IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CRIMINAL APPEAL 34/2017
IND. 83/2017

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and –

Seth O'Neil Watler

Respondent

Before:

The Rt Hon Sir John Goldring, President
The Hon John Martin QC, Justice of Appeal
The Hon Sir Richard Field, Justice of Appeal

Appearances: Mr Patrick Moran for DPP and Mr Jonathan Hughes of Samson Law for Respondent

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JUDGMENT
Revised from transcript of oral judgment 18 April 2018 and Approved
Released 25 April 2018

The President:

1. On 8 December 2017, in the Grand Court, the Respondent pleaded guilty to an offence of inflicting grievous bodily harm contrary to Section 204 of the Penal Code. On 13 December, Acting Justice Carter sentenced him to 10 months' imprisonment suspended for two years, ordered that he perform 100 hours community service and that he attend an anger management course. The Director of Public Prosecutions seeks leave to refer the sentence to this court on the basis it was unduly lenient.
2. Section 30(1) of the Court of Appeal Law (2011 Revision) states:

"If it appears to the Director of Public Prosecutions —

(a) that the sentencing of a person in a proceeding in the Grand Court has been unduly lenient or is wrong in law; and

(b) that the case is a case in which [the] sentence is passed on a person for an offence triable on indictment,

he may, with the leave of the Court, refer the case to it to review the sentencing of that person..."

3. Section 5(1) of the Criminal Procedure Code (2017 Revision) provides:

"For the purpose of determining the mode of trial before a court, offences shall be classified into three categories –

Category A – offences triable upon indictment and not otherwise;

Category B – offences triable upon indictment which, with the consent of the prosecution and the person charged ... may be tried summarily; and

Category C – offences triable summarily and not otherwise."

4. An offence contrary to Section 204 is a Category B offence. Mr Hughes, on behalf of the Respondent, submits that a reading of sections 30(1) and 5(1) together create a two-stage test if leave to appeal is to be granted. First, the sentence must be of a person in a proceeding in a Crown Court. Second, the sentence on that person must be for an offence "triable on indictment". "Triable on indictment" must mean triable *only* on indictment: in other words, in respect of a Category A offence under Section 5(1) of the Criminal Procedure Code. There is otherwise no reason, he submits, to have the dual requirement in Section 30(1) (a) and (b) that the proceeding has both to be in the Grand Court, and concern a sentence triable on indictment. It would suffice to say that the proposed appeal concerns a sentence passed in the Grand Court, or that the proposed appeal concerns a sentence triable on indictment.
5. In short, submits Mr Hughes, the intention of the legislature plainly was the Director of Public Prosecutions may only appeal sentences in respect of Category A offences.
6. Section 77 of the Criminal Procedure Code (1995 Revision) provided that:

"no offence which is triable summarily shall be triable by a Summary Court unless the charge or complaint ... is laid within six months".

7. In *McLean v Campbell, Brown and Burton* [2004-5] CILR Note 52, this court held that "triable summarily" referred only to those offences which could be tried summarily, in other words, Category C offences. It did not apply to those offences which could be tried summarily or on indictment, in other words, Category B offences. As the court put it:

> "Section 77 cannot encompass all offences triable in the Summary Court, as not only would the words emphasised above be superfluous, but summary trial would be excluded whenever the prosecution intended to proceed with a charge laid outside the limitation period."

8. Mr Hughes submits, that the reasoning applies equally in the present case.
9. As Mr Hughes recognised, that there are problems with his interpretation of the section. First, the wording of Section 30(1) is quite clear. It requires a sentence imposed in a proceeding in the Grand Court in respect of an offence triable on indictment. The words contain no restriction. The word "only" does not appear. Second, sentences may be passed in the Grand Court in respect of summary-only offences on appeal. The wording of both limbs of Section 30(1) would exclude any prosecution appeal in such cases. Third, although to some limited extent persuasive, similar legislation in England and Wales provides for the review of sentences for both indictable-only offences and either-way offences (including inflicting grievous bodily harm). However, such either-way offences are limited to those specified.
10. We do not think that the fact that in *R v Aspinall*, CICA 16 of 2016, leave was granted in relation to theft, forgery and converting criminal property, all Category B offences, provides much assistance to the Director. The present point was never taken. Neither do we think that *McLean v Campbell, Brown and Burton* (supra) provides assistance in the circumstances.
11. We grant leave.

