

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

**Criminal Appeal 18 of 2018
(IND 073 of 2017)
(SC 04364 of 2017)**

BETWEEN

DANE DAMEON McPHERSON

Appellant

AND

HER MAJESTY THE QUEEN

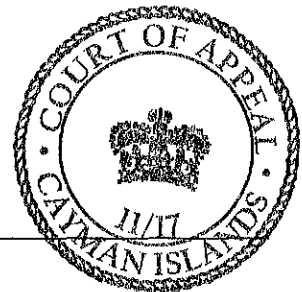
Respondent

BEFORE

**The Rt. Hon Sir John Goldring, President
The Hon Sir Richard Field, Justice of Appeal
The Hon C. Dennis Morrison, Justice of Appeal**

**Appearances: Ms. Amelia Fosuhene of Brady Law for the Appellant
Ms. Toyin Salako for DPP for the Respondent**

Hearing: 4 April 2019



JUDGMENT

**Transcript of oral judgment dated 4 April 2019
Approved and Released 10 April 2019**

MORRISON JA:

1. This is an application for leave to appeal against sentence.

Background

2. On 8 April 2018 the applicant stood trial in the Grand Court before Justice Michael Wood, QC (“the Judge”) and a jury for the offence of wounding with intent, contrary to section 203 of the Penal Code (2017 Revision). On 10 April 2018 the jury returned a unanimous verdict of guilty; and on 13 June 2018 the Judge sentenced the applicant to six years' imprisonment. The applicant now contends that the sentence was manifestly excessive in all the circumstances of the case.
3. The facts were as follows: The applicant and the complainant were co-workers at Foster's Supermarket, Countryside and they were both at work on 1 September 2017 when a dispute arose between them. The Crown's case, which the jury accepted, was that what started as a brief exchange of words led to the applicant arming himself with a hammer from a nearby shelf and approaching the complainant. The complainant was initially able to disarm the applicant, but the applicant then wrested the hammer from him and used it to hit him over the head a number of times. This resulted in what medical evidence would later reveal to be a 4.5 cm laceration to the complainant's scalp and a haematoma under the skin of his head.
4. At this point, other staff members intervened and disarmed the applicant. But even then the applicant again managed to arm himself, this time with a knife, before he was held by another staff member and left the supermarket.
5. In his defence, which the jury clearly rejected, the applicant relied on self-defence.
6. In addressing the Judge on sentence, the Crown referred firstly to the Chief Justice's Guidelines issued in October 2015, in relation to what it considered to be the relevant aggravating factors in the case. Among other things, reliance was placed on the fact that the applicant's intention was to cause more serious harm to the complainant than he actually did; and that the applicant used a weapon in an unprovoked and sustained attack

on the complainant. In these circumstances, in the absence of specific guidelines on the point in the Cayman Islands, the Crown referred to the United Kingdom Assault Definitive Guideline, submitting that the applicant had committed a category 1 offence, with the consequence that the Judge's starting point should be 12 years, with a sentencing range of 9 to 16 years.

7. Responding to these submissions, counsel for the applicant offered apologies to the court and to the complainant for what was described as "*a momentary lapse of someone who is usually calm, kind and helpful*". This had been brought about, the court was told, by what the applicant perceived to be the bullying which he faced at work. In all the circumstances, it was submitted, this was in no way a category 1 offence and the court should therefore impose a lesser sentence for the shortest possible period.
8. In his brief sentencing remarks, the Judge described the evidence against the applicant as "*overwhelming*", the entire incident having been captured on CCTV. While he accepted that there may have been an element of provocation in the circumstances of the offence, the Judge correctly pointed out that this could not afford the applicant a defence. He therefore considered that the only real mitigating factor in the applicant's favour was his previous good character. In this regard, he accepted the evidence of the witnesses called on the applicant's behalf at the sentencing hearing that the applicant's conduct on the day of the incident was wholly out of character and that he had "*an enviable work ethic and record*".
9. Against this background, the Judge concluded as follows:

"There are no Cayman Islands Sentencing Guidelines, so I consider the UK Assault Definitive Guidelines. In the context of this case, I'm prepared to accept that this was a case, fortunately for you, of a lesser harm but higher culpability. You used a weapon, a hammer, and by aiming blows with a hammer to the [complainant's] head, you must have intended to

inflict more serious harm on him than actually resulted from your attack. So in my judgment, this is a category 2 offence with a starting point of 6 years with a range of sentence between five and nine years.

