In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2012: CRIMINAL APPEAL NO: 22

STEPHEN COSHAM
(Police Inspector)

Appellant

-v-

LAURIE JULIAN FURBERT

Respondent

JUDGMENT
(In Court)[1]

Date of Hearing: February 6, 2014
Date of Judgment: February 17, 2014

Ms. Takiyah Burgess, Office of the Director of Public Prosecutions, for the Appellant
The Respondent did not appear

Introductory

1. On January 28, 2013, the Respondent, having been convicted following a trial, was sentenced by the Magistrates' Court (Wor. Khamisi Tokunbo) in respect of one count of behaving in a threatening manner on June 12, 2012 in Paget Parish. The complainant was a female Magistrate. The sentence imposed was a fine of $1500. He had previously been fined in 2005 for assaulting one police officer in the execution of his duty and violently resisting another officer who was arresting him. In July 2010 the Respondent received 12 months Probation for assault occasioning bodily harm. The offence which forms the

[1] The Judgment was circulated without a formal hearing for handing down Judgment.

subject of the present appeal was committed less than a year after the end of his probationary period for his last prior offence. The maximum penalty is six months' imprisonment under section 12 as read with section 25 of the Summary Offences Act 1926.

2. The Prosecution, unsurprisingly, appealed against this sentence on the grounds that it was manifestly inadequate under section 4A of the Criminal Appeal Act 1952. Because, it emerged at the hearing, the Respondent is no longer residing in Bermuda Ms. Burgess elected to proceed with the appeal on the basis that she would not seek to set aside the sentence imposed below. She submitted it was important for the administration of justice for the law to be clarified. I agreed to proceed on that basis.

The non-appearance of the Respondent and counsel's duty to the Court

3. On or about January 27, 2014, a Notice of Hearing was sent by the Registrar to the Respondent's Magistrates' Court attorneys of record. Approximately two weeks later at 2.23pm on the date of the hearing fixed for 2.30pm, the Respondent's former attorneys notified the Court by email that they last had contact with the Respondent in early 2013 when he was in the process of relocating to the United States.

4. As officers of the Court counsel have a duty to assist the Court by notifying the Court as soon as possible after receiving a Notice of Hearing for a matter in relation to which they are not in fact instructed that service has been ineffective. This will enable due consideration to be given to whether or not it is possible to serve the former client at some other address.

The sentencing hearing in the Magistrates' Court

5. The Prosecution case was that the Respondent, who had appeared before the Complainant in the Magistrates' Court a year earlier, on June 12, 2012 shouted at her a Paget supermarket car park: "*Yea, yea, look at me....yeah yeah you got to come out into the public sometime, and you don't have the security of the court now!...You're wicked you're gonna get yours!*" The Respondent was leaving the supermarket carrying groceries and the Complainant was waiting to use the ATM.

6. Although the Respondent was promptly charged on June 13, 2012 and the trial commenced on July 19, 2012, due to circumstances for which the Respondent was not apparently to blame, the Defence did not close its case until December 19, 2012. Judgment was delivered on December 6, 2012 and the Respondent was convicted. A Social Inquiry Report was ordered. When interviewed the Respondent effectively maintained his position of denying the offence and characterised himself as the victim of the complainant's unfair treatment, and anticipated the sentencing judge would side with their colleague. The Report (perhaps surprisingly) concluded that there was a low risk of reoffending and recommended a community sentence to address the Respondent's impulsivity.

7. At the sentencing hearing, Ms. Burgess submitted the offence was serious because it had been committed against a Magistrate and because the Respondent saw himself as the victim and had been convicted following a trial. To deter others from threatening Magistrates, a custodial sentence of 3-4 months was required. Defence counsel urged the court to impose a non-custodial sentence taking into account his employment record and the fact that he had moved overseas with his family and was the main breadwinner. The Respondent himself, very astutely, denied considering he was the victim and denied thinking that the Learned Magistrate was going to "*side with*" his colleague. He expressed regret at "*being here today*".

8. The Learned Magistrate imposed a fine of $1500 with three months in default and recorded no written reasons for his decision. When signing the 'Magistrates' Comments' section at the end of the appeal record, he did not suggest that that any relevant sentencing remarks were made orally so that the record could (or should) be supplemented with a transcript of such remarks. Crown Counsel (who appeared below) assisted the Court by revealing that according to her notes, the Learned Magistrate did acknowledge the seriousness of the offence and the need for a deterrent sentence.

9. It seems self-evident from the result that the Court gave greater weight to the rehabilitative needs of the offender (i.e. his desire to join his family abroad) than the need to denounce the conduct which formed the subject of the charge.

The Appellant's submissions on appeal

10. Crown Counsel advanced the following submissions in support of the appeal in her 'Case for the Appellant':

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19. The Appellant respectfully submits that although the sentencing Judge has a wide discretion on sentencing, the sentence imposed should reflect a consideration of the applicable sentencing principles.

20. We further submit that one of the many principles in sentencing a defendant is that of general deterrence.

21. It is our submission that a sentence which doesn't include a period of immediate incarceration for an offence of this nature is manifestly inadequate. The court should have given more weight to the aggravating feature that the complainant is a member of the judiciary and was confronted in public due to her role as a judge.