The facts

12. The offence was committed at about 9:30 on the evening of Saturday, 14 October 2017. The Respondent, a 25-year-old man of previous good character, had collided at a

roundabout on the Esterley Tibbetts Highway. Superintendent Lansdown, an officer on duty in full uniform, came across the Respondent and his crashed vehicle. As Superintendent Lansdown sought to make enquiries, the Respondent said, "What's this got to do with you, red stripe?" That was a reference to the uniform Mr Lansdown was wearing. When Mr Lansdown said to the Respondent that he would be required to provide a specimen of breath, the told him to 'fuck off.' The Respondent continued to walk away. A friend of the Respondent threatened to shoot Mr Lansdown and set fire to his house. Mr Lansdown, not surprisingly, sought assistance over his police radio. Further officers arrived. It was whilst another officer was seeking to administer a roadside breath test to him, that the Respondent ran over to Mr Lansdown. He said "You know what, I can't take this shit anymore." He then punched Mr Lansdown in the face, causing him to fall to the ground. He lay bleeding there bleeding and unconscious. His glasses were smashed. His mobile telephone was lost.

The injuries suffered by Mr Lansdown

13. Mr Lansdown suffered the following injuries: bruising to his cheeks, a 2-centimetre laceration almost severing his upper lip which required seven stitches, a laceration to his head which required five stitches, a fractured rib with a small area of underlying lung contusion. The continuing effect of those injuries was summarised by the learned judge:

> "The Complainant described, under oath, that he continued to have almost no feeling in his top lip, apart from searing pain, which he stated he experiences every half hour or so. He described further that the inside of his top lip was perpetually inflamed and that he continued to be treated with antibiotics for that injury. He stated that he was now able to sleep normally and the injury to his rib was healing. He had, however, been unable to do any physical exercise due to the rib injury for some six weeks since the time of the incident." (*See sentencing transcript at paragraph 9*)

14. In the early hours of the following morning the Respondent was breathalysed with a negative result.

The Social Inquiry Report

15. There was before the judge a Social Inquiry Report. It revealed, among other things, a hard-working young man with a young child. There were references suggesting that the violence exhibited by the Respondent on this occasion was wholly out of character. His risk of reoffending was suggested to be low.
16. The account of events given by the Respondent to the probation officer differed markedly from that of the police officers. The Respondent suggested that Mr Lansdown acted aggressively. When he grabbed the Respondent for a third time, the Respondent just reacted and struck Mr Lansdown once. That account was not advanced before the judge. The judge was therefore obliged to approach the case on the basis of the Crown's case.

The judge's sentencing remarks

17. The judge approached what we accept was a difficult sentencing exercise with care. She was referred to the Definitive Guideline for assault in England and Wales. As she rightly said, she had to take account of the fact that whereas the maximum sentence for inflicting grievous bodily harm in England and Wales is five years, it is seven years in the Cayman Islands. The judge found that this was a Category 3 offence, namely an offence of lesser harm and lesser culpability. Taking account of the higher maximum sentence in the Cayman Islands, she took, as a starting point, 12 months' custody, with a range of between 9 months and 2 years. We shall return to the Guideline shortly.
18. The judge went on to say (paragraphs 18-20):

> "Having found the category range, the Court must also be mindful to identify whether there are any other factual elements, or combination of those, which are also relevant and which could result in an upward or downward adjustment from the starting point. In this regard, there are four factors which reflect personal mitigation and can be considered to reduce the seriousness…
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> The mitigating factors are:
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> i. The defendant has no previous convictions;

ii. It is accepted that it is a single blow to the Complainant;

iii. The remorse shown by the Defendant, and.

iv. To a lesser extent, the good character reflected in the many character references presented to this Court on Defendant's behalf...

I weigh against those factors the important counterbalance that this was an offence which had been committed against a serving police officer acting in the service of the public and in the proper execution of his duty."

19. The judge (in paragraph 21) referred to the case of *Duane Bodden* CACR 5/2015 in which (in paragraph 11), Justice of Appeal Moses said that:

> "Police officers in this island, as elsewhere, are entitled to go about their difficult responsibilities, for which they deserve the highest praise, and in respect of which they deserve protection from this sort of behaviour, insults and threats".

20. The learned judge went on to say (paragraphs 22-24):

> "I note, however, that the court ... in that case, concerned with threatening violence against a police officer. Of course, in a case such [as] the one before me, I do think that the comments are relevant, and this court cannot agree more with those comments. The Defendant's behaviour was disrespectful and unjustified and exhibited a flagrant disregard for the Complainant's authority...
>
> I have already addressed the ongoing nature of the Complainant's injury above. It does appear that, although they are serious, there is nothing to suggest that the Complainant will not make a recovery in the fullness of time...
>
> This Court has always to balance the circumstances of the offender [and] the punishment that is to be imposed for an offence...

