[2021 Gib LR 504]

MESMOUDI v. R.

COURT OF APPEAL (Kay, P., Elias and Davis, JJ.A.): October 8th, 2021

2021/GCA/09

Sentencing—grievous bodily harm—attack on vulnerable partner—appeal dismissed against sentence of 3 years 6 months' imprisonment for attack on vulnerable partner, fracturing jaw

The appellant was charged with grievous bodily harm.

The appellant was convicted in the Supreme Court of inflicting grievous bodily harm. Following a disagreement, he had punched the victim repeatedly, fracturing her jaw. He refused to accompany her to hospital. There was a history of domestic violence and the court considered the victim to be vulnerable.

The appellant was sentenced to 3 years 6 months' imprisonment. Applying the sentencing guidelines from England and Wales, the judge had to have regard to the seriousness of the injury and the degree of culpability. The judge held that the case fell on the borderline between category 1 (greater harm, namely serious injury, and higher culpability) and category 2 (greater harm but not higher culpability). The appellant accepted before the judge that greater harm was present, given the nature of the injury and its continuing effect on the victim. In respect of culpability, the judge considered two features to be material: first, that the offence was not premeditated, which pointed to a lower category; secondly, that the attack involved more force than was necessary in the commission of the offence (not a single punch to the victim's face but also punches to the stomach which made her feel like "a boxing bag"), which pointed to a higher category. The judge took a starting point of 2 years 6 months, which was 12 months more than the starting point for a category 2 offence and 6 months less than the starting point for a category 1 offence.

The judge then identified aggravating features which justified an increase in the sentence: abuse of trust, the victim having been physically and emotionally abused throughout the relationship; the victim was particularly vulnerable; the appellant had a previous conviction for assault; this offence was just one episode in a pattern of domestic violence; and the continuing emotional and physical effects of the attack on the victim. In respect of

mitigation, the judge rejected the contention that there was just a single blow and did not accept that there was any genuine remorse.

The appellant appealed against his sentence. He submitted that the judge fixed the category too high and that the case should have fallen within category 2, with a starting point of 18 months and a range of up to 3 years' imprisonment.

Held, dismissing the appeal:

In finding that there had been more harm than was necessary to meet the requirements of the offence, which was not an easy factor to apply, the judge was saying that the attack went beyond the threshold necessary for the offence. The punch itself caused serious injury but in addition there were blows to the victim's stomach. It was surely more culpable if a defendant inflicted additional injuries in the course of an attack than those strictly necessary to justify the offence being charged, even if the harm they caused was not of the same character as the harm caused by the principal unlawful act. The judge could properly have considered that the attack involved a vulnerable victim, which would certainly have justified the starting point that the judge adopted. Taking into account the other aggravating features and looking at the matter in the round, it could not be said that this sentence was manifestly excessive. It was a nasty attack against a particularly vulnerable victim in the context of a highly abusive relationship. The appeal would therefore be dismissed (paras. 16–22).

Cases cited:

(1) *R.* v. *Hodgkins*, [2016] EWCA Crim 360; [2016] Cr. App. R. (S.) 13, referred to.
(2) *R.* v. *Jeffs*, [2021] Cr. App. R. (S.) 49, considered.
(3) *R.* v. *Lawrence*, [2011] EWCA Crim 3129, referred to.

O. Smith (instructed by TSN) for the appellant;
K. Drago (instructed by the Office of Criminal Prosecutions and Litigation) for the respondent.

1 **ELIAS, J.A.:** Following the trial before Mrs. Justice Ramagge Prescott and a jury, the appellant was convicted of inflicting grievous bodily harm under s.167 of the Crimes Act. He was acquitted of a more serious offence of causing grievous bodily harm with intent. On February 18th, 2021, he was sentenced by the judge to a term of imprisonment of 3 years 6 months. He now appeals against that sentence.

Background

2 The essential background is as follows. The appellant was in a relationship with the victim; she was 17 and he was 20. There was, as the judge found, a history of domestic violence beginning some six months after they got married. It involved kicks, punches, bites and slaps. The

circumstances in which the index offence was committed, and the nature of the injuries sustained, were described by the judge in the following terms:

