[2007–09 Gib LR 142]

BALLESTER v. R.

COURT OF APPEAL (Stuart-Smith, Ag. P., Aldous and Kennedy, JJ.A.): September 13th, 2007

Sentencing—sentencing principles—multiple offenders—disparity between sentences only relevant when two offenders sentenced unequally for same offence—if co-accused discharged, other offender to receive sentence appropriate to offence

Sentencing—sentencing principles—reference to previous decisions—Attorney-General's References unsuitable sentencing precedents as Court of Appeal review of original sentence places appellant in double jeopardy—final sentence often more lenient than would have been at first instance

The appellant was charged in the Magistrates' Court with wounding with intent contrary to s.75 of the Criminal Offences Act.

The appellant arranged to meet the complainant (with whom he had personal differences)and enlisted the help of his cousin, M, to carry out an attack on him. The appellant kicked him and M, who was armed with a metal rod, allegedly hit him on the head. Both attackers fled when a third party intervened. M was originally charged as a co-defendant but was discharged in the Magistrates' Court as having no case to answer.

The appellant was convicted and sentenced in the Supreme Court to two years' imprisonment. As he had previous convictions for drug offences, he was not a "good character" but, in spite of this, the guideline sentence of three years' imprisonment for such cases was reduced to two years on the basis that he was not prone to violence. The court also took into

consideration his bad health (asthmatic condition and drug-related problems) and the fact that his co-defendant had not been convicted.

On appeal, the appellant submitted that the sentence should be further reduced because (a) the disparity between his sentence and the acquittal of M was too great; (b) his role in the attack had been minimal and secondary to that of M who had caused the major wounds suffered by the victim; and (c) the sentence was manifestly excessive having regard to sentences in comparable cases.

Held, dismissing the appeal:

(1) The sentence of two years' imprisonment would be affirmed. The Supreme Court had been correct to follow the benchmark position of three years' imprisonment and had shown sufficient leniency and consideration of the appellant's circumstances in reducing it to two years. Disparity between sentences was only relevant when two offenders were sentenced unequally for the same offence. In the appellant's case, his co-defendant was not sentenced at all—but it did not follow that the appellant should not be either. He should receive a sentence appropriate to his offence (para. 10; para. 15).

(2) There was no justification for the appellant to receive a lesser sentence since his role in the attack was not secondary to that of M. This was a case of joint enterprise where both men were equally responsible for the injuries and although the appellant did not cause the victim's wounds, he arranged for the attack and enlisted the help of M, knowing that he was armed (paras. 11–12).

(3) The sentence was not excessive on consideration of the authorities. The local cases referred to were distinguishable on their facts from the appellant's case. The Attorney-General's References did not create suitable sentencing precedents, as, being referred to the Court of Appeal for review when an original sentence was thought inappropriate, they took account of the double jeopardy in which an appellant was placed and the final sentence was often substantially less than would have been given at first instance (paras. 13–14).

Cases cited:

(1) *Att.-Gen.'s Ref. (No. 65 of 1995)*, [1996] Cr. App. R. (S.) 209, referred to.
(2) *Att.-Gen.'s Ref. (No. 49 of 1996)*, [1997] 2 Cr. App. R. (S.) 144, referred to.
(3) *R.* v. *Fawcett*, [1985] 5 Cr. App. R. (S.) 158, referred to.
(4) *R.* v. *Isiic* (2004), unreported, referred to.
(5) *R.* v. *Sayah*, Supreme Ct., Crim. Case No. 15 of 2005, unreported, referred to.

Ms. S. Sacramento for the appellant;
L. Yates for the Crown.

1 **STUART-SMITH, Ag. P.,** delivering the judgment of the court: On March 16th, 2007, the appellant was sentenced to two years' imprisonment following his conviction for wounding with intent contrary to s.75 of the Criminal Offences Act 1960.

2 The facts can be summarized quite shortly. The appellant was convicted of going with another man and assaulting the complainant, Mr. Recagno, on February 13th, 2005 at Harbour Views Estate, where the complainant worked as a security guard. The appellant enlisted the assistance of his cousin, Mr. Muscatt, who armed himself with a weapon which appears to have been a metal rod or a metal implement of some sort, and they went to the scene following a telephone conversation with the complainant as a result of various text messages which had been sent to the appellant's girlfriend.

3 It is evident that there was, for good or bad reasons, some bad blood between the appellant and the victim and it is quite clear that the two men, the appellant and Mr. Muscatt, went to meet the complainant and have the matter out with him.

4 The complainant was attacked and he was injured. He sustained three wounds to the head inflicted by the other man with the metal bar or implement, he also sustained bruising to his hand (probably in attempt to protect his head), and he had bruising to his legs and back. That appears to have been a result of having been kicked by the appellant.

