



IN THE SUPREME COURT OF BERMUDA

CRIMINAL JURISDICTION

2014: No. 34

BETWEEN

THE QUEEN Applicant

and

STEVE B. SYMONDS Defendant

**JUDGMENT
(In Court)**

Date of Hearing: 5th December, 2014

Date of Judgment: 5th December, 2014

Mr. Carrington Mahoney, Department of Public Prosecutions and
Ms. Kenlyn Swan for the Crown
Ms. Elizabeth Christopher and Mr. Arion Mapp for the Defendant

INTRODUCTION

1. This is a Motion, in which counsel for the defendant seeks an order to quash the indictment, on grounds that: (a) There is insufficient evidence in the depositions to support a charge of grievous bodily harm with intent, contrary to section 305(a) of the Criminal Code Act 1907; (b) There is insufficient evidence in the depositions to support a charge of unlawful deprivation of liberty, contrary to section 321 of the Criminal Code Act 1907. At the end of her arguments counsel orally amended her motion to add, an order to vary, amend or stay the indictment. Counsel's other grounds alleging duplicity were abandoned at the onset.

THE FACTS

2. The defendant was charged and committed before a magistrate on a charge of assault with intent to do grievous bodily harm, contrary to section 305(a) and unlawful deprivation of liberty, contrary to section 321 of the Criminal Code Act 1907. It is accepted that the former charge is unknown to law.
The DPP, on the evidence he considered disclosed in the depositions, indicted the defendant on charges of grievous bodily harm with intent to do grievous bodily harm and unlawful deprivation of liberty, contrary to the same sections.

The evidence in the depositions is that the defendant was the respondent in certain divorce proceedings and the complainant was the attorney for petitioner. The defendant failed to comply with an ancillary order and upon further application by the complainant on behalf of the petitioner, the judge, in chambers, granted an order that the respondent pay to the petitioner, a sum of \$60,000 within a number of days or the judgment was to be satisfied against a house owned by the respondent in an overseas jurisdiction. Apparently a further order was also sought or made for the defendant to pay costs of \$35,000.

Upon demitting the judge's chambers, the defendant, upset by the result of the proceedings, attacked the complainant. He grabbed her by the neck, choked her, threw her to the ground, straddled her, hit her head against the ground and with his fist, delivered several blows to her, including to her face, until he was pulled off her by several witnesses. She was shortly thereafter taken to the hospital by ambulance where she was attended by a physician.

The complainant, in a statement, bearing a certificate in accordance with the Indictable Offences Act, made the same day, said she was diagnosed with multiple facial contusions, left side peri-orbital hematoma, soft tissue injury to her left upper chest, sprained left wrist and massive headache.

In a further statement some days later, not bearing the certificate, she added that she continued to suffer pain and suffering, her left eye had been completely closed for a number of days and was now opening again and was very painful, the side of her face was bruised, swollen and very painful, her jaw was so painful, it required her to eat soft food for days, her neck and throat were so inflamed and sore it made it painful to

swallow, her lower chest was very painful, deeply bruised, left wrist very sore, due to his twisting and bending of them when he attempted to break her arm, her right shoulder was bruised and banged, the most painful was her head and headaches which remained a constant feature, for which she took codeine and advil. These all day headaches were emanating from her neck and shoulders up through her back and skull and also from her left temple and eye to the front of her head, with no feeling over her right temple. Her left arm was so painful she was unable to lift it above her waist without pain. She continued to suffer flashbacks and will seek counselling to deal with these post-traumatic stress symptoms. She continues to be afraid of the defendant whom she said has a long history of violence. She provided no expert report relating to her mental stresses.

The emergency physician's report diagnosed her with bruising around the left eye, bruising with tenderness on the left side of face, abrasion on the occipital area (back of scalp), tenderness on palpation over the left upper chest, small bruise over the distal part of the left forearm. A cat-scan of the head showed no bony or internal injuries and a chest X-ray was normal. She was treated with analgesia and advised to follow up with her general practitioner if any further developments.

Some days later, a medical report from another doctor diagnosed her with residual issues from the assault, including, on-going left eye, face, jaw, neck and left shoulder pain, headaches, reduced movement of the left shoulder, presently unable to lift heavy objects with her left arm, neck muscles still in spasm. She was treated with diazepam.

GROUND 1

3. Counsel for the defendant submits that the above injuries do not constitute grievous bodily harm and on the evidence constitute no more than actual bodily harm, which should lead to a charge of assault occasioning actual bodily harm, contrary to section 309 of the Code.
4. Section 3 of the Code, defines bodily harm as meaning, any bodily injury which interferes with health or comfort.

