

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANTIGUA & BARBUDA

ANUHCRA2020/0002

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

and

[1] DALIANNE RICHARDSON

[2] SHANIQUE DWYER

[3] SHIMMEA WELSH

[4] LARSHEKA GRAY

Respondents

Before:

The Hon. Mde. Vicki-Ann Ellis

Justice of Appeal

The Hon. Mr. Trevor M. Ward

Justice of Appeal

The Hon. Mr. Eddy D. Ventose

Justice of Appeal

Appearances:

Ms. Rashida Jonas for the Appellant

The Respondents appearing in person

2024: October 01
 October 29

Criminal appeal against sentence – Unlawful wounding – Whether the award of compensation in the sum of \$2,400 imposed by the learned judge was unduly lenient – Whether the learned judge failed to take into account relevant factors when awarding and determining the level of compensation – Whether a higher award of compensation ought to have been ordered in the circumstances

On 25th September 2018 the virtual complainant ("VC"), her boyfriend AI, and friends were overnight guests at the Royal Cove Hotel in celebration of AI's birthday. At some point the VC and one of her friends attended the pool where they observed the respondents. The VC and her friend entered the pool where they proceeded to imbibe some alcoholic drinks. At one point the VC left the pool to use the restroom. Upon returning to the pool her friend told her about certain remarks that had been made by the respondents. The VC and her friend remained in the pool for some time but eventually returned to the room because the VC was feeling unwell. At about midnight, the respondents barged into the room. The fourth respondent, Ms. Gray, knocked over AI's birthday cake, claiming that AI was her boyfriend. This provoked a physical

altercation between her and the VC in which the other respondents joined. The fight was eventually parted, and the virtual complainant was conveyed to the St. John's Medical Centre. The virtual complainant was treated in the emergency department for a total of nine lacerations sustained to her scalp, forehead, face, neck, chest and both arms. The respondents were subsequently jointly charged with wounding with intent and, in the alternative, unlawful wounding. On 24th February 2020 the matter was called before the High Court. In apparent response to a request for a sentence indication by counsel for the respondents, the learned judge indicated that the sentence she would impose in the event of a guilty plea would be probation, a fine plus compensation to the VC. The judge then invited counsel for the respondents to take instruction 'in relation to the good-year indication'. Counsel for the respondents indicated that the respondents were open to paying compensation but did not know what sum the court had in mind. The judge replied by stating that if the respondents pled guilty, the Crown would be asked to either take a victim impact statement from the VC or the court would hear from her orally in relation to her injuries and how she was affected. The learned judge indicated that the respondents would have to plead first. The respondents were then arraigned and each pleaded guilty to the alternative count of unlawful wounding, which was accepted by the Crown.

The matter then came before the judge again on 3rd March 2020. Following evidence from the VC and pleas in mitigation the judge sentenced each respondent to pay the sum of \$600.00 to the virtual complainant by way of compensation; in default each would serve a term of imprisonment of 6 months. The judge also placed the respondents on probation for 2 years. No reasons for sentence were given. By notice of appeal filed on 11th March 2020, the DPP appealed against that part of the sentence comprising the award of compensation in the sum of \$2,400.00. Two grounds of appeal were advanced: (1) that the judge erred in principle when she imposed a sentence of an award of compensation and (2) that the sentence was manifestly lenient having regard to all the circumstances of the case.

Held: dismissing the appeal and affirming the decision of the learned trial judge, that:

1. On an appeal against sentence the Court of Appeal will not vary a sentence merely because it might have passed a different sentence itself. In practice, the usual terminology used as the basis for the Crown's appeal against a sentence is that the sentence passed is unduly lenient. An unduly lenient sentence is one which falls outside the range of sentences which the judge applying his mind to all the relevant factors could reasonably consider appropriate. The appellant must demonstrate that the judge has committed a gross error of principle that takes the sentence outside the range of reasonable sentences and not merely that it is lenient.

Eastern Caribbean Supreme Court (Antigua) Act Cap.143 of the Revised Laws of Antigua and Barbuda applied; **Attorney General's Reference No. 4** of 1989 followed.