The sentence I pass upon you, bearing in mind the aggravating features and the mitigating features, will be one of 6 years' imprisonment. The 65 days you spent in custody will count towards your sentence. Once you have completed your sentence, if it's necessary, I recommend your deportation from the Cayman Islands".

10. In her submissions in support of this application, Ms. Fosuhene quite properly accepted that the starting point of 6 years chosen by the Judge was sufficient to reflect the facts of the case. However, she submitted that the Judge erred in not reducing that figure further to take into account (i) his finding that there was an element of provocation prior to the offence; and (ii) the fact that the applicant had no previous convictions and was a young man of "*impeccable character*", (iii) the offence was not part of a sustained attack on the complainant, but was an isolated incident - a lapse of judgment - for which the applicant was clearly remorseful.

11. In addition, Ms. Fosuhene referred us to the various personal development programmes in which the applicant has successfully participated during his time on remand since his conviction. And she brought to our attention specifically this morning two letters from prison employees which attested to the good service that the applicant had been giving in the prison since his conviction. And finally, Ms. Fosuhene urged the court to bear in mind that the applicant, who is a Jamaican national, will be deported after he has served his sentence. In these circumstances, a shorter sentence ought to have been imposed which – in the language used by Ms. Fosuhene in her written submissions - "*would reflect the criminality yet balance justice and mercy*". For this formulation, Ms. Fosuhene referred us to the following statement of the court given by Sir Igor Judge in *R v Martin* [2006] EWCA Crim 1035, para 2.

“The sentencing decision does not represent a mathematical exercise, nor does it result from an arithmetical calculation. The decision imposes on the judge the heavy responsibility for making a balanced analysis of the requirements of both justice and mercy in each individual case, reflecting the sometimes conflicting aggravating and mitigating features of it.”

12. Responding for the Crown, Ms. Salako again identified the aggravating factors of the applicant's conduct as (i) his intention to cause more serious harm than was actually caused; (ii) the use of a weapon; (iii) an unprovoked attack; (iv) a sustained assault on the complainants; (v) showing little to no regard to causing injury to other persons present (vi) arming himself with a knife after the hammer was taken from him; and (vii) the serious injuries which the complainant sustained.
13. In these circumstances, Ms. Salako submitted that no complaint could now properly be made about the Judge's observations that the applicant's only mitigation was his previous good character; and that, having regard to the several aggravating factors in the case, the sentence of 6 years' imprisonment was appropriate.
14. We agree with Ms. Salako. There is now no controversy between the parties that the Judge was correct to treat the case as falling within category 2 of the UK Assault Definitive Guideline for wounding with intent. Offences in this category are defined in the guideline as offences of –

*“Greater harm (serious injury must normally be present) **and** lower culpability **or** lesser harm **and** higher culpability.”*

(Emphases in the original)

15. The Judge considered that the offence in this case was one of lesser harm - that is, as the guideline puts it, an injury *“which is less serious in the context of the offence”*; and higher culpability - that is, again in the language of the guideline, one which manifests an

intention *"to commit more serious harm than actually resulted from the offence"*. In our view, this analysis cannot be faulted, given the injury to the complainant, which the Judge described as *"a nasty cut"*, and the obviously far more serious injury which the applicant's use of a hammer to inflict more than one blow to the complainant's head could potentially have caused.

16. Nor is there now any controversy about the Judge's choice of 6 years as a starting point, based on the guideline for category 2 offences. As the guideline also indicates, the appropriate range for offences in this category is 5 to 9 years' custody. Ms. Fosuhene's complaint that, in the light of the applicant's strong personal mitigation, the Judge ought to have imposed a lesser sentence than 6 years is a clear invitation to the court to interfere with the Judge's exercise of his sentencing discretion. Virtually everything which has been urged before us was also put before the Judge. In our view, nothing has been advanced to make this an appropriate case for this court to differ from the conclusion which the Judge was plainly entitled to reach on the material before him, particularly in the light of the substantial aggravating factors to which we were referred by Ms. Salako.

17. In these circumstances, we therefore dismiss the application for leave to appeal.