Section 309, entitled, assault occasioning bodily harm, provides that, *any person who unlawfully assaults another and thereby does him bodily harm, is guilty of a misdemeanour, and is liable upon conviction...on indictment to imprisonment for four years.*

There is no dispute that upon the above facts, such an offence would be satisfied. Section 305(a), provides that, *any person who with intent to do some grievous bodily to any person, unlawfully wound or does any grievous bodily harm to any person by any means whatsoever is guilty of a felony, and is liable to imprisonment for ten years.*

Section 3, defines grievous bodily harm as meaning *any bodily harm of such a nature as seriously to interfere with health or comfort.*

5. The Bermuda Code was taken from the Queensland Criminal Code and it is often useful to find guidance therefrom but in this instance this latter definition is quite different to the definition of grievous bodily harm at section 1 of the Queensland Code.

There, it is defined as meaning, *(a) the loss of a distinct part or an organ of the body; or (b) serious disfigurement; or (c) any bodily injury of such a nature that, if left unattended, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health; whether or not treatment is or could have been available.*

6. It would seem therefore, as the prosecutor suggests, that on the face of the section in the Bermuda Code, the threshold for Grievous Bodily Harm appears to be lower than that in the Queensland Code. On the other hand, when a careful analysis is done of the Bermuda definition and the common law cases it may appear that there is no real difference between the Queensland definition and that intended by the Bermuda Code.
7. Submitting that the common law may be of some assistance, Ms. Christopher cited the old case of, *The King v Donovan* [1934]2KB 498, 509, where Swift J. said, *for this purpose we think that bodily harm has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling.*

She also referred to the UK Charging Standard Guidelines, of 1996 agreed between the Crown Prosecution and the police. These guidelines lay out a policy and practice regarding the types of injuries normally attracting a charge of actual bodily harm, grievous bodily harm, wounding, and other assaults, with a caution to avoid over charging where the circumstances or the degree of injury do not merit it.

For example, upon a choice between assault and actual bodily harm, assault maybe preferred where there are grazes, scratches, abrasions, minor bruising, swellings, reddening of skin, superficial cuts, a black eye; actual bodily harm may be preferred in cases of loss or broken tooth or teeth, temporary loss of sensory functions/ consciousness, extensive multiple bruising, displaced broken nose, minor fractures, minor not superficial cuts requiring medical attention, stitches, psychiatric injury more than fear, distress or panic, proved by expert evidence; grievous bodily harm and wounding would include injuries resulting in permanent disability or permanent loss of sensory function, injuries more than minor, permanent visible disfigurement, broken or displaced bones, limbs, fractured skulls, compound fractures, broken cheek bone, jaws, ribs, etc, injuries causing substantial loss of blood causing transfusions, injuries requiring lengthy treatment or incapacity, psychiatric injuries proved by appropriate expert evidence.

8. These guidelines are merely directory but they provide a useful assistance to this court in its determination.

It is evident that the injuries complained of in this case fall squarely within the actual bodily harm category but it's somewhat doubtful at this stage whether they are sufficient to satisfy a charge of grievous bodily harm, given those guidelines.

Both counsel refer to some passages from Blackstone's Criminal Practice 2012 at page 257. There, it is recognised that, *grievous bodily harm is not defined by the 1861 Act but was interpreted as meaning no more and no less than really serious harm. DPP v Smith [1961] AC290; Cunningham [1982]AC566;cf. Saunders[1985] Crim LR230.* Accepting that a number of minor injuries may collectively constitute grievous bodily harm, *Birmingham [EWCA] Crim. 2608*, Blackstone asserts that where the seriousness of the injury is questionable, the judge may withdraw a charge of grievous bodily harm from the jury.

Archbold 2009, 19-206, citing the same authorities cited by Blackstone, in defining grievous bodily harm says, it *should be given its ordinary and natural meaning of really serious bodily harm.*

9. Upon considering the injuries complained of in this case vis a vis the issue of whether they do constitute grievous bodily harm, I find them to be so marginal, that there is a real risk, that without more, a judge may be required to withdraw the grievous bodily harm charge from the jury.

Put another way, I am not convinced, at this stage, that the injuries suffered in this case as revealed on the depositions, though of substantial discomfort to the complainant at the time, constitute the types of injuries, individually or collectively, which may be safely regarded as amounting to the standard of serious-furthermore really serious.

Though the subjective discomfort and length of it to the complainant maybe a relevant factor, the test of whether the injuries are serious or really serious is still an objective one and I cannot say at this stage that that standard has been met.

