

**IN THE CAYMAN ISLANDS COURT OF APPEAL
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS CRIMINAL
DIVISION**

CRIMINAL APPEALS 9 of 2019 & 1 of 2020

IND 99/2017 & IND 63/2017
SC#06138/2017 & SC#3820/2017

BETWEEN:

CLAYBURN EBANKS

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**

Date of Hearing: 4th September 2020

Appearances: The Appellant in person
Ms. Toyin Salako, Office of the DPP for the Respondent

JUDGMENT

Transcript of oral judgment dated 4th September 2020 and Approved for Release 19th October 2020

MORRISON JA

1. On 20 September 2018, after a trial before Frank Williams J (Acting), sitting with a jury, the Applicant was convicted of the offence of wounding with intent to cause grievous bodily harm, contrary to s.203 of the Penal Code (2003 Revision). We will call this the "first offence".
2. On 16 October 2018, after a judge alone trial before Roger Chapple J (Acting), the

Applicant was convicted of the offence of unlawful wounding, contrary to s.204 of the Penal Code (2003 Revision). We will call this the "second offence".

3. The first offence was committed on 29 July 2017, while the second offence was committed on 28 November 2017. On the latter date, the Applicant was in fact on bail pending trial in relation to the first offence.
4. Both offences, which involved two different complainants and had no relationship to each other, were fully captured on CCTV. On 1 March 2019, after a sentencing hearing in relation to both offences, Frank Williams J (Acting) ('the sentencing judge', sentenced the Applicant to 5 years' imprisonment for the first offence and 2 years' imprisonment for the second offence. The sentencing judge ordered that both sentences should run consecutively.
5. The Applicant now seeks leave to appeal against both sentences on the ground that they were manifestly excessive. He also contends that the sentencing judge further erred by ordering that the sentences should run consecutively.
6. Before us this morning, the Applicant has also made a personal plea for leniency. He tells us that he has turned around his life in prison and that he is very remorseful. He advises us that that he is diabetic and hypertensive and that this is supported by medical reports submitted on his behalf. He also showed us an outbreak on his left arm, stating that he was not being treated properly in prison in relation to his required medication in prison. He therefore wished an opportunity to be a better man from here on.
7. In addition to this, the Applicant filed a number of points in skeleton arguments and documents submitted on his behalf. We will come to them in a moment.
8. But it is first necessary to give a brief outline of the facts of the separate incidents which gave rise to the convictions and sentences.

The First Offence

9. As we have indicated, the incident which led to the Applicant's trial for the first offence occurred on 29 July 2017. It arose out of an early morning altercation in a George Town bar between the Applicant and the complainant. There was evidence that during the course of the verbal exchanges between the two men, the complainant gestured towards the Applicant twice, making a gesture with the middle finger of his right hand. At one point, the Applicant was seen throwing the contents of a cup or a glass in the direction of the complainant while taking a few steps forward. The Applicant was seen holding onto something in his right pocket. The complainant then walked towards the Applicant and punched him. A scuffle ensued between the men, during the course of which the Applicant was seen to have a knife in his hand. The complainant then threw a bottle at the Applicant which struck him at the back of his head. At the end of the day, the complainant sustained the following injuries:

- (1) a 5 cm curved laceration to the right arm;
- (2) a 6 cm laceration to the base of the back of his head;
- (3) a stab wound between his ribs;
- (4) a 7-8 cm incised wound to the left side of his lower back;
- (5) two 5 cm stab wounds to the left side of his ribs and hip;
- (6) a 2 cm incised wound to the upper right arm; and
- (7) a 5 cm incised wound to the left elbow.

10. The complainant's injuries necessitated hospitalisation and surgery. The injuries were described by his doctor as serious, although not likely to be permanent.

11. In sentencing the Applicant for this offence, the sentencing judge rejected the Crown's submissions that the offence should be treated as a Category 1 offence as defined in the UK Assault Definitive Guidelines. The applicable sentencing range for offences falling within Category 1 is 9 to 16 years' imprisonment, with a starting point of 12 years. The sentencing judge considered that the injuries suffered by the complainant in this case were not life threatening and certainly not as serious as those in the cases relied on by the Crown. The sentencing judge therefore treated it as a Category 3 offence, attracting a range of 3 to 5 years' imprisonment, with a starting point of 4 years. In light of the Applicant's several previous convictions, 44 of them in all, the sentencing judge concluded that a sentence of 5 years' imprisonment would be

appropriate in all the circumstances.

