

IN THE CAYMAN ISLANDS COURT OF APPEAL

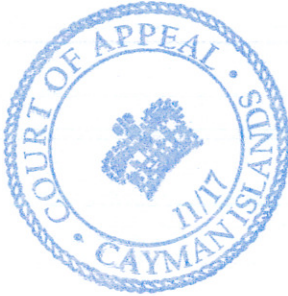
CRIMINAL APPEAL 8 of 2019

IND.52 of 2017

SC#3331 of 2017

JARON SOLOMON

Appellant



- and -

Her Majesty the Queen

Respondent

BEFORE: **The Rt. Hon Sir John Goldring, President**
 The Hon. John Martin QC, Justice of Appeal
 The Hon. Sir Richard Field, Justice of Appeal

Date of Hearing: Thursday 30th April 2020

Appearances: Mr. Oliver Grimwood of Richard Barton Attorneys for the Appellant
 Ms. Nicole Petit of the DPP for the Respondent

JUDGMENT

Transcript of oral judgment dated 30th April 2020 and Approved for Release 11th May 2020

MARTIN, JA

1. On the 18th of April 2019, the applicant, Jaron Solomon, was sentenced by Justice Wood to 9 years' imprisonment on a count of wounding with intent to cause grievous bodily harm, to which he had pleaded guilty. He was sentenced on the same occasion to lesser sentences on counts arising out of the same incident; all sentences to run concurrently.

2. The applicant now applies for leave to appeal against the sentence of 9 years' imprisonment on the ground that it is manifestly excessive.
3. We take the facts from the Crown's sentencing note, which also formed the basis of Justice Wood's sentencing remarks.
4. The victim of the wounding was a young woman called Eryka Ebanks, who was aged 18 at the time of the offence. She had been intermittently in an intimate relationship with the applicant, who was approximately 10 years older than her, since she was 15.
5. On the 6th of July 2017, she was at work at Ocean Frontiers dive shop. While there, she had a Facebook conversation with the applicant, which she ended abruptly when she became involved in a task. The applicant arrived unannounced at the dive shop visibly upset. He said to Miss Ebanks, *"You see you fucking little bitch, you always styling me, what you saying now? I swear to God I'm going to fucking kill you"*. He grabbed her by the hair, pulled her closer to him and put a knife at her throat saying, *"You see you, you think you're going back to your ex that stinking Jamaican."* He then punched and stabbed her repeatedly.
6. Another employee, Stuart Busby, tried to intervene but was slapped by the applicant across the face, causing a cut to his lower lip. The applicant said, *"I'm going to fuck you up"* to Mr. Busby. Mr. Busby ran to an area where there were other employees and alerted them as he called 911.
7. In the meantime, the applicant turned back to Miss Ebanks and hit her over the back of the head and repeatedly stabbed her to the left side of her body with the knife he had in his hand.
8. Other employees arrived to try to help Miss Ebanks. One of them, Tess Olson, was hit repeatedly by the applicant with a stick. Other employees tried to restrain the applicant, allowing Miss Ebanks to escape. One employee, Ruben Montilla, was punched and told by the applicant, *"Leave or I'll kill you."*

9. The employees tried to detain the applicant inside the dive shop while waiting for the police to arrive, but he broke a window and drove away.
10. Miss Ebanks was taken to the hospital where it was found that she had sustained at least eight stab wounds to various areas of her body, including the upper neck, left shoulder, right side of the back and underneath the left breast. One of the stab wounds to the left breast punctured her left lung.
11. The applicant was arrested later the same day on suspicion of attempted murder. In an interview on the 8th of July 2017, he suggested the reason for the attack was his jealousy and insecurity. He said he was confused and had no intention to kill Miss Ebanks.
12. The applicant was charged on an indictment containing 10 counts, including as count 1 attempted murder and as count 2 wounding with intent contrary to section 203 of the Penal Code. He pleaded guilty to count 2, count 4 relating to Miss Olson, count 5 relating to Mr. Montilla, counts 7 and 9 relating to Mr. Busby, count 8, carrying an offensive weapon, the knife, and count 10, damage to property, the window. These pleas were accepted by the Crown.
13. The sentences imposed by Justice Wood were of 6 months' imprisonment on each of counts 4, 5, 7, 9 and 10 and of 12 months' imprisonment on count 8, all sentences to run concurrently with each other and with the sentence on count 2. There is no application to appeal against any of those sentences.
14. In the absence of any offence-specific Cayman Islands Sentencing Guidelines, Justice Wood approached the sentencing exercise in relation to count 2 by reference to the section of the *UK Sentencing Council's Assault Definitive Guideline* dealing with offences of wounding with intent to do grievous bodily harm (section 18 of the Offences Against the Person Act 1861). No criticism is made of this approach.
15. These guidelines require the court first to determine which of three categories the

offence comes into: Category 1 involving greater harm (serious injury must normally be present) and higher culpability. Category 2 involving either greater harm (again serious injury must normally be present) and lower culpability or lesser harm and higher culpability; or category 3 involving lesser harm and lower culpability. The factors which the court may take into account when determining culpability and harm are specified.