> "On the 14 July 2016 yourself, the Complainant and two friends were in a bar and the Complainant challenged the fact that alcoholic drinks were to be had, given that it was Ramadan. You became angry and left the bar, the Complainant went after you. She caught up with you and in an alleyway you began hitting her. You punched her in the stomach several times and then you punched her on the left side of the face. The Complainant began to bleed and you ran off.
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> Once again the Complainant went after you asking you to look at what at you had done to her. When you were both at your parent's house you called an ambulance and told the operator that the Complainant had fallen down the stairs. Your mother told you then that you must not go with her in the ambulance and the Complainant told you that if you did not accompany her, she would not go to hospital. You refused to accompany her and you left. The Complainant spent the night in agony on the roof terrace. At some point in the night you returned. The next morning your father told the Complainant to come into the house and wash the blood off her face. He told her she should go to hospital. Still you refused to accompany her but told her to cover her face as she walked to hospital. The Complainant walked to hospital alone.
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> Upon arrival Nurse Netto immediately raised safeguarding concerns at a 17 year old presenting alone with a visibly serious injury and unable to speak properly. The account that she fell down the stairs did not ring true with the nurse and Police and Social Services were called.
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> The injury sustained by the Complainant was a fracture of the left mandible, she was put under general anaesthetic and the fracture was reduced and fixated with a plate and four screws. The surgical metal plate was eventually removed from her jaw in October 2019 because from the time it had been fitted it had continued to cause her pain. As a result of the nerve damage sustained in the injury there is permanent residual numbness on the lower left side of her lip."

3 When determining the appropriate sentence, the judge had to apply the sentencing guidelines adopted in the United Kingdom. The relevant guidelines are those in force at the time the offender is sentenced. These are the guidelines specifically for unlawful wounding. We were referred to more recent guidelines by Mr. Smith, counsel for the appellant, in support of his submission that the harm would now not be treated as seriously as it was by the judge. But it is well established that it is not appropriate for the

court to have regard to guidelines not in force at the material time (see *R.* v. *Hodgkins* (1)) and we do not do so.

4 Under the guidelines, the judge has to have regard to the seriousness of the injury and the degree of culpability. The basic scheme is that the case falls within category 1, which attracts the highest sentences, where there is greater harm, namely serious injury, combined with higher culpability. It falls into class 2 if one of those criteria alone is satisfied but the other is not; and into category 3 where there is lesser harm and lesser culpability. Having identified the relevant category and the appropriate starting point, the judge must then have regard to certain stipulated aggravating and mitigating factors insofar as they bear upon the facts of the case, and must fix the sentence accordingly. The scheme adopted in the guidelines assists the judge to come to a reasoned conclusion on the appropriate sentence. But ultimately we must stand back and ask whether in all the circumstances the sentence was appropriate in the sense that it was not manifestly excessive.

5 Since this was a domestic violence case, the Guideline for Domestic Violence was also engaged. Its significance in this case is that it emphasizes that sentences in such cases should be treated no less seriously than offences committed in a non-domestic context. It also identifies as potentially additional aggravating factors in such cases situations where there is an abuse of trust and power and where the victim is particularly vulnerable.

6 The judge held that the case fell on the borderline between category 1 and 2. She held that in view of the nature of the injury and its continuing effect upon the victim, this was greater harm in the context of this offence. The conclusion is consistent with the decision of the English Court of Appeal in *R.* v. *Lawrence* (3).

7 Mr. Smith realistically accepted before the judge that greater harm was present, and given the nature of the injury it unarguably was. The question was whether there was also greater culpability so as to bring the offence within category 1. The judge had to have regard to a range of factors which pointed either towards or against a finding of higher culpability.

8 In this case, there were in the judge's view two features which were material. One, which pointed to a lower category, was the fact that the offence was not premeditated. However, the judge held that this particular attack involved more force than was necessary in the commission of the offence and this pointed to the higher category. It was not just a single punch to the chin, but also punches to the stomach which made the victim feel that she was "a boxing bag." Taking these features together, the judge took as the starting point 2 years 6 months. This was 12 months more than

the starting point for a category 2 offence and 6 months less than the starting point for a category 1 offence.

9 Having fixed the starting point, the judge then identified some aggravating features which in her view justified an increase in the sentence. These included the following matters. First, the fact that there had been an abuse of trust to the victim arising from the fact that she has been not only physically but also emotionally abused throughout the relationship.

10 Secondly, the judge considered the victim to be particularly vulnerable; in that context she observed that she was effectively homeless. The couple had for a while had been living in her grandmother's house but were asked to leave because of the arguments between them, and the fact that the victim misguidedly sought to protect the appellant from criticism. The victim sometimes stayed at the appellant's parents' house but at the time of the offence she was sleeping on the roof terrace. There was an arid discussion whether it was a balcony rather than a terrace, but it is of no material significance. In the context of considering vulnerability, the judge was particularly critical of the refusal of the appellant to go to hospital with the victim on the night of the offence. She treated his failure to do so as being reprehensible conduct.

11 Third, there was a previous conviction for assault which involved twice punching a male who had said hello to the appellant's then partner. The judge thought that this was relevant not merely because it involved similar violence but also because it showed a possessive and controlling attitude towards his partner.