The Second Offence

12. The complainant in this case was the Applicant's brother. There was a suggestion that the complainant was the aggressor, but the trial judge considered that the Applicant used unreasonable force by using a knife to wound the complainant who had hit him with a fan belt. In the result, the complainant received stab wounds to his chin, right anterior chest and abdomen. These injuries were not considered serious.
13. Again rejecting the Crown's submission that the offence should be classified in a higher category in relation to offences from unlawful wounding, the sentencing judge treated it as a Category 2 offence, attracting a range of 1 to 3 years' imprisonment, with a starting point of 18 months. In the result, bearing in mind, among other things, that the Applicant was on bail for an offence of a similar nature when he committed the second offence, the sentencing judge sentenced him to 2 years' imprisonment.
14. Finally, with regard to the question of whether this sentence should run concurrently or consecutively to the sentence for the first offence, the sentencing judge took into account the Cayman Islands Sentencing Guidelines ('the Sentencing Guidelines') and opted for the latter. He accordingly sentenced the Applicant to serve the two sentences consecutively.
15. In a detailed submission filed on 8 August 2020, the Applicant makes a number of points — a number of which are overlapping — about the sentences both offences.
16. As regards the first offence, he submits that the sentencing judge did not give adequate weight to the issues of provocation and self-defence, both of which arose on the evidence. Further, in taking into account his previous convictions, the sentencing judge ignored the propensity principle by placing reliance on the fact that the Applicant had committed previous offences.
17. As regards the second offence, the Applicant submits that, by sentencing him to a further 2 years' imprisonment, to run consecutively to the 5 years for the first offence,

the judge failed to have regard to the totality principle; that, in all the circumstances, a total of 5 years' imprisonment would have been appropriate in this case; and, as we have already indicated, the Applicant made a spirited plea for leniency before us on his own behalf.

GOLDRING P: I see the Applicant has his hand up.

THE APPLICANT: Yes, sir. Can I say something, sir?

GOLDRING P: Well, very briefly, Mr Ebanks. The learned judge is now giving judgment.

THE APPLICANT: Okay. What I want to say, I was on bail for 14 months. I turned myself into the station. I did everything that I was told to do sir. And I was on bail. And when I was on bail I was provoked and I got in trouble, sir. And I'm very sorry, sir. Please, sir, I just want you to know that. I turned myself into the station.

GOLDRING P: All right.

THE APPLICANT: -- 14 months without -- on all two charges, sir. And I got in no trouble after that.

GOLDRING P: Thank you very much.

MORRISON JA: Thank you very much, Mr Ebanks.

MORRISON JA:

18. We remind ourselves that, as Hilbery J said in the well-known case of *R v Ball* (1951) 35 Cr App R 164 at p.165:

"... this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence ... It is only when a sentence appears to err in principle that this Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles then this Court will intervene."

19. In his sentence judgment in this case, the sentencing judge referred to the Sentencing

Guidelines. In particular, he referred to para.1, under the heading the "Aims of Sentencing":

"In sentencing an offender, the Court has to balance a number of competing interests and objectives, tailoring the punishment to the individual circumstances of the offender whilst ensuring that the punishment is commensurate with the seriousness of the offence.

A number of aims govern the sentencing process and it will be rare for them all to be met; the task of the Court is to consider which of these aims will be best served by the sentence to be passed on an individual offender."

20. The sentencing judge also referred (at paras. 5 and 6 of the sentence judgment) to a number of well-established principles of sentencing in respect of which no citation of authority is necessary. These are the proportionality, parity and totality principles.
21. It therefore seems to us that the sentencing judge plainly had in mind all the relevant principles in sentencing the Applicant in the manner in which he did. So the only question that remains, as it seems to us, is whether the judge can be said to have erred in any way in his application of the principles in this case.
22. The first issue which arises is whether the judge erred in the length of sentence which he imposed on the first and second offences. In our view, the judge gave careful consideration to this aspect of the matter in respect to both offences, rejecting the Crown's suggestion of significantly higher sentences in both cases, particularly in relation to the first offence. We can find absolutely no fault with the sentencing judge's more moderate approach to sentencing the Applicant in this case. In considering that the Applicant's dismal history of previous offences should be taken into account as an aggravating factor, the sentencing judge was doing no more than applying standard sentencing principles. Despite the great learning which the Applicant deployed in support of his submissions that the sentencing judge disregarded the propensity principle, we are afraid that this principle was wholly inapt in the circumstances of this case. While it may obviously have been relevant if the court had relied on the Applicant's previous misconduct in proof of his guilt of either offence, it had no

relevance in the sentencing context save with regard to aggravation.

23. The second issue has to do with the sentencing judge's order that the sentence of 2 years' imprisonment for the second offence should be consecutive to the sentence of 5 years for the first. In considering this issue, the sentencing judge referred to s.6 of the Sentencing Guidelines in which this issue is dealt with in some detail as follows:

“Consecutive sentences will ordinarily be appropriate where:

- (a) Offences arise out of unrelated facts or incidents*
- (b) Offences are of the same or similar kind but where the overall criminality will not be sufficiently reflected by concurrent sentences for example:*
 - I. Where offences are committed against different victims*
 - II. Where sexual offences or domestic violence are committed against the same individual*
 - III. Where the offender commits the same or a similar offence after having been arrested on the original offence ...”*

(Emphases as in the sentence judgment)

24. As can readily be seen, all of the factors underlined in this extract applied in this case. An additional consideration was that the second offence was committed while the Applicant was actually on bail for the first offence.
25. With regard to the totality principle, it seems to us that a total sentence of 7 years' imprisonment for two offences, involving different victims, committed within months of one another, both involving the use of a knife and in one case causing serious injuries, cannot possibly be considered manifestly excessive. Therefore, despite the Applicant's plea for leniency, we are clearly of the view the application for leave to appeal must be refused.