16. Each category is then ascribed a starting point and a sentencing range and aggravating and mitigating factors are identified which may result in upward or downward adjustment from the starting point. Thereafter, the court is required to consider other matters, including in particular potential reduction for a guilty plea and the totality principle, which requires the court sentencing for more than one offence to consider whether the total sentence is just and proportionate to the offending behaviour.
17. Justice Wood concluded that the case fell within category 1, something which he said both advocates realistically accepted. He identified the range of sentencing for that category as 9 to 16 years with a starting point of 12.
18. He identified as aggravating features the use of a weapon taken to the scene; Miss Ebanks' age of 15, which he said put her in a vulnerable position; and the fact that the offence was committed in the presence of others, who, when they tried to assist, were themselves assaulted.
19. The judge's sentencing remarks were then interrupted by counsel seeking to correct the judge's statement that Miss Ebanks was 15 at the date of the offence; and after it had been established that she was either 17 or 18 (in fact, 18) at that date, the judge withdrew his statement that because of her age she was vulnerable. He made it clear, however, that he was maintaining his view about the other two aggravating features.
20. He then said that he had read the victim impact report and the social inquiry report, that he noted the applicant's relatively few minor convictions, and that in mitigation

he noted the applicant's remorse, with the applicant crying during his police interview. He remarked that the sentencing submissions, worryingly, spoke of the applicant suffering a personality disorder.

21. He then said this:

"Bearing in mind the totality of this offence or these offences, in my view, if this case had been contested, the appropriate sentence on count 2 would have been 14 years.

In view of your pleas, on count 2 I round the sentence down to one of 9 years' imprisonment."

22. The applicant contends that the notional sentence of 14 years, had there been no guilty plea, was too high, and that in any event, the sentence was manifestly excessive in all the circumstances.

23. The first point made in written submissions filed on the applicant's behalf by Mr. Grimwood, who did not appear at first instance, is that this was not a category 1 case. This proposition, which was contrary to the accepted position below, as recorded by the judge, and as demonstrated by the transcript of the initial sentencing hearing, was based on an assertion that the offence did not involve greater harm as required by the UK guidelines for a category 1 offence.

24. The guidelines stated that:

"The court should determine the offender's culpability and the harm caused, or intended, by reference only to the factors below (as determined by the presence of one or more)" (original emphasis).

25. The only specified factor indicating greater harm said by Mr. Grimwood to be relevant was *"injury which is serious in the context of the offence (must normally be present)"*.

26. Mr. Grimwood's skeleton submissions made the point in this way:

“12. It is noted that for Greater Harm an injury which is serious in the context of the offence must normally be present. This is the primary feature of a case which is deemed to have caused “greater harm”.

13. Absent such an injury the Court must scrutinise the factors indicating greater harm, so assess if they justify the doubling of the starting point from some 6 years in a Category 2 case to 12 years in a Category 1.

...

15. It is accepted by all parties that the injuries in this case were not of a nature to justify a finding of greater harm, but inherent in the offence charged.

16. It is accepted that there were at least 8 stab wounds, that were primarily 0.5 cm and 1 cm lacerations, but went up to one 3 cm laceration. One of these stab wounds punctured the victim’s lung and was no doubt the injury that justified Count 2.

17. It is submitted that whilst this was a sustained assault, most of the injuries caused may be considered less serious in the context of the offence, and likely only one injury would be at a level which is deemed normal for the purposes of section 203.

18. It is accepted that this offence is close to a Category 1 offence, but does not justify the starting point adopted by the Learned Judge”.

27. In the end, Mr. Grimwood, in his oral submissions, was driven to accept that this was, in fact, a category 1 offence. But he said that the same considerations meant that the judge should have adopted a lower starting point.

28. Quite apart from the fact that the guidelines prescribe a starting point of 12 years for a category 1 offence, we would not have accepted the underlying submission for three main reasons:

29. First, it is too narrow in its focus only on one stab wound. It was necessary for

Miss Ebanks to undergo emergency surgery. On arrival at the hospital, her condition was so grave that the doctor could not wait to sedate her before intubating her, and she remained in hospital for approximately four days. Her injuries were described by both attending doctors as serious, so that the guideline requirement that "*serious injury must normally be present*" was, in terms, satisfied.

30. The expression in the UK guidelines "*injury ... which is serious in the context of the offence*" appears to us to mean that the injury must be capable of being regarded as serious even by the standards of injury that would justify a charge of wounding with intent to cause grievous bodily harm.
31. As the matter was put in the English Court of Appeal case of *R v Grant Smith*, [2015] EWCA Crim 1482 at paragraph 14:

"...given that there is such a marked disparity in the starting point between categories 1 and 2, the sorts of harm and violence which will justify placing a case within category 1 must be significantly above the serious level of harm which is normal for the purposes of section 18."

