IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 16/2019
IND#0040/2017
SC#02796/2017

BETWEEN:

GARFIELD SILBURN Jnr.

Appellant

- and –

Her Majesty the Queen

Respondent

BEFORE:

The Rt. Hon Sir John Goldring, President
The Hon John Martin, Justice of Appeal
The Rt. Hon Sir Alan Moses, Justice of Appeal

Date of Hearing**:** 13th November 2020

Appearances: Mr. Rupert Wheeler for Appellant
Mr. Garcia Kelly Office of the DPP Respondent

JUDGMENT

Transcript of oral judgment dated 13 November 2020 and Approved for Release 3 February 2021

GOLDRING, PRESIDENT:

1. On 28 July 2017, the Applicant, who was then 21 years old, appeared before Mr. Justice Quin on an indictment containing two counts. Count 1 was of causing grievous bodily harm with intent, contrary to section 203 of the *Penal Code (2013 Revision)*, count 2 of assault occasioning actual bodily harm, contrary to section 216 of that code. The victims of the two assaults were police officers; respectively, Police Constable Wade Gordon and Police Constable Pamela Heard Davis. On 18 September 2017, the judge imposed concurrent sentences in respect of those offences of imprisonment for ten and two years. On 18 October 2018, this court dismissed the Applicant's appeal against the sentence of ten years' imprisonment imposed on count 1.

2. The applicant now seeks an extension of time and leave to appeal against his conviction on count 1 on the basis that his plea in respect of causing grievous bodily harm on count 1 was incomplete and ambiguous. It is said that a reading of the transcript makes it clear that his plea of guilty was only to causing grievous bodily harm, not grievous bodily harm with intent.

The facts

3. They were set out in some detail in the judgment of this court on 18 October. In short, in attempting to resist arrest, the applicant punched Police Constable Gordon several times, including in the face, stamped on the officer when he was on the ground, kicked the officer in the head several times and finally choked him so as to cause him to begin losing consciousness and his eyes to bulge. Finally, he tried to run away. There were serious consequences for Police Constable Gordon. Among other things, he lost the vision in his right eye as a result of a detached retina.

The ground of appeal

4. In order to understand the grounds of appeal, we need to refer briefly to what happened when the counts were put, for it is a reading of the transcript which Mr. Wheeler, on behalf of the applicant, submits as the basis of his appeal.

5. The case was called on on 28 July 2017. Mr. Moran, who was then prosecuting, submitted that both counts were properly before the court and that, if necessary, the Crown would proceed to trial in respect of both. Mr. Brady, an experienced criminal attorney in the Cayman Islands, was representing the Applicant. Mr Moran said:

> "*I don't know whether my learned friend disagrees…that both counts are here properly*".

6. Mr. Brady responded by saying:

> "*The charges can be put to Mr. Silburn, My Lord*".

7. The Clerk of the Court then read out the counts. In respect of count 1 he said:

> "*Count 1. Causing grievous bodily harm with intent, contrary to section 203 of the Penal Code (2013 Revision)".*

8. He then read the Particulars of the Offence, setting out where the offence was said to have occurred, and completed the reading out of the Particulars with these words:

> "*...unlawfully and maliciously caused grievous bodily harm to Wade Gordon with the intent to do him grievous bodily harm. How do you plead?*
>
> *THE DEFENDANT: Plead guilty to grievous bodily harm.*
>
> *THE COURT: I'm sorry, what was that?*
>
> *THE DEFENDANT: To grievous bodily harm.*
>
> *THE COURT: You're pleading guilty?*
>
> *THE DEFENDANT: Yes, sir*".

9. The second count was then put. The case was adjourned for sentence. The case was next before the court on 14 September 2017. The Applicant and Mr. Brady were again present. The case was opened. In the course of the opening, Mr. Kumar, who was then representing the prosecution, said that the Applicant had made no comment when interviewed by the police, other than to say that the injuries inflicted on the officer were not intentional.

10. Mr. Brady mitigated. In the course of his mitigation, he submitted that the conduct on the day in question was:

> "*...certainly, serious and unacceptable*".

11. He went on to say that the Applicant instructed him that he only acted as he did in a bid to escape. He submitted:

> "*[The Applicant] maintains that he had no intention of causing the injuries that he did…He pleaded guilty once the allegations were put to him and the injuries, and the extent of those injuries. Mr. Silburn was quite surprised and remorseful*".

12. Mr. Brady continued that the Applicant did not intend to cause maximum harm to the victim. There was discussion as to the appropriate bracket into which this offence of causing grievous bodily harm with intent fell. It was said that the Applicant was not beyond redemption, that he pleaded at the earliest possible opportunity.

13. Mr. Wheeler, on behalf of the Applicant, submits that a reading of what happened on 28 July makes it plain that the plea to count 1 was, as he puts it, "*incomplete and ambiguous:*" that in the circumstances it cannot stand. In his submissions and skeleton argument, he refers to the relevant authorities. It is not necessary to set them out.

14. Whether this plea was incomplete and ambiguous involves an assessment of what happened in proper context. On 28 July 2017 the Crown made it clear that absent a full plea to Count 1, there would be a trial on that count. That must have clear to the Applicant and his experienced attorney. A plea to the full offence was then entered. Neither the Applicant nor his attorney demurred. A little over 14 days later, the case was back before the court. By then, on any view, it must have been quite clear to everyone that a full plea to count 1 had been entered. There was a further opportunity for the Applicant to indicate he did not intend to plead to the full offence, that there had been some misunderstanding. No such suggestion was made by the Applicant or Mr Brady. The whole proceedings were conducted upon the basis that he was guilty of count 1. Indeed, the fact that he did so at the earliest opportunity was an important element of the mitigation. Finally, some 12 months later, the case went on appeal. At no time during the course of the appeal was it submitted that the Applicant had not intended to plead to the full offence or that his plea was incomplete or ambiguous.

15. In short, while we, of course, accept that if a plea is ambiguous it should not stand, that was not in our judgment the case here. It is inconceivable to us that the applicant did not appreciate what, by his words in July, he was accepting. It is not in the circumstances, appropriate to extend time.

16. Finally, we would make this observation.

17. If an Applicant or Appellant seeks to blame previous counsel, as this Applicant effectively is, we would expect as a matter of course a waiver of privilege in respect of the earlier proceedings. We would expect the previous advocate to have been contacted and his explanation of events sought. It is not good enough simply to come to this court and cast blame without permitting the court to have a complete understanding of what happened.