

IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT JUSTICE
(CRIMINAL DIVISION)

CASE NO. ANUHCR 2022/0017

BETWEEN:

THE KING

and

SAMUEL COX

Appearances:

Mrs. Shannon Jones-Gittens, Counsel for the Crown

Mr. Andrew O’Kola, Counsel for the Defendant

2022: December 7th, 8th, 13th;
2023: January 23rd, 24th;
February 13th;
March 20th, 23rd, 29th;
April 19th, 21st, 24th;
May 12th;
June 12th;
July 5th.

DECISION

- [1] **SMITH, J.:** This trial was conducted as a Judge Alone Trial by virtue of the **Criminal Proceedings (Trial by Judge Alone) Act**, No.8 of 2021, the charges on the indictment in this matter are mandated to be tried by a single Judge. The **Criminal Proceedings (Trial by Judge Alone) Act**, was signed by the Governor-General on the 28th May, 2021 and provides for cases to be tried by a Judge sitting alone without a jury.

Factual Background

- [2] The Complainant is the uncle to the Defendant. The Defendant at one time shared the Complainant’s yard whilst living with his mother at the back of the property with his then girlfriend,

Maalom Belgrave. At some point the relationship between the Complainant, the Defendant and his girlfriend soured and the Defendant and his girlfriend left the premises.

- [3] The Complainant indicated that he had leased a piece of land to Kerry Ann Kelly and she had paid him \$3,900.00 EC. He said that he had the money in his waist on the day in question. On that day the Defendant attended at the yard with his girlfriend to retrieve a water tank from his mother's part of the premises. After an exchange of words a fight ensued with the Complainant taking up a stone and advancing on the Defendant. During the fight, the stone fell from the Complainant's grasp and the Defendant continued to beat him resulting in serious injury. After the fight the Complainant noticed that the rent money which he said he had in his waist was missing. The Defendant and his girlfriend were originally charged but the Crown discontinued against the girlfriend.

Burden and Standard of Proof

- [4] In a Judge-alone trial, or a 'Bench Trial', a Judge sits without a jury. The Judge is both the Judge of the law and the forum of fact. The burden of proof and the standard of proof remain the same as they were and are in every other criminal case. It is the Crown that has the responsibility of satisfying the forum of fact that it was the Defendant who committed the offence(s) as alleged; and the Crown can only do so by making the forum of fact feel certain of the Defendant's guilt. The Defendant does not have to prove anything.

Elements to be Proved

- [5] I directed myself that the Crown must prove each element of the offences by providing me with evidence of such a quality that I can feel sure of the respective elements of each Count on the Indictment. Ultimately, if I am sure of each element and have no reasonable doubt, then I can be certain of the guilt of the Defendant and may convict him. If, on the other hand, the Crown fails to make me feel sure and I have reasonable doubt of any of the elements of the offence I will be obliged to acquit.

The Indictment and the Elements of the Offences

- [6] I now turn to the Indictment:-

1. Count One's particulars are that Samuel Cox on 24th June, 2020 at Lightfoot West, in the Parish of Saint John in Antigua and Barbuda unlawfully and maliciously caused grievous harm to Philmore George with intent to do him grievous bodily harm.

2. Count Two's particulars are that Samuel Cox on 24th June, 2020 at Lightfoot West, in the Parish of Saint John in Antigua and Barbuda unlawfully and maliciously inflicted grievous bodily harm on Philmore George.
3. Count Three's particulars are that Samuel Cox on 24th June, 2020 at Lightfoot West in the Parish of Saint John in Antigua and Barbuda stole \$3,900EC the property of Philmore George.

[7] Counts One and Two are in the alternative.

Circumstantial Evidence

[8] In their opening address, the Crown submitted that their case is based on circumstantial evidence in relation to the larceny count. They contended that there was sufficient evidence upon which the Defendant's guilt could be proved, in whole or in part, by the drawing of certain inferences from circumstantial evidence in relation to the larceny.

[9] It is clear that where on one possible view of the facts there is evidence upon which a Judge could properly come to the conclusion that the Defendant is guilty, then the Judge should allow the matter to be tried by the Jury. The situation in a Judge Alone Trial is similar. The Judge will decide whether the Crown at this stage are not required to show that the tribunal of fact could not reasonably reach any alternative inference contended for. The question is whether it is properly open to the tribunal of fact to reach the inferences contended for by the Crown.

[10] What is the circumstantial evidence that the Crown is relying on to show that the Defendant stole the Complainant's money? The facts are that the Complainant had the money in his waist prior to the altercation with the Defendant and afterwards, he realized that he no longer had the money in his possession. The Crown has asked the Court to infer based on these facts that the Defendant took up the money belonging to the Complainant. When it was put to the Complainant that he didn't actually see the Defendant take up the money he agreed. The former co-defendant, Maalom Belgrave also denied taking up the money or seeing her then boyfriend take it up. While the Court ruled in the No Case Submission that the Defendant did have a case to answer for larceny, at this stage having heard **ALL** of the evidence, the Court now has to consider whether the Crown has proved beyond a reasonable doubt that the Defendant was guilty of larceny.

[11] The Court is satisfied that the Crown has not proved beyond a reasonable doubt and to make me sure that the Defendant did indeed steal the Complainant's money. The evidence is just nonexistent and the inferences the Court is being asked to make cannot be made here. The Defendant is therefore acquitted of the charge on Count Three.

[12] The Court will now move on to consider Counts One and Two.

Doctor's Evidence

- [13] Evidence was led that the Complainant was prescribed pain medication and nasal spray. The medication was not specifically for fractures but due to the bleeding from his nose and the fact that he had a blockage. The Doctor was not able to say what caused the injuries but said it was possibly caused by a blow. So, it is clear to the Court that the Complainant received serious injury amounting to grievous bodily harm.