12 A fourth and very important feature was the fact that this was just one episode, albeit a particularly serious one, in a pattern of domestic violence.

13 Finally, the judge had regard to the victim's statement in which she said that the attack had continuing emotional and physical effects; she still felt pain in her jaw from time to time.

14 The judge then rejected two alleged mitigating factors. First, she rejected the contention that there was just a single blow; and secondly, she gave detailed reasons why she did not accept that there was any genuine remorse. She also said that in the circumstances of this case the age of the appellant afforded only limited mitigation. Counsel's written submissions suggested that the judge, by implication, has treated this as an aggravating factor, but that is simply unsustainable.

The ground of appeal

15 The single ground of appeal is that the judge fixed the category too high. The case should, it is alleged, have fallen clearly within category 2 with a starting point of 18 months and a range of up to 3 years. In the course

of his submissions, however, counsel analysed certain factual conclusions in great detail, and also focused on whether the judge was entitled to rely upon certain aggravating features. As I have said, it is accepted that the judge's assessment of greater harm cannot be challenged. The focus, therefore, is on the assessment of culpability.

16 Counsel criticized the judge's analysis that there had been more harm than was necessary to meet the requirements of the offence. I accept that this is not altogether an easy factor to apply and it is not being retained in the new guidelines following criticisms of the difficulty in applying it. But the judge had to apply it and she did so in a way which, in my view, is consistent with the various authorities to which our attention was drawn, and in particular to a case which also concerned grievous bodily harm, namely *R.* v. *Jeffs* (2). The judge was in my view saying that the attack went beyond the threshold necessary for the offence. The punch itself caused serious injury but in addition there were blows to the stomach which the victim said, as I have noted, "felt that I was being treated like a boxing bag."

17 Mr. Smith submitted that there was no basis for treating the blows to the stomach as falling within the concept of more force than was necessary for the commission of the offence. His argument seemed to be that the additional force must be in some way related to the harm caused by the act which gives rise to the offence itself. I see no basis for limiting its meaning in that way. It seems to me to be inconsistent with authorities such as *Jeffs,* and it would also import difficult distinctions for judges to apply. Quite apart from that, it is surely more culpable if a defendant inflicts additional injuries in the course of an attack than those strictly necessary to justify the offence being charged, even if the harm they have caused is not of the same character as the harm caused by the principal unlawful act.

18 Mr. Smith says that even if there was the aggravating factor of causing more harm than was necessary, weighing that against the lack of premeditation, it was impossible to say that the offence was on the cusp of categories one and two. That is, however, too narrow an approach. As Mr. Smith realistically recognized, the judge could have had regard in this context to the fact that the attack involved a vulnerable victim. This was in fact a matter considered by the judge at the later stage of aggravating factors. However, as long as there is no double counting, it is probably better considered at the first stage when the offence category is being assessed. Had the judge done that, it would certainly have justified the starting point which she adopted.

19 Mr. Smith also challenged certain adverse observations on which the judge had relied, asserting that they were not fairly held against the appellant. These were not pursued strongly by Mr. Smith in his oral argument and I will deal with it briefly. First, he claimed that the judge's

comment that the couple had had to leave the grandmother's house was inaccurate. Mr. Smith asserted that it was not even clear that they lived with the grandmother before the offence took place. However, we were shown passages in the evidence in the helpful skeleton of Mr. Drago, counsel for the prosecution, which fully justifies the judge's conclusion.

20 Second, the judge was, Mr. Smith said, unfairly critical of the appellant for not taking the victim to hospital on the night of the attack. The evidence was that it was his mother in effect who prevented him from doing so by telling him not to, and the judge ought to have made allowances for that. The judge was aware that the mother did not wish him to go as she referred to it specifically in her sentencing remarks, as I have outlined above. She was entitled to form the view that in all the circumstances he should have gone in any event, putting the best interests of his very vulnerable wife first.

21 Third, there was no basis, it is alleged, for the finding that there was any exploitation of the victim emotionally. Again, I would reject that. She was obviously very heavily dependent on him and needed his constant support, as her refusal to go to hospital demonstrates. He took advantage of that.

22 In all the circumstances, the judge gave cogent reasons which justify her sentence. As Mr. Smith conceded, and as I have said, the judge could have properly considered the fact that a vulnerable victim had been targeted when fixing the starting point. Taking into account the other aggravating features, and looking at all the matters in the round, I do not believe that it can be said that this sentence was manifestly excessive. In truth it was a nasty attack against a particularly vulnerable individual in the context of a highly abusive relationship.

23 I would therefore dismiss the appeal.

24 **DAVIS, J.A.:** I agree with the judgment of Sir Patrick Elias.

25 **KAY, P.:** I also agree.

Appeal dismissed.