BERLLAQUE v. R.

COURT OF APPEAL (Fieldsend, P., Huggins and Davis, JJ.A.): December 28th, 1995

Criminal Law—wounding with intent—intent—severity of injury is merely guide to whether accused intended grievous bodily harm—victim's ability to fend off attack and intervention of others in defence may be relevant factors

Criminal Law—wounding with intent—sentence—tariff—3–7 years' imprisonment appropriate for wounding with intent—5 years justified for unprovoked group attack on unarmed victim causing minor injuries

Criminal Procedure—sentence—imprisonment—comparative conditions of Gibraltar and English prisons not relevant to court considering English sentencing authorities—no allowance to be made for more onerous conditions in Gibraltar

The appellant was charged in the Supreme Court with unlawful and malicious wounding with intent to do grievous bodily harm, contrary to s.75 of the Criminal Offences Ordinance.

The appellant, together with six or seven others, attacked the victim, a sailor on shore leave, as he walked along a street after an evening spent drinking with a friend. The group had driven past the two men in a car in a dangerous fashion and then got out of the car and blocked their path. Whilst others of the group pulled the victim to the ground and kicked him, the appellant drew a knife and, kneeling on him, drew the knife across his neck and slashed at his face. The assault ended when the

attention of neighbours was drawn to what was happening, and the group ran off, the appellant delivering a parting blow with his knife to the man's shoulder. The victim sustained superficial lacerations to his face, neck, the back of his head and his shoulder blade.

The appellant pleaded not guilty to the offence of wounding with intent but was convicted and sentenced to five years' imprisonment, to run consecutively to a sentence of four months imposed by the magistrates' court two months earlier for an offence of causing grievous bodily harm which the appellant committed whilst on bail for the present offence.

On appeal, the appellant submitted that (a) the trial judge was wrong to impose a sentence of five years' imprisonment for the present offence, since the appropriate sentence was between three and seven years according to the seriousness of the injuries sustained, and the victim in this case had received only minor injuries; (b) in considering the English authorities on sentence for this offence, the court should have borne in mind the fact that prison conditions in Gibraltar were worse than in England and reduced the term imposed accordingly; and (c) any term of imprisonment passed should run concurrently with the earlier sentence passed by the magistrates.

The Crown submitted in reply that (a) the trial judge had properly taken all the circumstances of the offence into account—namely that the assault was unprovoked, was carried out by a group of men outnumbering the victim and his friend, involved the use of weapons against an unarmed person, and may well have had more severe consequences had others not intervened—and had passed an appropriate sentence notwithstanding that the actual injuries sustained were not severe; (b) since there had been no recent similar cases in Gibraltar to guide the court in sentencing the appellant, the trial judge had correctly been guided by the relevant English authorities, and the comparative standard of prison conditions in England and in Gibraltar was not a factor which the court should consider in deciding whether to follow them; and (c) the trial judge had not erred in passing a sentence of imprisonment to run consecutively to that imposed by the magistrates, since he had been in no position to judge whether the earlier offence warranted a concurrent sentence.

Held, dismissing the appeal:

(1) The appropriate sentence for an offence of wounding with intent was between three and seven years' imprisonment. Whilst the severity of the injuries sustained by the victim of a wounding was a factor to be considered by the court in sentencing and could in itself be evidence of an intention to cause grievous bodily harm, it was not the sole criterion, since other factors such as the victim's ability to ward off injury and the intervention of bystanders could also be significant. In the absence of evidence from the appellant to the contrary, the jury had concluded that he intended to inflict grievous bodily harm on his victim and, given the other circumstances of the assault, namely the lack of provocation, the

number of people also involved and the fact that the victim was defenceless, the sentence of five years' imprisonment was not excessive (page 189, line 27 – page 190, line 18).

(2) The trial judge had properly taken into account the guidance available from English authorities in the absence of any relevant Gibraltar cases. There was no basis for discarding these or differentiating the appellant's case from them on the ground that the conditions to which he would be subject in a Gibraltar prison were less comfortable than those in an English prison. Accordingly, the sentence would not be reduced (page 190, lines 29–36).

(3) Moreover, since neither the Supreme Court nor the Court of Appeal was able to form an opinion as to the circumstances of the offence committed whilst the appellant was on bail, the trial judge's order that the term of imprisonment for the present offence should run consecutively to the earlier sentence would not be disturbed (page 190, lines 19–28).

