[2019 Gib LR 31]

MOR v. R.

COURT OF APPEAL (Kay, P.): March 29th, 2019

Sentencing—grievous bodily harm—attack with knife—10 years' imprisonment too high for serious knife wound inflicted on sleeping/minimally conscious victim—sentence reduced on appeal to 8 years

The appellant was charged with inflicting grievous bodily harm with intent.

The appellant, his brother and a man named Nuñez purchased knives which they intended to use to attack the victim. Later that day, the appellant and Nuñez entered the victim's accommodation. Nuñez hit the victim with a bottle, causing a laceration to his head, and the appellant stabbed the victim in the leg, causing a large wound. The victim required emergency surgery and spent two days in intensive care.

Nuñez was dealt with by the Supreme Court before the appellant, who had to be returned to Gibraltar from Spain. Nuñez pleaded guilty to conspiracy to cause grievous bodily harm with intent. He was sentenced to 4 years 6 months' imprisonment. The judge (Ramagge Prescott, J.) was persuaded to sentence Nuñez on the basis that the only violence for which he was responsible was causing the laceration to the victim's head. He was therefore sentenced by reference to Category 2 in the Sentencing Guidelines (which had a sentencing range of 5 to 9 years).

The appellant pleaded not guilty to conspiracy to cause grievous bodily harm. An alternative charge of inflicting grievous bodily harm with intent was added, to which he pleaded guilty. The Chief Justice considered the offence to be a Category 1 offence, which had a sentencing range of 9 to 16 years' imprisonment, and a starting point of 12 years. The Chief Justice considered the seriousness of the offence to have been increased by the fact that the victim was assaulted when asleep or minimally conscious, that the evidence, namely the knife, had been discarded, and that the offence came about in the context of drug dealing. The Chief Justice took a starting point of 14 years, which he reduced to 12 years to avoid too great a disparity with the sentence of Nuñez. It was further reduced by one-sixth to reflect the fact that the appellant had pleaded guilty but had not accepted the case as put by the Crown and instead insisted on a *Newton* hearing, at which his account was rejected.

The appellant appealed against his sentence of 10 years' imprisonment on the grounds of the disparity between his sentence and that of Nuñez,

and that the Chief Justice wrongly identified the offence as falling within Category 1 rather than Category 2.

Held, allowing the appeal:

The court considered the Chief Justice's analysis to be correct in almost all respects. The one point on which the court would differ from it was in relation to the starting point. A starting point of 12 years (*a fortiori* at the 14 years which the Chief Justice would have chosen but for the Nuñez sentence) was too high. The court agreed that the offence satisfied the Category 1 criteria of serious injury and high culpability, but it only marginally crossed that threshold. The correct starting point was in the region of 10 years. Applying the Chief Justice's approach to the appropriate discount would produce a figure slightly in excess of 8 years. That would be rounded down to 8 years' imprisonment. The appellant's appeal would therefore be allowed. His sentence of 10 years' imprisonment would be set aside and a sentence of 8 years substituted (para. 8).

C. Brunt for the appellant;
M. Zammitt for the prosecution.

1 **KAY, P.:** This is an appeal against sentence. On October 9th, 2018, in the Supreme Court before the Chief Justice, the appellant, who was aged 25 at that time, had entered a guilty plea to a single count of inflicting grievous bodily harm with intent. The Chief Justice sentenced him to 10 years' imprisonment. It is his case that that sentence was unjustly excessive.

2 The facts disclose an offence of seriousness. On August 30th, 2017, the appellant, his brother and a man called Nuñez began the day by purchasing three large kitchen knives at Morrisons supermarket. It is plain that the intent was to use the knives in an attack on the eventual victim, Sean Casey. After a certain amount of toing and froing they eventually arrived at the victim's accommodation and the appellant and Nuñez entered that accommodation. There was initially an issue as to whether they forced their way into the flat but that was eventually resolved in the appellant's favour, the Chief Justice accepting that there was not a forcible entry. However, the appellant's account of what happened within the flat was significantly rejected by the Chief Justice following a *Newton* hearing. The version of events accepted by the Chief Justice was that, at the time of the entry into the flat, the victim was asleep or minimally awake on his bed and he was attacked in that very place. He was hit on the head by Nuñez who was wielding a bottle, and that caused a laceration to his head. More significantly, he was stabbed by this appellant using one of the purchased knives, as a result of which he received a large puncture wound to his left thigh, the knife passing all the way through his leg before emerging on the other side, having narrowly missed his femoral artery. The victim managed to speak to an associate and medical attention

was obtained but only after he had lost a considerable amount of blood and consciousness. He was taken to hospital where he underwent emergency surgery and he spent two days in intensive care. Sometime soon after the incident, the appellant and his brother crossed the border into Spain. This led to the unfortunate consequence that Nuñez was apprehended first in Gibraltar and was dealt with by the court before the appellant and his brother had been returned to Gibraltar following the execution of a European Arrest Warrant.

3 One of the grounds of appeal relied upon by the appellant is an asserted disparity in sentence between the 10 years imposed upon him and the substantially shorter sentence imposed on Nuñez by a different judge. Initially, both men were charged with conspiracy to cause grievous bodily harm with intent. When arraigned on an indictment containing that charge, Nuñez pleaded guilty and he was sentenced by Ramagge Prescott, J. on February 22nd, 2018. The sentence was one of 4 years 6 months. However, at that time, as we have related, the appellant was still in Spain. He was arrested there shortly before the Nuñez sentencing hearing but was not handed over to the Royal Gibraltar Police until April 9th, 2018. On June 29th, he pleaded not guilty to conspiracy to cause grievous bodily harm with intent and his case was adjourned for trial on August 6th. However, on July 25th, an alternative charge of inflicting grievous bodily harm with intent was added and on July 27th he pleaded guilty to that offence. It was a substantive reformulation of the very same behaviour that was reflected in the previous conspiracy charge.