2. Where a court is contemplating ordering the payment of compensation, a number of factors must be considered which would inform whether a compensation order is appropriate in the first place, and, if so, the quantum. It is usual for the court to have before it, evidence from the VC which would show

any loss occasioned as a result of the offence as well as evidence of the financial means of the defendants. The court must therefore satisfy itself on evidence that the offender has the means to pay compensation. Here, while the VC gave evidence of the injuries she sustained and their effects on her, there is no evidence that there was any inquiry directed to ascertaining the means of the respondents, and the appellant has not addressed this issue at all in its written submissions before this Court. This 'means assessment' was critical because even if the nature and extent of the injuries might *prima facie* call for a higher level of compensation, that would have been subject to the ability of each respondent to pay more. The prosecution did not point the judge or this Court to the evidence that the respondents had the means to pay more than \$600 each. Therefore, the appellant has not discharged its burden of establishing that the sentence was unduly lenient as they have not been able to point to any evidence which was before the judge as to the financial means of the respondents at the time of sentencing that would have warranted her imposing a higher level of compensation in all the circumstances of the case.

R v Bragga (1989) 11 Cr. App. R(s) 497 followed.

3. The Court considered whether the matter should be remitted to the court below to reconsider the issue of the appropriate level of compensation. However, it has been six years since the offence was committed and four years since the respondents were sentenced. They have each paid the compensation ordered and served out their probation with no indication to this Court that they have re-offended or in any way breached the term of the probation order. Moreover, from the brief oral submissions made by the unrepresented respondents before this Court it would appear that they cannot afford to pay additional compensation should that matter fall to be explored. In these circumstances, it would be unfair to the respondents and not in the interest of justice to remit the matter to the High Court for rehearing on the compensation component of the order.

JUDGMENT

- [1] **WARD JA:** This is an appeal by the Director of Public Prosecutions against the sentence imposed by the learned judge on the respondents following a plea of guilty to unlawful wounding. The judge sentenced each respondent to pay the sum of \$600.00 to the virtual complainant by way of compensation; in default each would serve a term of imprisonment of 6 months. The judge also placed the respondents on probation for 2 years. The DPP contends that the compensation order aspect of the sentence is unduly lenient.

Background facts

- [2] The facts giving rise to the respondents' convictions are straightforward and arise out of a brawl which occurred 6 years ago on 25th September 2018 at the

Royal Cove Hotel. The virtual complainant, her boyfriend, Al, and a couple friends were overnight guests at the hotel in celebration of Al's birthday. At some point the virtual complainant and one of her friends went to the pool where they observed the respondents. The virtual complainant and her friend entered the pool where they proceeded to imbibe some alcoholic drinks. At one point the VC left the pool to use the restroom. On returning to the pool her friend told her about certain remarks that had been made by the respondents. The VC and her friend remained in the pool for some time yet but eventually returned to their room because the VC was feeling a bit unwell. At about midnight, the respondents barged into the room. The fourth respondent, Ms Gray, knocked over Al's birthday cake which was on the kitchen counter claiming that Al was her boyfriend. Suffice it to say, this provoked a physical altercation between her and the VC in which the other respondents joined. The fight was eventually parted by someone, and the virtual complainant was conveyed to the St. John's Medical Centre.

[3] The virtual complainant was treated in the emergency department for a total of nine lacerations sustained to her scalp, forehead, face, neck, chest and both arms. Her wounds were cleaned and sutured and she was discharged. The respondents were subsequently jointly charged with wounding with intent and, in the alternative, unlawful wounding.

[4] The Record of Appeal discloses that the matter was called before the High Court judge on 24th February 2020. By then the judge was in receipt of the prosecution's submissions in apparent response to a request for a sentence indication by counsel for the respondents. After appearances were announced the judge simply stated:

"Thank you. Now I am in receipt of the Prosecution brief for the good-year indication and I'm grateful to counsel for the authorities. Having read the authorities and the facts of the case, the good-year indication will be an indication between probation and a fine to be imposed plus compensation to the virtual complainant."