Cases cited:
(1) *Att.-Gen.'s Ref. (No. 23 of 1992)* (1993), 14 Cr. App. R. (S.) 759.
(2) *R.* v. *Ghuman* (1985), 7 Cr. App. R. (S.) 114.
(3) *R.* v. *McGrath* (1991), 13 Cr. App. R. (S.) 83.
(4) *R.* v. *Marsh* (1983), 5 Cr. App. R. (S.) 437.

J.B. Gittings for the appellant;
J.M.P. Nuñez for the Crown.

FIELDSEND, P., delivering the judgment of the court: On September 5th, 1995 we dismissed the appellant's appeal against sentence. These are the court's reasons for that decision.

The appellant was convicted on April 5th, 1995 of wounding with intent to do grievous bodily harm a marine named Rhodes, who was ashore on May 22nd, 1994 from "*H.M.S. Fearless*" with a fellow marine named Hulse. By 3 a.m. Rhodes and his friend had been ashore for some seven or eight hours during which time they had consumed approximately seven pints of beer and had a meal but were not drunk. They were walking up a narrow road without pavements when a car came up fast behind them and went past with its horn sounding. Hulse, who was the nearer to the centre of the road had to jump aside and may have been struck by the near-side wing mirror. He shouted some swear words at the disappearing car. The car bore left along the main carriageway and stopped. Rhodes and Hulse continued in the same direction and found themselves confronted by a hostile group of between seven and eight men whom they tried to pass. Their first instinct was, as they put it, "to leg it" but they were strangers to Gibraltar and instead tried to calm what they regarded as a threatening situation, but to no avail.

The appellant produced a knife and, stepping forward, knocked from Rhodes's hand a can of beer which he was carrying. Rhodes picked up the can and, turning to go, saw one of the group knock a can of beer from Hulse's hand. He saw the group edging towards him and his friend and noticed another man produce a knife. Before they could get away as they intended, Rhodes was grabbed and pulled to the ground by three or four men and was kicked several times. The appellant then dropped down, kneeling on Rhodes, and put his knife against his throat and pulled it across. Rhodes started to struggle and hit out. The appellant leant forward as he was kneeling on Rhodes and waved the knife in a slashing move towards Rhodes's face, swinging the knife down at him and cutting him in three places. Rhodes managed to grab the feet of one of those who was kicking him when he felt a hard kick to the back of his head and a sharp pain at his right shoulder blade. The attacking group, having attracted the attention of people living nearby who shouted at them, then made off.

Rhodes was taken to hospital where it was found that he had a 1 cm. laceration of the right scapula requiring three stitches, a 1 cm. laceration of the occiput requiring four stitches, a 0.5 cm. laceration to the corner of the right eye which needed to be closed with steristrips, a 0.5 cm. laceration to the right nasal fold and a 7 cm. superficial horizontal laceration over the larynx, the latter two injuries requiring no stitches. The doctor considered the injuries to be of a minor nature, but compatible with a violent and potentially life-threatening knife attack. Fortunately, Rhodes suffered no lasting ill effect from his injuries.

The appellant is a man of 24 years of age. He has a relationship with a woman who has borne him two children, now aged two and four. He has not had a blameless career, having a number of convictions for minor offences as a juvenile, and having received a prison sentence of 15 months on three counts of burglary in January 1993. In June 1994, whilst on bail pending his present trial, he committed an offence of causing grievous bodily harm for which he was convicted on a guilty plea in February 1995 and sentenced to four months' imprisonment.

At his trial for the current offence the appellant pleaded not guilty, having denied to the police on arrest any participation in the assault. He was sentenced to five years' imprisonment consecutive to the sentence of four months' imprisonment imposed by the magistrates' court in February 1995. The learned judge accurately set out the salient facts bearing on the question of sentence, saying:

> "The courts have to deal severely with offences of violence, and especially those committed by someone in a group who wields a knife on a defenceless victim who is outnumbered by the offender and his gang. They kicked and punched their victim, Rhodes. This was not a 'one-off' act of violence. There was no provocation that justified the defendant in inflicting the injuries he did on Rhodes. The weapon used was a butterfly knife. Rhodes was a visitor to Gibraltar."

