IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT

CACR005/2014
IND 32/13
#/04374/2013

BEFORE

THE RT HON SIR JOHN CHADWICK, PRESIDENT

THE HON ELLIOTT MOTTLEY, JUSTICE OF APPEAL

THE RIGHT HON SIR BERNARD RIX, JUSTICE OF APPEAL

BETWEEN

H.M THE QUEEN

Respondent

and

NIKOLAR KERR

Appellant

Appearances: Appellant in person and Greg Walcolm –Crown Counsel for the Director of Public Prosecutions.

JUDGMENT
Revised from transcript of oral judgment 21 November 2014 and Approved
Released 13 January 2015

Sir John Chadwick, President

1. On 11 February 2014 the appellant, Nikolar Kerr, was convicted on a plea of guilty for the offence of wounding with intent, contrary to section 203 of the Penal Code (2010 revision). On 27 March 2014, following a social inquiry report, he was sentenced to imprisonment for a term of five years and two months. He appeals to this Court from that sentence on the stated ground that it was manifestly excessive in the circumstances.

2. The offence with which the appellant was convicted occurred on the 22 June 2013, in the early hours of that morning. The complainant, Mr. Lyndev Reid, had been to a party, at which the appellant was also present. On his return home, but before he was able to open the door of his house, Mr. Reid was struck by a car driven at speed by the appellant. Mr. Reid jumped over the car and ran. The appellant pursued him on foot and attacked him with his fist. The appellant was then given a knife by acquaintances and used that knife to stab Mr. Reid in the chest. There was a struggle in the course of which the appellant stabbed Mr. Reid several times in the face and neck. When Mr. Reid was taken to hospital he was found to have sustained a five centimetre chest wound, which had penetrated the lung, a three centimetre neck wound and some lesser lacerations to the face. The judge, in the course of his sentencing remarks, described the attack as "unprovoked and extremely violent".

3. The appellant was charged on two counts: first, attempted murder contrary to section 194 of the Penal Code; and second, wounding with intent contrary to section 203 of that code.

4. The trial was listed for hearing on 10 February 2014. When the matter came for hearing on that day the judge was invited to adjourn the proceedings for further enquiries to be made; and he did so. On the following day the parties came back before the judge and the judge was invited to give a *Goodyear* indication of the sentence that he would be minded to pass on a guilty plea to the lesser offence of wounding with intent. After a short hearing on that day, he did so: indicating that the maximum sentence he would impose on the material then before him was one of six and-a-half years on a plea of guilty to wounding with intent. Shortly thereafter, and on the same day, the appellant pleaded guilty to that offence. The Crown indicated that it was content to accept that plea; and to leave the charge of attempted murder on the file. The judge then heard submissions on sentence by counsel then instructed by Mr. Kerr.

5. In imposing the sentence that he did, the judge accepted, first, that the attack was

not premeditated - in the sense that, as he put it, "The appellant did not know where the complainant lived and came across him, as it were, by chance" – and, second, "That the appellant did not himself bring a knife to the scene. A knife was handed to him by one of his acquaintances during the course of the attack".

6. The judge indicated that he placed the offence in category 2 of the United Kingdom Sentencing Guidelines; with a category range of five to nine years and a starting point of six years. He went on to say that, in giving his *Goodyear* indication, he had directed himself that the appropriate starting point in this case was one of seven years - because of the factors which indicated a higher culpability - from which he had deducted six months to reflect the guilty plea: thereby arriving at the indicated maximum, under his *Goodyear* direction. of six and-a-half years.

7. The judge went on to say this, at pages 39 to 40 of the transcript of his sentencing remarks:

> "However today I have heard further submissions, some of which I have already reflected in my sentencing remarks, from Ms. Organ [who was then counsel for the appellant] who asked me to take into account further factors; namely, positive good character as evidenced by the various references I have read that this man's actions were positively out of character. The excellent references themselves and the background of the stable family influences, together with the overall assessment of the probation officer of his risk profile, although I mentioned it seems to me that the assessment might have been unduly influenced by some of the factors which are now discounted.
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> I have concluded that there is some reason to depart to some extent from the indication I have already given as to the correct sentence in this case. I would not increase the indicated sentence for obvious reasons, but I am going to reduce it to reflect what I have heard today since the plea was entered. The sentence will be one of five and-a-half years' imprisonment to include a six month reduction for the guilty plea and I shall give credit for time on curfew with a total amount of four months which will reduce that sentence to five years and two months' imprisonment".

So the effect of the pre-sentence submissions made to the judge was to reduce the indicated maximum sentence, after giving credit for six months in respect of the guilty plea, from six and-a-half years to five and-a-half years; with a further

reduction of four months in respect of the time spent in curfew.

8. In reaching that conclusion the judge referred to two decisions of this Court; *R v Hyre*, CICA (Crim) 9 of 2009 and the *R v O'Neill Alrick Robinson*, CICA (Crim) 37 of 2010. In the first of those cases (*Hyre)* the Court upheld a sentence of seven years imposed after a trial. That was a case in which, on the facts, there was the aggravating factors that the attacker had armed himself with a knife which he had taken into a public place, a night club and that the injuries were so severe that but for the prompt and expert medical attention, the victim would have died.