21. The judge referred to the Social Inquiry Report and the victim impact statement. She observed that the Defendant was a man of previous good character who pleaded guilty at the first available opportunity and had shown genuine remorse. She went on to say (paragraphs 27-28):

> "I find, and both the Crown and the defence accept, that the custody threshold has been passed in this case. In [the] circumstances, where a member of the public shows such blatant disregard for the authority of the police, a custodial sentence should be imposed…
>
> However, I go on to consider whether that sentence can be suspended. In the circumstances of this case and this offender, I find that the sentence should be suspended".

22. The judge took a starting point of 15 months' custody, which she discounted by one third to reflect the early guilty plea and imposed the sentence of 10 months' imprisonment. She also made the other orders to which we have referred.

The Argument

Mr Moran's submissions

23. Mr Moran submits that we should consider some video footage depicting, as he puts it, the Respondent's dangerous driving leading up to the collision. Such irresponsible behaviour, he submits, was relevant in deciding the appropriate sentence. The fact that the Respondent may have driven irresponsibly prior to these events does not seem to us to resolve what happened between him and the superintendent, or make worse his alleged conduct. We have not considered the video footage.
24. Mr Moran submits the sentence was unduly lenient for three basic reasons. Firstly, the judge failed sufficiently to take into account that this was a vicious, unprovoked attack on a uniformed police officer which left ongoing after-effects. He will be permanently scarred. It was wrong to say that the attack was the result of 'a single unguarded moment'. The Respondent attacked the officer when not under threat. Secondly, submits Mr Moran, it is

important that the court is seen to protect police officers acting in the execution of their duty. The element of deterrence was insufficiently taken into account. Thirdly, too much weight was placed on the mitigation.

25. Moreover, submits Mr Moran, the judge was wrong to place the offence into Category 3 of the Sentencing Guideline. This was, he submits, a Category 2 case. It was a case, in other words, of greater harm in the context of the offence charged, and lower culpability, attracting in England and Wales a starting point of 1 year 6 months, with a range of 1 to 3 years. Factoring in the higher maximum sentence in the Cayman Islands would translate into, as Mr Moran submits, a starting point in the order of 2½ to 3 years. In support of that submission, Mr Moran relies on the extent of the injuries suffered.
26. He submits too that there has to be some flexibility when assessing the seriousness of harm and, in consequence, categorising the offence for the following reason. The Guideline applies both to the infliction of grievous bodily harm and unlawful wounding. Whether an offence is one of greater harm in the context of the case might, on the same facts, be different, depending upon whether it is charged as inflicting grievous bodily harm or unlawful wounding.

Mr Hughes' submissions

27. Mr Hughes accepts the custodial threshold was passed. He submits that the judge was entitled to approach sentence in the way she did and suspend the inevitable prison sentence. Among others, he makes the following points. It is plain from her sentencing remarks the judge had well in mind the fact that the victim was a police officer. Those remarks make plain the importance she placed on deterrence in sentencing a case such as the present. The account she took of the mitigation was appropriate in the circumstances. This was a man of previous excellent character who, in an instant, inflicted a single blow which resulted in more serious injury than might have been anticipated. He pleaded guilty at the earliest opportunity. The judge rightly considered and applied the appropriate guideline.
28. This was, as the submission ran, one of those exceptional cases in which, following an assault on a police officer, immediate custody did not need to follow. It could not be said that the sentence imposed was lower than that which could reasonably have been passed in the circumstances. (See *DPP v Jackson* [2012] 92 CILR Note 1.)

