participation in all the circumstances of this case, which involved a high speed chase, following Mr Angelov in to his home, pouncing upon him in his parking area, following him on to his patio area, where the assault began and which ultimately resulted in Mr Angelov being stabbed 13 times. He remarked that it was the Appellant who had pointed what appeared to be a gun at Mr Angelov, and threatened him, and that after the patio lights had been turned on, the two assailants had fled, leaving Mr Angelov bleeding profusely from his injuries. This led the judge to comment that whether or not the Appellant had tried to stop the other assailant from stabbing Mr Angelov was neither here nor there, given the totality of what the Appellant had done. And the fact remains that the jury found the Appellant guilty of the charge of wounding with intent.
16. We agree with the learned judge's comments, and would add that we reject the argument that the judge sentenced on the basis of rejecting those parts of Woods' evidence that might have been seen as favourable to the Appellant. The judge clearly looked at the evidence as a whole, as he was bound to do, and sentenced on that basis.

Comparative Cases

17. Ms Mulligan recognised the difficulty of finding cases which were truly comparable to the facts of this case. Some of the cases which bore similarities to those in this appeal involved sentencing on the basis of a guilty plea, and when the discount factor for such a plea is excluded, come very close to the 10 year sentence imposed on the Appellant. These include *Trott -v- R* (Court of Appeal, 4 November 1991), and *Roberts -v- R* [2014] Bda LR 1, a case which the learned judge said provided guidance. But on analysis and comparison of the facts, the judge concluded that the case at bar was a more serious case than that of *Roberts*.

18. But the reality is that all of the cases have their common points and their differences, whether they be in terms of the defendant's record, age, the injuries sustained by the victim, the particular charge or charges, the number of offences, the imposition of a section 70P order and so on. The learned judge reviewed the relevant cases, commenting at the outset of his review that the cases clearly showed the evolution of how the courts and the Legislature view the seriousness of the offences for which the Appellant had been convicted, and adding that such seriousness is punctuated by the increased level of tariffs. And as Mr Richards submitted, the issue for this Court is whether the effective total sentence is manifestly excessive.

Conclusion

19. In our view, the total sentence imposed in this case cannot be said to be manifestly excessive, and is not disproportionate to the sentences imposed on others who have been convicted of like offences. Accordingly we refuse leave to appeal against sentence.

Geoffrey R. Bell

BELL, JA

C.S.R.S. Chair.

CLARKE, JA

Maurice King

KAY, JA