[5] The judge then invited defence counsel to take instructions from their clients 'in relation to the good-year indication'. Counsel indicated that while their clients

were open to paying compensation, they did not know what sum the court had in mind. To this the judge replied:

“Well if they plead guilty, I would ask the Crown to get the virtual complainant into court...either to take a victim impact statement or for me to hear from her orally in relation to her injuries and how this attack affected her...so they would have to plead first. And Mr. Daniels, they would always get time to pay. I would not make any award forthwith. They would get time to pay”

- [6] With that said, the respondents were arraigned and each pleaded guilty to the alternative count of unlawful wounding, which was accepted by the Crown. The matter was adjourned.
- [7] On 3rd March 2020, the matter came on again before the judge. The prosecution opened the facts. This was followed by evidence from the virtual complainant who spoke to the injuries she had sustained, showed some residual scars to the judge and described the lingering effects some of the injuries had on her. In this latter regard, it was her evidence that the head injury caused her constant headaches for which she took Advil liquid gel. Additionally, she complained that the injury to her breast had initially not healed well as she was still passing blood and pus for which she was prescribed antibiotics and pills. She said she still experienced pain in her breast when the weather gets too cold.
- [8] The pleas in mitigation by defence counsel followed next. Each counsel pleaded their client's youth and clean record and indicated their client's willingness to pay compensation.
- [9] Immediately, upon conclusion of the last plea in mitigation and apologies proffered to the virtual complainant by each respondent, the learned judge pronounced the sentence. No reasons for sentence were given.
- [10] By notice dated and filed 11th March 2020, the DPP gave notice of appeal against that part of the sentence comprising the award of compensation in the sum of \$2,400.00. The two grounds of appeal advanced were: (1) that the judge erred in principle when she imposed a sentence of an award of compensation

and (2) that the sentence was manifestly lenient having regard to all the circumstances of the case.

[11] In relation to ground 1, the DPP in its written submissions argued that when a sentence indication is given, it is binding on the trial judge. However, the judge's indication failed to provide a range and quantum of compensation that would be imposed on the respondents. It was submitted that the judge erred when she ordered that the sum of \$2,400.00 be borne equally by the respondents. It is said that the sentence of \$600 each is not proportionate to the gravity of the offence and degree of responsibility of the offenders. Before this Court, the DPP urged a variation in the compensation order by substituting the sum, of \$2,400 to be paid by each respondent.

[12] In relation to ground 2, the DPP contended that the judge failed to apply her mind to the overall circumstances surrounding the case and all the relevant factors, including the aggravating factors. The aggravating factors were said to be: (a) the number and nature of injuries inflicted; (b) the lingering effects of the injuries; (c) multiple weapons were used in the commission of the offence; (d) it was a group attack; and (e) the prevalence of the offence. Failure to take these into account caused the judge to err when in the exercise of her discretion she ordered the respondents to each pay compensation in the sum of \$600.00.

Discussion

[13] The DPP's right to appeal a sentence imposed after conviction on indictment is derived from section 50B (1) of the **Criminal Procedure Amendment Act**¹. The only ground on which such an appeal may be lodged is as it relates to the nature or extent of the sentence: section 50B (2) (b).

[14] The maximum sentence on conviction for unlawful wounding is five years imprisonment pursuant to section 22 of the **Offences Against the Person Act**².

¹ No. 14 of 2004 Cap. 117 of the Revised Laws of Antigua and Barbuda.

² Cap. 300 of the Revised Laws of Antigua and Barbuda.

- [15] The court's jurisdiction to place an offender on probation and to award compensation derives from section 2 of the **Probation of Offenders Act**³. The relevant provisions provide:

"(2) Where any person has been convicted on indictment of any offence punishable with imprisonment, and the Court is of opinion that, having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances, under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the Court may, in lieu of imposing a sentence of imprisonment, make an order discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for sentence when called on at any time during such period, not exceeding three years, as may be specified in the order.