We further submit that an attack on the judiciary is an attack on the administration of justice as a whole.

22. *Having recognized the seriousness of the offence the Learned Sentencing Magistrate erred in principle by placing too little emphasis on the need for general deterrence and sentencing the Respondent to an inappropriately lenient sentence.*

23. *It is our humble submission that when the Learned Sentencing Judge imposed a non-custodial sentence, he failed to appreciate the seriousness of this type of offence.*

24. *It is the Appellant's contention that this type of offence strikes at the heart of the administration of justice. Behaving in a threatening manner to a judge whilst in public is a matter of deep concern and therefore when it comes to sentencing it is essential to look at the prevalence of the offence and the message it may send to the public.*

25. *We further submit that threats to a judge can be seen as an attempt to pervert the course of justice, and can be likened to the threatening of a witness in that it is an attempt to affect the outcome of proceedings. The UK authorities clearly outline that offences of threatening witnesses and contempt of court are treated seriously.*

26. *In this regard it is my humble submission that threats to members of the judiciary should not be treated lightly, and in all but exceptional cases, a fine would be an inappropriate sentence for this kind of offence."*

11. In terms of authorities, Ms. Burgess firstly referred to *Plant-v-Robinson,* Criminal Appeal No. 1 of 1983, where the Court of Appeal for Bermuda first explained that manifestly inadequate in a Crown sentence appeal meant "obviously inadequate" or "wrong in principle". She then referred to a selection of cases to demonstrate that threats made to judicial officers or jurors normally attract at least short custodial sentences. The cases I considered to be of particular relevance were the following:

(a) In *R-v-Britton* [2006] EWCA Crim 2082, the mother of a brother and sister who were convicted by a jury (who was herself of previous good character) shouted at the jury as the verdict was being read out: "*You bastards! I'll get you back*". When charged with contempt of court the following day she apologized and her 8 weeks' sentence of imprisonment was reduced to 20 days on appeal. Counsel pointed out this a less serious offence because it was an instantaneous reaction to a jury verdict which took place in court;

(b) In *R-v-Osbourne* (1993) 14 Cr.App.R. (S) 265, the boyfriend of a defendant approached the female prosecutor after sentence had been passed and was found guilty of contempt of court for making remarks like "*you will not be smiling anymore*". His sentence of four months imprisonment was reduced to two months on appeal;

(c) In Delic (www.abc.net.au/news/2014-02-04), the accused was reportedly sentenced to a maximum of six months imprisonment for retaliating against a judicial officer when he said to a magistrate in the course of a sentencing hearing: "*I'm going to chop you u*p…"

Findings: appropriate sentence for persons convicted of threatening judicial and other public officers involved in enforcing the law

12. These cases do, in my judgment, demonstrate that in Commonwealth jurisdictions with very similar legal traditions whose case law is routinely recognised for its persuasive value in the Bermudian courts, making threats against judicial officers or others involved in the administration of justice in connection with their involvement in court proceedings, irrespective of the precise offence with which the offender is charged, ordinarily attracts an immediate sentence of imprisonment even where:

    (a) the offender is of previous good character;

    (b) the offender pleads guilty;

    (c) the threats are made in the heat of the moment in court; and/or

    (d) the threats are of a rather general and non-specific nature.

13. Ms. Burgess correctly suggested in the Court below that an immediate custodial sentence was essential in the Respondent's case, bearing in mind the following factors making the offence before this Court more serious than the cases referred to in the course of the appeal:

    (a) the Respondent had previous convictions for violence;

    (b) the Respondent was convicted following a trial and showed no remorse;

(c) the threats were not made in the heat of the moment but months after the court proceedings with which the Respondent was dissatisfied (albeit that they appear to have been made in the course of an entirely accidental meeting);

(d) the threats were made by a man against a female off Court premises and specifically threatened violence when the judicial officer was beyond the safety of the court.

14. While the suggested sentence of 3-4 months was not excessive, even a short custodial sentence was clearly required, not just to deter other offenders from committing similar offences but also to denounce conduct likely to undermine the authority of and respect for the courts. It ought to have been self-evident to the Learned Magistrate without reference to the authorities that were placed before this Court on appeal that in all the circumstances of the present case an immediate custodial sentence was required. The fine of $1500 imposed was clearly wrong in principle.

Conclusion

15. Section 19 of the Criminal Appeal Act 1952 provides as follows:

> "*19A On an appeal under section 4A against sentence, the Supreme Court shall, if it thinks that the sentence imposed is manifestly inadequate or excessive, quash the sentence imposed by the court of summary jurisdiction, and impose such other sentence as may be warranted in law in substitution therefor, and in any other case shall dismiss the appeal.*"

16. As noted at the beginning of this Judgment, due to the fact that the Respondent was not before the Court and was believed to be permanently residing overseas, Crown Counsel agreed that this Court should provide guidance for future cases without making a formal finding that the sentence imposed was manifestly inadequate and quashing the sentence imposed below. Accordingly, the appeal is dismissed.

Dated this 17th day of February, 2014_____

IAN R.C. KAWALEY CJ