[2017 Gib LR 45]

RUDGE v. ATTORNEY-GENERAL

COURT OF APPEAL (Kay, P., Goldring and Moore-Bick, JJ.A.):
March 30th, 2017

Sentencing—possession of offensive weapon—possession of knife in public place without lawful authority or reasonable excuse—1 year 6 months' imprisonment appropriate where aggressive intent; previous convictions; consumption of alcohol and drugs; offence committed on bail; and late guilty plea—offender's conduct before and after offence may be relevant to show intent with which knife carried

The appellant was charged with attempted rape, trespass with intent to commit a sexual offence and having an article with a blade in a public place.

The appellant had consumed a significant amount of alcohol and drugs and then left his home late in the evening with a knife. He claimed he had been trying to find the home of a man who had allegedly threatened him earlier that evening, and that he carried the knife for self-protection. The man refused to open the door to the appellant, who then left, carrying the knife in a public place. The appellant subsequently entered the home of an elderly woman.

The appellant initially pleaded not guilty to attempted rape, trespass with intent to commit a sexual offence and having an article with a blade in a public place without lawful authority or reasonable excuse. He subsequently pleaded guilty to possession of the knife in a public place and was acquitted of the other counts. He had an extensive criminal record and was assessed as posing a high risk of harm to the public. He was sentenced to 3 years 1 month's imprisonment.

The appellant appealed against his sentence on the grounds that it was manifestly excessive and wrong in principle. He submitted *inter alia* that the Chief Justice had wrongly taken into account the circumstances that formed the basis of the counts of which he had been acquitted; the Chief Justice had erred in concluding that it was evidence that the appellant had had the knife with him to threaten violence or at least to intimidate the man; and the Chief Justice should have had regard to the draft sentencing guidelines which indicated that a shorter sentence was appropriate.

Held, allowing the appeal and varying the sentence:

First, in assessing the seriousness of the offence of having a knife in a public place without lawful authority or reasonable excuse, it was plainly relevant to know why and with what intent the appellant had had the knife in the public place. The appellant's conduct with the knife before and after the offence could assist in that determination and the Chief Justice had been entitled to consider it as part of the circumstances of the case. The appellant's conduct before the offence, in going to the home of a particular person armed with the knife, and after the offence, in the private home of the elderly woman, showed that he had possessed the knife in a public place with aggressive intent. That conduct aggravated the offence. Indeed, if the Chief Justice had not taken those circumstances into account he would have assessed the seriousness of the offending on an artificial basis. Secondly, the Chief Justice had correctly not felt obliged to follow the sentencing guideline consultation. (For what it was worth, if the guideline were to be unaltered following consultation, the present case would be one of high culpability and would fall within Category 2.) Considering the sentence as a whole, the maximum sentence for the offence was 4 years' imprisonment. The appellant was entitled to only a very limited reduction for his late guilty plea. There were some significantly aggravating factors, namely his previous convictions; the fact that the offence was committed whilst he was on bail; the effect of his consumption of alcohol and drugs; and that the knife had been carried with aggressive intent. The court agreed with the Chief Justice that this was a serious offence. It was concerned, however, that the Chief Justice had placed too much weight on the events in the elderly woman's home. The appellant did not fall to be sentenced directly for that, albeit the events had some relevance. The appropriate sentence after a trial would have been 2 years which, taking into account the late guilty plea and rounding down, would be reduced to 1 year 6 months' imprisonment (paras. 14–19).

Case cited:

(1) *R.* v. *Povey*, [2008] EWCA Crim 1261; [2009] 1 Cr. App. R. (S.) 42; [2008] Crim. L.R. 816, referred to.

E. Phillips for the appellant.

1 **GOLDRING, J.A.,** delivering the judgment of the court: On June 24th, 2016, the appellant pleaded not guilty on an indictment containing three counts. Count 1 alleged attempted rape; Count 2, trespass with intent to commit a sexual offence; and Count 3, having, without lawful authority or reasonable excuse, a bladed article in a public place, namely a serrated steak knife with a blade exceeding 3 inches, contrary to s.128(1) of the Crimes Act 2011. All the offences were alleged to have been committed on March 18th, 2016. The public place alleged in Count 3 was Scud Hill in Gibraltar.