4 There is, manifestly, a significant difference between the sentence of 10 years that was imposed on the appellant and the one of 4 years 6 months that was imposed on Nuñez. However, there were significant differences between the two sentencing exercises. For one thing, Nuñez, who is about four years younger, had pleaded guilty at the first opportunity. More importantly, the judge in his case was persuaded to sentence him on the basis that the only violence for which he was actually responsible was the laceration on the head of the victim caused by the bottle which Nuñez had wielded. She distanced him from the use of the knife and the serious injury which it caused. On that basis, he was sentenced by a reference to Category 2 in the Sentencing Guidelines to which we shall return. It seems to us that he was very fortunate. He was being sentenced for a conspiracy which had begun with the purchase of knives and he was very much part of the attack involving the use of the knife, even though he had discarded his knife prior to encountering the victim. We find it surprising that the judge disassociated him from the far more serious injury caused by the appellant with the knife. In our judgment, the appellant cannot claim to be sentenced on the same merciful basis that had been extended to Nuñez.

5 We turn to the other and main ground of appeal which asserts that the Chief Justice wrongly identified the offence as Category 1 rather than Category 2. It is common ground that the Guidelines issued by the United Kingdom Sentencing Council for this offence fall to be applied in Gibraltar. They require the offence to be identified as Category 1, Category 2 or Category 3, each of which attracts a different starting point. The categorization is arrived at by a consideration of the degrees of harm and culpability. Category 1 refers to "greater harm (serious injury must normally be present) and higher culpability." Category 2 refers to "greater harm (serious injury must normally be present) *and* lower culpability; *or* lesser harm *and* higher culpability)." [Emphasis in original.] We do not need to refer to Category 3.

6 Category 1 attracts a starting point of 12 years within a range of 9 to 16 years. Category 2 attracts a starting point of 6 years within a range of 5 to 9 years. The Chief Justice considered that the correct starting point was 14 years, well up the scale of Category 1. Most of his approach can be seen in this passage dealing with both the injury and culpability.

> "The stabbing of the leg resulted in a 6 to 7 centimetre wound on the lateral side of the thigh with an exit wound on the medial side of the thigh of about 3 centimetres. Emergency surgery was required, bleeding was controlled and Casey was admitted to the Intensive Care Unit for 2 days. Thereafter, he was again taken to theatre where his wounds were closed. Fortunately, there was no major vessel injury, and there was no nerve injury. In my judgment and the tentative indication given by me in this regard having been accepted by Mr Miles, the nature of the injury is such that, from the perspective of the English Guidelines when determining the offence category, this is a case involving greater harm. In relation to culpability this was a case in which there was premeditation, weapons were used and the Defendant played a leading role within a group. The Guidelines suggest a category of 9 to 16 years with a starting point of 12 years custody."

The Chief Justice then noted the following aggravating and mitigating features:

> "In my judgment seriousness of the offence is increased by the following factors: that the victim was assaulted whilst asleep or minimally conscious; that although given the victim's previous convictions he could probably be described as an individual prone to violence, he was at the time of the assault vulnerable; that evidence, mainly the knife, was discarded; and that the offence came about in the context of drug dealing.
>
> There is no evidence of remorse and the pre-sentence report indicates that in the Probation Officer's opinion there is a high risk of the

> Defendant re-offending and causing harm to the public. However, although the Defendant has previous convictions, none are for violence. I therefore do not treat these as increasing the seriousness of the offence but rather as a factor reducing seriousness. It is right to say that the injuries do not appear to have had an ongoing effect on the victim."

7 In arriving at the final sentence of 10 years' imprisonment, the Chief Justice took his starting point as 14 but reduced it to 12 so as to avoid too great a discrepancy with the case of Nuñez, in which the judge had applied a starting point of 7 years. He then reduced the conventional one third discount for a guilty plea to one quarter to reflect the fact that the appellant had not pleaded guilty on first arraignment. He further reduced the discount to one sixth because the appellant had not accepted the case as put by the Crown but had insisted on a *Newton* hearing so as to advance his assertion that, far from being asleep at the time of the attack, the victim had been aggressive and had fought. The Chief Justice rightly rejected the appellant's account which was inconsistent with a contemporaneous text message recorded on the appellant's mobile phone. So, having applied the final discount of one sixth to the starting point of 12 years, the Chief Justice reached the imposed sentence of 10 years.

8 In almost all respects we consider that the analysis of the Chief Justice was correct. The one point at which we differ from it is in relation to the starting point. In our judgment, to put it at 12 years (*a fortiori* at the 14 years which he would have chosen but for the Nuñez sentence) was to start too high up the scale. In effect, he was taking the point about half way up the Category 1 scale. Whilst we agree that this case satisfied the Category 1 criteria of serious injury and high culpability, we consider that it only marginally crossed the Category 1 threshold. For this reason we believe that the correct starting point was in the region of 10 years. If we then apply the Chief Justice's approach to the appropriate discount, we reach a figure slightly in excess of 8 years. We shall round that down to 8 years. Accordingly, the appeal against sentence is allowed. We set aside the sentence of 10 years and substitute one of 8 years. As before, the time spent on remand will continue to be taken into account.

Appeal allowed.