32. It may be, as Mr. Grimwood says, that the only injury capable of justifying the charge was the wound that penetrated Miss Ebanks' lung, but the consequences of that injury were life threatening and caused Miss Ebanks enduring psychological damage. On any basis, the consequence of the penetrating wound justifies the description of Miss Ebanks' injuries as serious in the context of an offence based simply on the stabbing itself.
33. Secondly, Mr. Grimwood's argument is too narrow in another respect. We agree with the contention of the Crown that it ignores the entire context of the attack on Miss Ebanks. The single stab wound, on which Mr. Grimwood focuses, was one of at least eight inflicted by the applicant on Miss Ebanks. That makes the violence more

serious and the harm greater.

34. This topic, too, was addressed in *R v Grant Smith* where the wounding consisted of a blow to the back of the head with a baseball bat. The court said this at paragraph 16:

"We have also considered whether that single blow must be viewed as intrinsically more serious because it followed on from a previous blow which caused a fracture to the victim's arm and lacerations to his head, notwithstanding that this was not at the time said in and of itself to amount to a section 18 offence. We consider that it is relevant as context to take all the blows into account, including those which preceded the blow said to amount to the section 18 offence. Viewed in this light, the violence is more serious and involves materially more harm."

35. We agree.

36. The third point, related to the second point, is this. Another factor specified in the UK guidelines as indicating greater harm is *"sustained or repeated assault on the same victim"*.

37. On two occasions, the attack was broken off so that the applicant could deal with attempted interventions by other employees. If the attack on Miss Ebanks is regarded as a single attack, it was a sustained one. If account is taken of the pauses, it was a repeated one. On any basis, this factor was present and it fully justified a finding of greater harm.

38. In reaching that conclusion, we have borne in mind the statement made at paragraph 18 of *R v Grant Smith* where the court said this:

"The concept of sustained or repeated, in our view, imports some degree of persistent repetition. These concepts must be read in the

light of the major difference in starting point between the two categories. In order for a sentence to be compliant with the test of proportionality, the facts warranting the higher sentence should reflect the difference in the guidelines. In our judgment, two blows, one of which is not said to amount to a section 18 offence, would not at least normally amount to a sustained or repeated assault. We do not wish to be more specific or precise than this because we acknowledge that each case will entail a very fact-specific assessment."

39. A fact-specific assessment in the present case, made having regard to the difference in the starting points prescribed by the guidelines, leads inevitably to the finding made by the judge that this was a category 1 case. The judge was, accordingly, entitled and, indeed, obliged to take a 12-year starting point. It is implicit in his statement he would have imposed a sentence of 14 years' imprisonment after trial, that he added 2 years for aggravating factors.
40. The two factors identified by the judge were the use of a weapon taken to the scene and the fact that the offence was committed in the presence of others, who were themselves assaulted when they tried to assist.
41. Mr. Grimwood's second challenge to the sentence is based on an assertion that these aggravating factors had already been taken into account in determining the level of culpability so that an element of double counting was involved.
42. Two of the guideline factors indicating higher culpability are "*a significant degree of premeditation*" and "*use of a weapon*". Neither of them appears in the separate list of factors increasing seriousness.
43. Mr. Grimwood suggests that the fact that the applicant took a knife with him and used it means that both factors were present and could only be taken into account in

determining the level of culpability. We do not agree. The use of the knife on its own was sufficient to justify a finding of higher culpability. The list of factors increasing seriousness is expressly stated to be non-exhaustive, and as the judge thought, the fact that the applicant had taken the knife with him added a level of seriousness to the offence beyond its mere use.

44. Mr. Grimwood accepts that the presence of others is a factor identified by the guidelines as increasing seriousness. He says, however, that the applicant's conduct towards the employees was fully accounted for by the offences relating to them to which the applicant had pleaded guilty and that it was inappropriate to have regard to that conduct in sentencing for the assault on Miss Ebanks.
45. Again, we do not agree. The factor focuses simply on the presence of others, not on any actions that the offender may take in relation to them. The significance of the factor lies in the likely effect on persons witnessing a violent assault.
46. As the judge said in his sentencing remarks, this was "*...an utterly disgraceful, frightening and it must have been a horrific incident for all involved.*" He was fully entitled to reflect that view when considering whether the starting point sentence should be increased.
47. The Crown suggested that there were other aggravating factors that might have been taken into account, in particular the long-lasting-psychological effects on Miss Ebanks. Although we think that the judge might have made express reference to these effects, it can be seen that he had read the victim impact report which identified very clearly how Miss Ebanks had been affected by the attack, and we do not think it necessary to seek to uphold the sentence by reference to its consequences for Miss Ebanks, severe though they were.
48. Mr. Grimwood made in his written submissions two further points. First he suggested that any aggravating factors in the offending were balanced by the remorse shown by

the applicant. In the circumstances of this case, that suggestion is manifestly wrong.

49. Secondly, he contended that the overall sentence was out of line with other Cayman Islands cases. This court has repeatedly stated that each case turns on its own facts and that sentences passed in other cases, unless they are guideline cases, are of little or no assistance in determining the appropriate level of sentence for offending of the same type. In any event, we note that the cases relied on antedated the introduction of the UK sentencing guideline.
50. We consider that no successful criticism can be made of the judge's methodology or conclusion. The sentence he passed, although severe, was commensurate with the seriousness of the offending. This application is dismissed.