(3) The Court may, in addition to any such order, order the offender to pay such damages for injury or compensation for the loss (not exceeding in the case of an inferior court of summary jurisdiction, five hundred dollars, or if a higher limit is fixed by any enactment relating to the offence, that higher limit) and to pay such costs of the proceedings as the Court thinks reasonable."

- [16] The Court of Appeal's jurisdiction to increase a sentence on appeal is found in section 40(4) of the **Eastern Caribbean Supreme Court (Antigua) Act**⁴, which provides:

"On an appeal against sentence the Court of Appeal shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor, as it thinks ought to have been passed, and in any other case shall dismiss the appeal."

- [17] It is important to bear in mind, however, that the Court of Appeal does not vary a sentence merely because it might have passed a different sentence itself. In practice, the usual terminology used as the basis for the Crown's appeal against a sentence is that the sentence passed is unduly lenient. The conventional understanding of what constitutes an unduly lenient sentence is one which falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate: **Attorney General's**

³ Cap. 345 of the Revised Laws of Antigua and Barbuda.

⁴ Cap. 143 of the Revised Laws of Antigua and Barbuda.

Reference No. 4 of 1989⁵. It is important to stress that the appellant in an appeal of this nature must demonstrate that the judge has committed a gross error of principle that takes the sentence outside the range of reasonable sentences and not merely that it is lenient. The error of principle identified by the appellant in this case, is the judge's alleged failure to take the aggravating factors into account.

[18] The circumstances under which the respondents to this appeal were ordered to pay compensation causes some disquiet. The first cause for concern is that the procedure adopted for the good-year or sentence indication was unsatisfactory and not compliant with the established procedure governing such an exercise. The Chief Justice of the Eastern Caribbean Supreme Court has issued Practice Directions for Saint Lucia⁶ and Saint Vincent and the Grenadines⁷ providing comprehensive guidance to judges on the procedure to be adopted where a sentence indication is sought. These practice directions embody the same common law principles and procedure derived from **R v Goodyear**⁸ which applies in jurisdictions to which the Practice Directions do not apply. In particular, where the judge proposes to give a sentence indication the judge must give both sides an opportunity to be heard on the matter. Further, the judge must be satisfied that the information available at the time is sufficient to enable the judge to give a sentence indication.

[19] Against those requirements, it strikes me that the judge's response to counsel's query following the sentence indication about the level of compensation she had in mind, suggests that the judge intended to determine that based on testimony from the virtual complainant. It is curious that the judge felt able to indicate from the outset that compensation would be ordered without any information as to the means of the respondents.

[20] A compensation order is not intended as punishment; rather the aim is to compensate the victim for injury or loss suffered. Where a court is contemplating

⁵ [1990] 1 WLR 41.

⁶ No. 4 of 2014.

⁷ No. 1 of 2020 (Re-Issue).

⁸ [2005] EWCA Crim 888.

ordering the payment of compensation, a number of factors must be considered which would inform whether a compensation order is appropriate in the first place and, if so, the quantum. It is usual for the court to have before it medical reports speaking to the extent of the injuries and any lingering effects; receipts of medical or associated expenses incurred by the virtual complainant, which would evidence any loss occasioned as a result of the offence; and evidence of the financial means of the defendants.

[21] I should think it trite that before ordering a defendant to pay compensation, the court must satisfy itself on evidence that the offender has the means to pay compensation. Indeed, it has been held that when a court is minded to make a compensation order, it is under a duty to canvass the matter so that a proper inquiry into the offender's means can be made. See **R v Bagga**⁹. While the virtual complainant gave evidence of the injuries she sustained and their effects on her, there is no evidence before us that there was any inquiry directed to ascertaining the means of the respondents, and the appellant has not addressed this issue at all in its written submissions.

[22] Of course, the respondents have not appealed and, in fact they have paid the compensation, which gives rise to the inference they, at least, had the means to pay the sum awarded. But the question before this Court is whether the judge should have ordered them to pay more based on the aggravating factors, such that the sentence is unduly lenient. In considering whether the sentence is unduly lenient, it is well to bear in mind that, in the absence of new or fresh evidence, this Court may only consider the material that was before the sentencing judge.