He accurately described the injuries, though perhaps giving the appellant some excuse for the facial injuries which Rhodes sustained by saying they may have been caused by Rhodes's shaking his head to avoid the knife. This does not accord with Rhodes's evidence which was uncontradicted.

He stated that the normal sentencing bracket for offences of this nature was from three to eight years but there have been, we were told, no offences of a similar kind before the superior court in Gibraltar for many years and Mr. Nuñez for the Crown was unable to refer us to any such cases. Mr. Gittings for the appellant, in a comprehensive argument, referred us to a number of English cases collected in Thomas, 3 *Current Sentencing Practice*, at 21101–21110/1, under "Stabbings." These cases of course vary greatly in their circumstances but, with few exceptions, woundings with intent to do grievous bodily harm attract sentences of at least three years but not more than seven years and the latter in only one extreme case of a man inflicting multiple lacerations on his sleeping wife with a sabre: see *R.* v. *Marsh* (4).

It may be, therefore, that the learned judge somewhat overstated the upper limit of the sentencing bracket for this type of case. In *Att.-Gen.'s Reference (No. 23 of 1992)* (1) Lord Taylor, C.J. said that a normal sentence would be in the region of three to four years. See also *R.* v. *Ghuman* (2), in which five years was described as a moderate sentence for a man who had stabbed his former wife in her sleep, once in her hip, twice in her arm, and twice in the legs.

Mr. Gittings's main submission, however, was that in average circumstances the level of sentence is to be determined primarily by the seriousness of the wounds actually inflicted. Of course the seriousness of the wounds is, in the first place, normally a most persuasive factor in determining whether an assailant has an intention to do grievous bodily harm. In the same way, the seriousness of the wounds is a guide to the level of sentence to be imposed, particularly where the wounds are very serious. On the other hand, the fact that the actual wounds are not serious does not mean that there was not an intent to do grievous bodily harm or that the sentence should not be as severe as if the wounds were in fact serious. A case such as *R.* v. *McGrath* (3) shows that stab injuries that were not serious due to the thick winter clothing worn by the victim still warranted a sentence of five years' imprisonment.

It may be that a person intending to do grievous bodily harm is thwarted in his intention either by pure chance or the ability of the victim to ward off the worst possible results of an attack. That does not mitigate the seriousness of the attack or the penalty that might be imposed for it. Although the injuries suffered by Rhodes were found to be of a minor nature this could well have been because he was an active and capable man who knew how to look after himself and this may well have thwarted the appellant in an intention to inflict even more serious injury.

In finding the defendant guilty of wounding with intent to do grievous bodily harm the jury almost certainly must have thought that he intended more than a purely superficial laceration to the vital area of Rhodes's throat. The appellant gave no evidence that he intended only the actual wounds suffered by Rhodes. Had he done so and been believed he might not have been sentenced as heavily as he was and might not even have been convicted of wounding with intent.

Looking at the circumstances in the round, the confrontation was sought by the group of whom the appellant was a member and was without any good reason. The appellant was the first in the group to draw a knife and assault Rhodes by knocking the can of beer from his hand. The knife had an 8 cm. blade and was very sharp, although the tip had been broken off. The attack was unfairly balanced against Rhodes and the appellant took advantage of his having been brought down by others. The appellant struck the final blow to Rhodes's shoulder in order to help the group to extricate themselves. It cannot be said, in our view, that a sentence of five years' imprisonment is so severe as to warrant this court interfering with it.

Mr. Gittings contended that the sentence should not have been made consecutive to a sentence of four months' imprisonment imposed by the magistrates' court in February 1995 for an offence of inflicting grievous bodily harm committed in June 1994 when the appellant was on bail pending the trial of the present case. It is true that had the two cases been heard together, concurrent sentences might have been imposed but this court cannot properly take this course. It has no knowledge of the facts or circumstances of the June offence upon which to make a proper judgment as to whether or not the sentence in the case now under consideration should be made concurrent with that passed for the June offence.

Finally, he submitted that the sentences imposed in the English cases should be discounted to some extent because conditions of imprisonment in Gibraltar, particularly for long-serving prisoners, were much more onerous than those in England. It is always recognized in Gibraltar that sentences in England give no more than an indication of what in that society is regarded as appropriate. We do not think that such factors as conditions of imprisonment come into the equation in the present circumstances.

Appeal dismissed