9. In *O'Neill Alrick Robinson* this Court reduced a sentence of seven years on a guilty plea to one of six years. It did so on the ground - peculiar to that case - that the judge had not indicated what, if any, discount he was giving for the guilty plea. But for that feature, as the Court indicated, it would have been impossible to suggest that seven years after a guilty plea was excessive. *O'Neill Robinson* was on its facts a more serious offence than the present. The defendant had gone to the apartment of the victim, a lady with whom he had formerly been in an intimate relationship, in order to attack her; and he had inflicted very serious damage upon her which would have led to her death. I read from paragraphs 3 and 4 in the judgment of this Court:

> "3. On the evening of 9 May 2010, Mr. Robinson went to the victim's apartment and asked to be let in. She refused him entry but he used a key which he had in his possession and entered that apartment without her consent. He immediately grabbed her by the throat and started to choke her. He then picked up a metal object and beat her over the head. He threatened to kill her. He then proceeded to kick her about the body and the face causing her to lose a tooth. She shouted for help but the door to the apartment was locked. The offender used a knife and stabbed the victim in the back of the neck. The knife broke. That didn't stop him and he obtained some scissors and continued stabbing the victim. She pretended to be dead in order to stop the defendant attacking her.
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> 4. The victim suffered injuries to her hands, a punctured lung and stab wounds to the rear of her neck. The broken tip of the knife was lodged in her spinal canal which left her with little or no movement on her left side. Following a call to the emergency services by neighbours, she was taken to George Town Hospital where she received treatment. It was noted that she had approximately ten stab wounds at the base of the neck. She was lifted by air to University Hospital in Jamaica for emergency

> surgery. At that stage her lower left limbs were incapacitated, but fortunately a second surgical procedure relieved the problem and following physiotherapy she has largely recovered the ability to walk although, as the judge thought, with a slight limp."

In those circumstances, the sentencer could have come to the conclusion, quite properly, that an appropriate sentence after trial would have been in the region of ten years and from that starting point he could then properly have allowed a discount by way of credit for the guilty plea which would have brought him to a figure of sentence between six or seven years; and this Court emphasised that there was nothing in its judgment which was intended to suggest that a sentence of seven years after a guilty plea would have been regarded as excessive, *a fortiori*, manifestly excessive, on the facts of that case. It was only because, as the Court explained at paragraph 18 of its judgment, the sentencer had not indicated what discount for a guilty plea (if any) he was giving that the Court thought it appropriate to reduce the sentence to what, on any basis, would be the acceptable minimum.

10. In the light of those decisions it would have been difficult to contend that a starting point of seven years, in this case after a trial, was manifestly excessive. That would be a starting point before taking account of mitigating factors and before taking account of any discount for the guilty plea. But there are three matters which, as it seems to me, affect the position in the present case. The first is that, in giving his *Goodyear* indication based on seven years as a starting point, the judge was influenced by what he described as "a higher culpability arising from significant premeditation". When he came to sentence, he accepted that that element was not present. The second is that this is a case in which there was a strong case of positive good character, advanced on behalf of the appellant in the course of the pre-sentence submissions. The judge said that he had taken that into account: but he did not indicate the extent to which he regarded that as a reason for reducing the sentence. Third, there was the guilty plea. Taken together those factors had the effect of reducing the sentence - before taking account of the curfew - from seven years to five and-a-half years.

11. In my view, the judge gave insufficient weight to those three factors. Having reached the conclusion that a reduction from his *Goodyear* indication was required - because he now took a different view as to culpability - he should have indicated, as it seemed to me, what his starting point would be by reason of that change in circumstances. He should have indicated that, given that he no longer took the view that this was a case involving significant premeditation, not only was his starting point lower than seven years, but how much lower than seven years it was. And, from that starting point, he should then have given a further discount in relation to the mitigating factor of positive good character. It seems to me that, if the judge had done either of those things, he could hardly have given a lesser discount than nine months for the change in his perception of culpability; and he could hardly have given a discount of less than another nine months in relation to the strong mitigation to which he referred. So, it seems to me, his starting point, after taking an account of mitigation, should have come down from seven years to five and-a-half years.

12. To that starting point of five and-a-half years, he should then have applied a discount for the guilty plea. In the event he gave a discount of six months on a sentence of some six years, a discount of about eight percent. He took the view that the guilty plea was entered at a late stage and therefore did not attract any significant discount. But that, as it seems to me, is to overlook the fact that this defendant was charged with attempted murder; and that it would have been unrealistic to expect him to enter a guilty plea to a charge of attempted murder which would carry a potential life sentence. What needed to be discussed with the Crown was whether the Crown would accept a guilty plea to the lesser offence of wounding with intent; and so agree not to pursue, but to leave on the file, a charge of attempted murder.

13. The appellant, who has appeared before us in person and addressed us with moderation and obvious sincerity, has told us that those discussions took place in the week before the trial. No explanation has been advanced as to why they did not, or could not, have taken place a good deal earlier; but, while those

discussions took place it seems to have emerged that the Crown would be prepared to accept the guilty plea to the lesser offence and to leave the charge of attempted murder on the file. That obviously changed the position and it led to the invitation to the judge to give the *Goodyear* indication which he did and to the guilty plea to the lesser offence immediately following that indication.

14. In those circumstances it seems to me harsh to say that this guilty plea was entered at such a late stage that it deserved very little recognition by way of discount from the sentence that the judge would otherwise have passed. It seems to me that it was entered at a stage which was understandable and not unreasonable given the circumstances that the appellant had been charged with attempted murder: a charge to which, as I have said, it would be unrealistic to expect him to plead guilty. In my view, the judge should have appreciated that; and should have applied a discount of at least one year to the sentence of five and-a-half years which - for the reasons that I have indicated - would have been the appropriate starting point after taking account of the change in his appreciation as to significant premeditation and the glowing character references of positive good character in this case. One year on five and-a-half years is, of course, a discount of somewhat less than 20 percent.

15. For those reasons, I would allow this appeal against sentence and set aside the sentence of five years and two months passed by the judge. In its place I would substitute a sentence of four years and two months.

16. I understand the other members of the Court to take the same view. So we set aside the sentence of five years and two months and we substitute a sentence of four years and two months with time spent in custody to be taken into account.

Chadwick P

Mottley JA

Rix JA