2 On October 18th, the appellant was to be tried in respect of all three counts. He was re-arraigned on Count 3 and pleaded guilty. He was tried in respect of Counts 1 and 2 and acquitted by the jury. On October 23rd, 2016, the Honourable Chief Justice, Dudley, C.J., who had been the trial judge when the appellant was acquitted, sentenced him to imprisonment for 3 years 1 month on Count 3. He now appeals against that sentence. The maximum sentence for that offence is 4 years.

The facts

3 On the night of March 18th, 2016, the appellant consumed a great deal of drink. He also smoked cocaine. As his condition on arrest made clear, he was considerably affected by the drink and drugs. At what must have been between 10 p.m. and 11 p.m., he left his home with the knife. His case was that he was trying to find the address of a man called Mr. Glover who had earlier that night twice threatened him over the telephone. The detail does not matter. His case was that he was in a state of paranoia. He had the knife to defend himself against Mr. Glover and others. Although the appellant did finally locate Mr. Glover's address, Mr. Glover did not open the door but instead called the police. Dudley, C.J. described what happened in the following way in his sentencing remarks:

> "It is evident that the defendant had the knife with him to threaten violence or at the least intimidate Mr Glover, either of them is an aggravating feature. The Defendant's contention that he had the knife with him for protection from Mr Glover does not make sense, and if he had that belief because of his paranoid state brought about by his voluntary intoxication it affords no mitigation."

4 Dudley, C.J. went on to describe events later that night, we again quote:

> "Later at about 11:00 PM the Defendant wielding the knife went down Scud Hill. He then left a 'public place' by trespassing into a dwelling house. Although technically at that point he was therefore not committing an offence it is a very serious aggravating feature of

> the offence. At the time the dwelling was occupied by an elderly lady in poor health and restrictive movement. He went into her bedroom knife in hand. The victim was watching television and the fear she suffered which cannot be overstated is borne by the fact that she urinated herself. That fear is matched only by her level headedness which allowed her to push the defendant over, run down a flight of steps; call the police and leave the house. When she gave evidence it was clear to me that the event has had a real impact upon her life, she is traumatised by it and is now longing to move out of what has been her home for many years."

5 There was a pre-sentence report before the learned judge. The appellant's risk of re-offending was assessed as high. He had previous convictions for offences of violence, including robbery. We have seen that antecedent history. He was on bail at the time of this offence for an offence of child abduction in respect of which he had pleaded guilty, although that is a plea presently under challenge. The probation officer was of the view that the appellant's offending behaviour "indicates that he could continue to pose a high risk of harm to the public."

6 In his sentencing remarks, Dudley, C.J. went on to say this:

> "That the defendant acted as he did because he was under the influence of drink and drugs offers an explanation but no mitigation and is an aggravating feature.
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> There is also no ignoring the fact that the defendant has extensive previous convictions including offences of violence and robbery and that this offence was committed whilst he was on bail. It is the Probation Officer's assessment that 'the defendant's offending behaviour indicates he could continue to pose a high risk of harm to the public.' That said, I take account of the limited personal mitigation which is advanced and of the fact that he is engaging with counselling services and has tested negative in prison drug tests.
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> The maximum sentence that can be imposed for this offence is imprisonment for 4 years. Maximum sentences should be reserved for the most serious examples of the offence and in my view the aggravating features present make it such a case. There are no definitive English Sentencing Guidelines for this offence but the draft guidelines which have been produced and are at present subject to consultation suggest a category range for category 1A cases of between 1 year and 2 years and 6 months custody. In my view if those Guidelines applied, this is a case in which the aggravating features are such that it is appropriate to move outside that category range. In my judgment in all the circumstances the appropriate sentence in this case had no plea been entered would have been one of 3 years and 6 months imprisonment. Of course credit has to be

given for the guilty plea but given that it was entered on the trial date the appropriate reduction is of 1/10 of the sentence which I round up to 5 months. In the circumstances I impose a sentence of 3 years and 1 month."

The grounds of appeal

7 The grounds of appeal submit that the sentence was manifestly excessive and wrong in principle. Two primary matters are relied upon. First, it is said the judge wrongly took into account what happened when the appellant was not in a public place but in a private house. Secondly, that the judge should have had regard to the draft sentencing guidelines and if he had done so appropriately the sentence would have been a lesser sentence.

8 We deal with the first ground first.

9 The submission comes to this. Count 3 was an allegation of having the steak knife in a *public place*. The judge wrongly took into account what is described (not entirely accurately) as the "acquitted conduct." It could not, having taken place in a private house, amount to a "very serious aggravating feature." It was, it is submitted, wholly irrelevant.