Our conclusion

The Definitive Guideline

29. In our view, it was appropriate for the judge to apply the Guideline, making adjustments for the higher maximum sentence in the Cayman Islands. Mr Moran was right to say that the Guideline should be applied with some flexibility. That said, it does not seem to us any criticism can be made of the judge's conclusion that this was a Category 3 case. First, while in no way diminishing the effect of the injuries on Mr Lansdown, in the context of an offence of inflicting grievous bodily harm, these injuries were at the lower end. Second, as to culpability, none of the factors indicating higher culpability was present. The absence of premeditation also suggested lower culpability.
30. In England and Wales, that would mean a starting point of a high-level community service order, with a range of a low-level order up to 51 weeks in custody. As we have said, some adjustment to the available range was necessary to reflect the higher maximum sentence in the Cayman Islands. We can understand how, in the Cayman Islands context, the judge took, as a starting point, a sentence in the order of 12 months' imprisonment, with a range in the order of 9 months to 2 years' custody. However, as we emphasise, these can only be broad figures. We are not seeking to lay down an invariable approach to be applied in every case.
31. Page 9 of the Guidelines states:

> "When sentencing Category 3 offences, the court should also consider the custody threshold as follows:
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> • has the custody threshold been passed?
>
> • if so, is it unavoidable that a custodial sentence be imposed?
>
> • if so, can that sentence be suspended?"

32. The words, "if so, can that sentence be suspended" encapsulate one of the issues here.

Suspension and length of sentence

33. There were, as the judge set out, significant mitigating features. There was, however, what seems to us, a very significant aggravating feature, insufficiently recognised or acknowledged by the judge in the sentence she passed. This was an offence, in the words of the Guideline, "committed against someone providing a service to the public", namely, a police officer. The first question is whether, in the light of that significant aggravating feature, and having regard to the Respondent's conduct, the judge was entitled to conclude that a sentence of 15 months' imprisonment, reduced by one third to reflect the early guilty plea, did adequately reflect the offending. The second question is whether the judge was entitled to suspend the prison sentence.

34. Not without regret, considering the background of this Respondent, we have concluded both that the length of sentence was inadequate and its suspension wrong in principle. In the final analysis, when one officer was trying to administer a breath test, the Respondent, plainly having lost his temper and self-control, deliberately ran towards a police officer who was merely standing there. He punched him so hard to the face that that officer fell to the ground, lost consciousness and, in consequence, suffered the injuries we have set out. In our judgment, the observations of Justice of Appeal Moses in *Duane Bodden* (supra) are right. The element of deterrence is particularly important in this context. Officers are entitled go about their difficult responsibilities deserving the protection of the courts when they do so.

35. We have concluded that the minimum sentence, after trial, should have been in the order of 2 years' imprisonment. Taking into account the plea of guilty, that should have been reduced to 15 months' imprisonment.

Double jeopardy

36. This issue arose during the course of argument.

37. In *R v French and Webster* [2007] 1 Cr.App.R.(S.) 40, a five-person Court of Appeal of England and Wales, presided over by the Lord Chief Justice, considered the topic of double jeopardy in cases where the court found that the sentence imposed was unduly lenient. At paragraph 57 and following, under the heading, "Double jeopardy," Lord Phillips, Chief Justice, giving the judgment of the court, said:

"Our conclusions thus far would lead us to increase Webster's minimum term to one of eight years, being half of a notional determinative sentence of 24 years, discounted to 16 years for his guilty plea. The question then arises of whether we should make a further reduction of this minimum term to reflect the fact that he has been subject to 'double jeopardy' ...

Almost from the start it has been the practice of the Court, when considering whether to substitute a heavier sentence and, if so, the length of such sentence, to have regard to the fact that the procedure subjects the defendant to anxiety which should normally be reflected by some discount in the sentence which would otherwise be imposed. This consideration has been described as 'double jeopardy'. In rare cases double jeopardy has a been instrumental in leading the court to decide not to alter the sentence...

The Attorney-General has submitted that the principle of double jeopardy should have no application to a minimum term set within a life sentence and no, or very limited, application to significant sentences of imprisonment. He has further submitted that the principle of double jeopardy must not have the effect of requiring the Court of Appeal to substitute a sentence which itself is unduly lenient...

Having regard to double jeopardy is but one aspect of the task of this Court when considering, in the exercise of its discretion, whether and how to intervene where an unduly lenient sentence has been imposed. Where a defendant has had no responsibility for the fact that he has been given a sentence which is unduly lenient, we consider that it accords with justice that, when substituting a weightier sentence, this Court should have some regard of the distress and anxiety experienced by the defendant as a consequence of having his sentence re-opened and increased. The degree of distress and anxiety and thus the size of the discount will, depend on the facts of the particular case...

The distress and anxiety is likely to be particularly great where the decision of this Court results in a defendant being placed in prison where originally no custodial

sentence was imposed, where a custodial sentence has been completed, where the defendant is young and immature or where the defendant was about to be discharged from prison. In all of these cases the distress and anxiety caused by the double jeopardy is likely to be significant when weighed against the original offending. The authorities show that in such circumstances discounts for double jeopardy tend to be granted that are near the upper end of the range..."