[23] Further, at the sentence hearing itself no reasons, however brief, were given by the judge explaining the sentence she had arrived at and the factors she had taken into consideration in determining the quantum of compensation to be paid by the respondents. This means that no reasons were given explaining the reasons underpinning the sentence indication and none was given at the time

⁹ (1989) 11 Cr. App. R(s) 497.

sentence was passed. This Court does not have the benefit of the judge's reasons for sentence, which would provide necessary insights as to the reasons or evidential basis grounding the judge's assessment that the sum of \$2,400.00 in compensation was adequate.

[24] That 'means assessment' was critical because even if the nature and extent of injuries on their face might prima facie call for a higher level of compensation, that would have been subject to the ability of each respondent to pay more. The prosecution did not point the judge or this Court to the evidence that the respondents had the means to pay more than \$600.00 each.

[25] The dearth of material means that it is difficult for this court to take an informed view as to whether the compensation ordered falls outside the range of sentences which a judge, applying her mind to all the relevant factors, could reasonably consider appropriate because we have no evidence of what the individual means of each respondent was at the time of being sentenced to conclude that a higher level of compensation was warranted.

[26] Moreover, the appellant's invitation to view the sentence as unduly lenient faces the problem that such a determination cannot be made solely on the basis of the personal injuries sustained by the virtual complainant, without regard to the means of the respondents at the time of sentencing. Even so, it appears to me that two of the three authorities relied on by the appellant (which were summarised but not provided) to urge a substantially higher level of compensation are readily distinguishable. In **The Queen v Chayanne Isaac & Shemal Reuben**¹⁰ and **The Queen v Zahvante Hill**¹¹ the injuries sustained by the respective complainants were considerably more serious, resulted in permanent scarring to the face and necessitating hospitalization for a few days and surgery (in the former) and in the latter, multiple stab wounds requiring hospitalisation for four days. In **The Queen v Romel Santana**¹² the complainant was chopped in the head with a machete. The appellant has not provided any

¹⁰ Criminal Appeal No.4 of 2000 St. Lucia

¹¹ Criminal Case No. 67 of 2020 Antigua and Barbuda (delivered 20th July 2020, unreported).

¹² Criminal Case No. 106 of 2016 Antigua and Barbuda (delivered on 16th October 2017, unreported).

information on what evidence was before the court in those cases when it determined the quantum of compensation in those cases, including whether the means of the defendants was even considered.

[27] In the present case, the injuries were not as severe, and, more importantly, there was no evidence adduced of any loss suffered by the virtual complaint, which is the statutory basis on which compensation is awarded. While the appellant urges compensation in the global sum of \$7,200.00 or \$2,400.00 per each respondent, this figure is not backed up by reference to any evidence of loss or the means of the respondents (which has to be assessed separately) to pay \$2,400.00 each.

[28] To my mind, the appellant has not discharged its burden of establishing that the sentence was unduly lenient as they have not been able to point to any evidence which was before the judge as to the financial means of the respondents at the time of sentencing that would have warranted her imposing a higher level of compensation in all the circumstances of the case.

[29] The appellant asks this Court to increase the sentence in circumstances where it has been six years since the offence was committed and four years since the respondents were sentenced. They have each paid the compensation ordered and served out their probation with no indication to this Court that they have re-offended or in any way breached the term of the probation order. From the brief oral submissions made by the unrepresented respondents before this court it would appear that they would assert that they cannot afford to pay additional compensation should that matter fall to be explored. I have given consideration to whether the matter should be remitted to the court below to reconsider the issue of the appropriate level of compensation. However, given the time that has passed and the events that have transpired since sentencing in 2020, I would consider it unfair to the respondents and not in the interest of justice to remit the matter to the High Court for rehearing on the compensation component of the order.

[30] For all the reasons set out above, I would dismiss the appeal.

I concur
Vicki Ann-Ellis
Justice of Appeal

I concur
Eddy D. Ventose
Justice of Appeal

By the Court

Deputy Chief Registrar