10 Another point is made by Mr. Phillips on behalf of the appellant in his skeleton argument. It is said that the learned judge erred in concluding that it was evident that the appellant had the knife with him to threaten violence or at least intimidate Mr. Glover. It is submitted that if the appellant's state of mind and logic in taking the knife is not tested in cross-examination, then the learned judge ought to have relied on the appellant's subjective state of mind, that is to say that he picked up the knife feeling threatened by Mr. Glover.

11 It seems to us plain that the judge was entitled to reject the appellant's account in respect of the Glover incident in the way that he did. Indeed we note that the Probation Officer in his pre-sentence report did not accept the appellant's account.

12 As to the evidence concerning the elderly woman, it is said that her evidence was rejected by the jury. The judge should not therefore have relied upon it.

13 It seems to us that is a point with little merit. There could be no sensible argument but that the woman was terrified for the reasons Dudley, C.J. set out. The essential issue for the jury revolved, we apprehend, around the sexual element of the allegations.

14 As Dudley, C.J. himself said, the appellant had to be sentenced exclusively in respect of Count 3. The offence in Count 3 was committed, and only committed, as Mr. Phillips submits, when the appellant was in a

public place on Scud Hill. Was Dudley, C.J. entitled, when assessing the seriousness of that offence, to take into account the appellant's conduct with the knife as far as Mr. Glover was concerned and his conduct with the knife when in the private house?

15 The appellant was charged with having the knife in a public place *without lawful authority or reasonable excuse*. It seems to us plainly relevant when assessing the seriousness of that offence for the purpose of sentencing to know *why or with what intent* the appellant had that weapon in the public place. His conduct before and his conduct afterwards may throw light on that. If it does, it seems to us that the judge is entitled to rely on it as part of the circumstances of the case. Here, Dudley, C.J. was in essence saying no more than this. The appellant was, as he put it, "wielding" this knife in Scud Hill with aggressive intent. His conduct with Mr. Glover shows it. So too does his conduct with the elderly woman in the house. It is conduct which throws light on *why* he had the knife in the public place. That conduct, in our judgment, does aggravate the offence. The line of reasoning which the Chief Justice took was, in our judgment, sustainable. Indeed, not taking those circumstances into account would have meant assessing the seriousness of the offending on Count 3 on an artificial basis. It is however still open to the appellant to argue that too much emphasis was placed upon it, resulting in a sentence which, as it is put in the skeleton argument, was manifestly excessive.

16 The second ground of appeal refers to a series of authorities and the proposed sentencing guidelines. The authorities to which we were referred are mostly overwhelmingly fact specific. They do not help. In several of them, the possession of the bladed weapon was no more than an adjunct to offending on a much larger scale. Moreover, the fact that the Court of Appeal does not disturb the sentence which has been imposed below does not provide any sort of indication of the appropriate length of a sentence for a particular offence. Although we were referred to the leading case of *R.* v. *Povey* (1), it is not an authority to which it is necessary now to turn.

17 As to the sentencing guideline consultation, in our judgment, Dudley, C.J. was right not to feel obliged to follow it. For what it is worth, however, were the guideline to be unaltered following consultation, in our judgment this case would be of high culpability and fall into Category 2, with a range of 6 months to 1½ years after a trial, and before consideration of aggravating and mitigating features.

Our view on the sentence as a whole

18 As we have said, the maximum sentence for this offence is 4 years. The appellant was only entitled to a very limited reduction given his late plea. There were some significantly aggravating features in the case as Dudley, C.J. pointed out. He has previous convictions. The offence was

committed on bail, and he was of course affected by drink and drugs. The weapon was carried with an aggressive intent.

19 As did Dudley, C.J., we do regard this as a serious offence in all the circumstances. However, all that said, we are left with a concern that a little too much weight may have been placed by Dudley, C.J. on what, no doubt, were the horrific events in the house. In the final analysis, the appellant was acquitted by the jury. He did not fall directly to be sentenced for that, albeit, as we have said, those events have relevance. We have come to the conclusion that the appropriate sentence for this offender was one of some 2 years after trial, which, taking into account the late plea and rounding down, would reduce to a sentence of 1 year 6 months.

20 We have concluded that a different sentence should have been passed. We quash the sentence of 3 years 1 month and substitute a sentence of 1 year 6 months. To that extent this appeal is allowed.

Appeal allowed; sentence varied.