In the circumstances, I would hold that there is merit in the submissions of counsel for the defendant.

10. However I hold the view that this court is without authority to quash the indictment or to amend or stay it without the consent or request of the prosecution, particularly since the prosecution appears to be of the view that the evidence of the complainant is expected to reveal more. Despite my reservations about how that could be, I will exercise some caution at this stage, particularly since there are recourses available to the court at the appropriate time.
11. Should I be incorrect in my judgment and recognising that it is not the role of the court to insist to the prosecution what charges should be on the indictment, it is my view, that in circumstances such as they are in this case, the defendant ought to have been given the opportunity to at least face a charge of actual bodily harm in the alternative on this indictment.

12. Given the law, as it appears to be presently, without a charge of actual bodily harm, on the indictment, a judge would be prohibited from leaving actual bodily harm to the jury as an inclusive and in my opinion that would be fair neither to the defendant nor to the complainant.

That seems to be so because as stated at Carters Criminal Law of Queensland 16th Edn, page 570, *A person cannot be convicted of assault occasioning actual bodily harm on an indictment charging only the doing of grievous bodily harm. R v Kaporonowski [1972] Qd R 465; R v Saylor [1963] QWN 14 and the other cases cited there*, unlike the present situation in the UK. See Archbold 2009, 19-203.

13. In addition, the defendant has in his deposition raised the defence of provocation. It seems the only possible defence available to him.

On an indictment charging him only with grievous bodily harm, that defence would be unavailable to him and a judge would further be prohibited from leaving it or actual bodily harm to a jury. The consequence would either be a complete withdrawal of the grievous bodily harm at half time, bringing all proceedings to an end, or a possible unsafe conviction if the matter proceeded beyond half time, or a complete acquittal. That's one reason why I have said that in the circumstances, the absence of actual bodily harm on the indictment may not be said to be fair to either the defendant or the complainant.

14. Unlike at common law where the defence of provocation was not available to offences other than murder, *R v Marks [1998] Crim. LR 676*, sections 254 and 255 of the Bermuda Code, like sections 268 and 269 of the Queensland Code create a statutory exception in cases of actual bodily harm and common assault but like the common law does not extend it to cases of grievous bodily harm; though it is doubtful, even in cases of assault, that such statutory defence, per section 254(3) is available against the lawful acts of another.

In the circumstances, it is open to the prosecution, to amend the indictment, to include an alternative count of actual bodily harm and to choose thereafter what course he shall take. In short he may decide whether to reach for the shadow and lose the bone or whether the bird in the hand is worth the two in the bush.

In consequence of my ruling, I find it unnecessary to consider the issue raised by counsel regarding the absence of the certificate on the complainant's second statement.

GROUND 2

15. Ms Christopher submitted that it is not proper that a charge of deprivation of liberty contrary to section 321 of the Code, arising from the same facts, ought to be included. She offered no cogent basis for that argument other than her realisation that this offense will expose the defendant to a greater penalty of seven years as provided by the statute.

Her comparison of it to the offenses of kidnapping and false imprisonment does not assist her.

This offense was ideally created and suited to situations as illustrated in these depositions. There is no prejudice to the defendant. In the end, if he is convicted of both offences, it will be for a judge to decide, on totality and proportionality principles, what sentence he should receive.

Once the prosecution has sufficient evidence to indict on such a charge, the court is without any power to quash the indictment or, I think as it is in this case, stay the indictment. I think that point is illustrated in *The Queen v Durant and Gardiner. No: 2 of 2006*.

There is no definition in the Code for deprivation of liberty and the offence is unknown to the common law, but assistance can be found at Carter's Criminal Law of Queensland, 19th Edition, where it is stated that its' meaning can be gleaned from the ordinary meaning of the words in section 355 of the Queensland Code. That section is identical to section 321 of the Bermuda Code, which provides, *Any person who unlawfully confines or detains another in any place against the other person's will, or otherwise unlawfully deprives another person of his personal liberty, is guilty of a misdemeanour, and is liable on conviction on an indictment to imprisonment for seven years.*

The terms, confines, detains, deprives and liberty should each be given their ordinary and natural meaning....liberty as defined in the Oxford English dictionary is, the condition of being able to act in any desired way without restraint; power to do as one likes...deprive, is defined as including denial of enjoyment of something, and detain, has a variety of meanings, including, keep in confinement, hold back, delay, stop.

On the depositions this is exactly what the defendant did to the complainant. There is no merit in this ground. It is dismissed.

Carlisle Greaves, .PJ.
5th December 2014