38. In *Duquesne-Eden* [2009 CILR Note 22], this court, on the Director of Public Prosecution's appeal, decided that the sentence of 2 years imprisonment imposed in a case of aggravated burglary was unduly lenient. It should have been three years. Reflecting the Court of Appeal's judgment in *French and Webster*, and having regard the facts of the particular case, the court did not increase the sentence originally imposed.
39. In *R v Rameez Afzal, Babar Malik* [2014] EWCA, the Court of Appeal of England and Wales re-visited the topic of double jeopardy. Under the heading "Double jeopardy," Lord Thomas, Chief Justice, said (at page 3 of the transcript):

> "...Some concern has been expressed that the principle of 'double jeopardy' is no longer referred to in the judgments of this court. In *Attorney-General's Reference Nos 14 and 15 of 2006 (R. v. French and Webster)*...this court set out the way in which the issue of double jeopardy should be considered in references by the Attorney General. Comment has been made that in its more recent decisions, this court no longer makes reference to that principle. It is evident that the more recent practice of the court has been that it does not refer to the absence of any reduction for 'double jeopardy' where there has been no reason to make any reduction. As both counsel have submitted, it is pointless for this court to deal with the principle if it does not arise; the practice is therefore entirely proper.
>
> That practice also reflects the more recent practice of this court in applying the guidance given in Attorney General's Reference Nos 14 and 15. It reflects changes that have occurred in our sentencing regime, including:

(1) As a result of the work of the Sentencing Guidelines Council and of the Sentencing Council, there is much greater clarity and uniformity in relation to sentencing for most offences. The starting points and ranges are set out in clear, comprehensive guidelines.

(2) Where a judge has departed from those guidelines without explanation or good reason, it should be readily apparent to the advocate [when] advising an offender that the sentence might be referred to this court. Advocates no doubt advise of that risk.

(3) Rapid consideration is given to any sentence by the Attorney General so that it is referred to this court.

(4) This court is more conscious of the position of victims than it was in 2006.

For those reasons, therefore, although the principle of 'double jeopardy' remains for consideration in the kind of case identified in Attorney General's references Nos 14 and 15, subject to the observations we have made, the practice has evolved that no reference is to be made to it, save in the category of case in which it is likely to arise. For the reasons we have endeavoured to state, these cases have become, and are likely to remain, rare."

40. Our attention has been drawn to the 18th edition of Archbold, at paragraph 7-449, where the topic of double jeopardy is discussed. In that paragraph, there is reference to a case in which an allowance for double jeopardy was made. As the summary puts it:

"For a rare recent example of the Court of Appeal making an allowance on...account [of double jeopardy], see *Attorney General's Reference, R v Farizi* [2017] 1 Cr.App.R. 26...The Respondents were both young, 18 and 19, one had received a non-custodial sentence and the other was approaching his release date. In the circumstances, the court discounted the appropriate by a third for double jeopardy."

How this court will now approach the principle of double jeopardy

41. The changes of sentencing regime referred to by the Chief Justice in paragraphs 1, 2 and 4 of *Rameez Afzal, Babar Malik* (see paragraph 41 above), apply equally to the Cayman Islands. While rapid consideration of a case by the Director of Public Prosecutions (paragraph 3) may be possible, rapid consideration by this court may not be. In our judgment, it is now appropriate for this court, when considering the principle of double jeopardy, generally to follow the approach set out in *Rameez Afzal, Babar Malik.* However, it will have regard to the particular features of every case which might justify a discount of the basis of double jeopardy. It may, for example, particularly be that it was not possible to list the case with the expedition to be expected in England and Wales.
42. In the present case, for example, the Respondent pleaded guilty on 20 October 2017. He was sentenced on 13 December 2017. He now falls to be re-sentenced after a delay of some four months in which, as we readily accept, his anxiety must have been great. That is particularly so for a young man of previously good character, who of course never before has served a prison sentence.

Whether there should be a reduction for double jeopardy in the present case

43. As we have said, the sentence which should have been imposed was one of 15 months immediate imprisonment. In recognition of the facts set out in paragraph 42, we have decided it would be appropriate to reduce that sentence to reflect double jeopardy. We therefore reduce the sentence to be served from 15 to 12 months' imprisonment.
44. In the result, we order that the Respondent serve a sentence of 12 months immediate custody. We quash the other orders the judge made.

Martin, JA

Field, JA