5 He was taken to St. Bernard's Hospital and the wounds in his head were stitched but, apparently, he was not kept in overnight, it not being considered necessary, and he appears to have made a full recovery with no side-effects.

6 But it is right to say that the attack stopped because, fortunately, there was a witness who saw what was happening and began to intervene, whereupon the two assailants ran off.

7 Mr. Muscatt was originally charged as a co-defendant because the police stopped the car in which he and the appellant were travelling from the scene of the crime. But for reasons which we do not know, Mr. Muscatt was discharged on the basis that there was no case for him to answer in the Magistrates' Court.

8 The appellant's background is this. He is 27 years old, has suffered from a drug problem for a number of years (having used cocaine and cannabis) and he has quite severe health problems. He is asthmatic and his lung capacity is markedly reduced, seemingly as a result of his addiction to drugs. He also sustained a serious accident in the past with a result that he has had major facial reconstruction. He has previous convictions for drug offences but nothing relevant to this type of offence. The learned judge, in sentencing, considered him to be one who could not take the

advantage of having a good character but he did not regard him as a man who was prone to violence before.

9 The first ground Ms. Sacramento urges on his behalf is that there is a disparity of sentence. She says that the cases such as *R.* v. *Fawcett* (3) are relevant to a situation where one of the co-assailants is not convicted at all. The principal of disparity of sentence is well known and applies where two men are sentenced for the same offence but there is great disparity between their sentences. It seems to us that it cannot possibly apply in a case where, for whatever reason, one of the assailants is not convicted at all.

10 As was pointed out in the course of this argument, if one of two assailants runs off and is never caught, the logical conclusion would be that the person who is caught should not be sentenced at all, and that obviously cannot be right. In our judgment, there is nothing in that argument. It is also worth pointing out that the learned judge, in arriving at the discount from what would have been the appropriate sentence if there were no mitigating factors, did take into account the fact that the co-assailant had not been convicted at all.

11 Then, it is said by Ms. Sacramento that the appellant's role was a secondary one, that he did not cause the wounds. That is true, and the judge accepted that the evidence was that the co-assailant had inflicted the wounds. But, this is a case of joint enterprise, and in cases of joint enterprise, both, or all those involved are equally responsible for the injuries which are inflicted.

12 Moreover, in this case there can be no doubt that it was the appellant's quarrel—he was the man who recruited Mr. Muscatt, or whoever it was, the co-assailant, to come with him. He knew he was armed with a weapon and he must take the consequences for it. This is not a case where there might be some grounds for distinguishing between the two where the person with the main grudge simply recruits somebody to come along and be there by his side. In those circumstances, there might be some justification for a lesser sentence for the person who is recruited, but that is not this case. We are quite satisfied that there is nothing in this ground at all.

13 Then finally, Ms. Sacramento submits that this sentence was manifestly excessive having regard to the tariff which has been derived from a number of cases. She referred the court to *Att. Gen.'s Ref. (No. 65 of 1995)* (1). That was a case of wounding with intent but these cases of Attorney-General's References are of very little assistance where the sentence is increased. If the sentence is maintained, they may be of some value. But there always has to be taken into account the fact that there is double jeopardy. Very often the original sentence is a non-custodial one so, after a long period of time and perhaps when the defendant has complied with the

original non-custodial sentence, he finds himself going back to prison. Invariably in those cases a sentence is passed by the Court of Appeal which is less, and sometimes substantially less, than what would have been imposed at first instance.

14 The same thing can be said of the next case to which we were referred, *Att.-Gen.'s Ref. (No. 49 of 1996)* (2). That was a plea of guilty, which again makes some difference. The original sentence was non-custodial—150 hours' community service and a compensation order, which had been complied with. Then, Ms. Sacramento drew our attention to two local cases, first, *R.* v. *Isiic* (4). This was a case where the defendant was convicted of wounding, as opposed to a charge of wounding with intent. There was a great deal of mitigation in this case and in any event, in our judgment, it is of no help because wounding is a lesser offence as its maximum sentence is five years' imprisonment whereas, for wounding with intent, the maximum sentence is life imprisonment. We derive no assistance from that case at all. Finally, Ms. Sacramento drew our attention to the case of *R.* v. *Sayah* (5). The defendant was convicted, and 12 months' imprisonment was imposed for severing the victim's little finger with his teeth and causing permanent disfigurement as the finger never recovered. But, in this case, the defendant was of good character. He was a much older man, there was very strong mitigation and, in any event, this court considers that that sentence was a lenient one.

15 We have come to the conclusion that the learned judge was entirely justified. What he did was to take the tariff point of three years and reduce it to two, having regard to the appellant's health problems and the fact that the companion was not likely to be dealt with or convicted. He, in those circumstances, reduced the tariff figure of three years to two years and we can find no grounds for interfering with that sentence which, in our judgment, was wholly correct.

Appeal dismissed.