Discrepancies

- [14] As with every case that comes before the Courts there were discrepancies and inconsistencies. The Court had to consider how significant they were and whether they diminished the Crown's case and the credibility of the witnesses.
- [15] The Court found the following discrepancies:-
- **Shoot versus kill.** The defence Counsel put it to the Complainant that he did not tell the police that the Defendant said he was going to shoot him. The statement he gave to the police does not have that the Defendant said he would shoot him. In looking at the statement the Court notes that the Complainant said "the defendant would kill him" Is this a significant discrepancy? No, the Court does not find so and attaches very little weight to it.
 - Another discrepancy which the defence put great store on was the fact that the Complainant said the Defendant was warned about coming back to the premises. The Defendant denied that any such warning was issued and the police also denied this. Is this a discrepancy which goes to the crux of the Crown's case? Defence Counsel has urged the tribunal of fact to disregard the Complainant's testimony as he is not a credible witness.
 - There was also the discrepancy of the non-disclosure of Maalom's statement to the defence. I agree that this was a statement that should have been disclosed to Counsel. Does it prejudice the Defendant's case? The Court does not believe so and finds that the Defendant has received a fair trial.
 - Upon the Court's visit to the locus, there was a discrepancy relating to the Complainant's testimony as to where he was when the Defendant first entered the yard and where the altercation occurred. The Court does not find that these discrepancies diminished the Complainant's testimony about being severely beaten by his nephew.

Defendant's Good Character

- [16] There are two limbs of good character--credibility and propensity. Because the Defendant did testify under oath, he is entitled to the benefit of the full good character direction which is credibility limb of

good character as well as the benefit of the propensity limb which says that Mr. Cox is less likely to have committed the offence because of his previous clean criminal record. Good character is not a defence but a positive feature of the Defendant that I should take into account when assessing whether I believe the Defendant committed the offence.

- [17] After considering his good character and taking both the propensity and credibility limbs into account, it does not change my acceptance of the Crown's evidence that the Defendant committed the crime he is accused of on the Indictment. I have reached this conclusion after considering that the conduct by the Defendant apparently would have been out of character for him, a person who had not previously been convicted of violating the law. Since I believe the Crown's evidence, I can give the good character of the Defendant little to no weight in deciding the verdict.

The Defence Case

- [18] The defence case was mounted on the issue of credibility of the Complainant, the non-disclosure of the statement of Maalom Belgrave and self defence. I will deal firstly with self defence. The Defendant's case was that the Complainant approached him with a "big stone in his hand and he felt threatened and feared for his life".

Self Defence

- [19] As already stated the Defendant in his sworn testimony indicated that the Complainant came at him with a stone and that he had to defend himself and that he feared for his life. The Court examined his testimony carefully and reproduces a part of it here:-

"I entered from the fence on the left side, by the neighbour. The bus was facing the yard and the car was facing the road. The girl friend was parked in the vehicle. I entered the yard he I didn't see anyone. The complainant is my uncle we are related. He saw me and said "you nuh see mi...whah you ah do yah" and I responded "see wha? Me and you ah friend?" I turned and kept on walking to my mother's house. While walking towards the house my girlfriend screamed out Sammy. I turned around and I saw my uncle coming at me with a stone in his hand. He was directly in front of me within a hands reach. I held his hand and grabbed my uncle's hand and we wrestled. He had a stone in his hand and he was coming at me, he was rushing at me with a big stone. I felt threatened and I felt that my life was in danger. We wrestled and I tried to take the stone from him. I slammed him in his house. He dropped the stone. I punched him in his face. Then I kept on punching and hitting him until my girl friend told me to stop and I walked away to the back of the house to my mother's half of the property got the water drum and put it in the van".

- [20] Under cross examination the Defendant admitted to Counsel that he continued to hit the Complainant even after the stone had fallen from the Complainant's grasp.

The Authorities

- [21] Counsel for the Defendant submitted authorities on self defence for the consideration of the Court.
- [22] The first case the Court considered was the case of **R vs Owino** (1996) 2 Cr App Rep 128. In that case the appellate Court noted that "the elements of self defence are clear enough. The jury have to decide whether a defendant honestly believed that the circumstances were such as required him to use force to defend himself from an attack or a threatened attack. In this respect, a defendant must be judged in accordance with his honest belief, even though that belief may have been mistaken. But the jury must then decide whether the force used was reasonable in the circumstances as he believed them to be". In that case the Court also referred to the case of **R vs Scarlett** (1993) 4 All ER 629. At page 636 Beldam LJ said:-

"where as in the present case an accused is justified in using some force and can only be guilty of an assault if the force used is excessive, the jury ought to be directed that he cannot be guilty of an assault, unless the prosecution prove that he acted with the mental element necessary to constitute his action an assault, that is that the defendant intentionally or recklessly applied force to the person of another". Further they should be directed that the accused is not to be found guilty merely because he intentionally or recklessly used force which they consider to have been excessive... they ought not to convict him unless they are satisfied that the degree of force used was plainly more than was called for by the circumstances as he believed them to be and provided he believed the circumstances called for the degree of force used, he is not to be convicted even if his belief was unreasonable".

- [23] In the case of **Stanford**, the CCJ noted:

"The common law has always recognised the right of a person to protect himself or another person from imminent attack and if necessary to inflict violence to repel that attack. No crime is committed where the person uses no more force than is reasonable in the situation. Accordingly, if the person honestly believed that the circumstances, if true, would justify his use of force to defend himself or that other person and that it was reasonable to resist the attack, he was entitled to be acquitted of murder". Further, the Court opined that self-defence should be left to the jury when there was "evidence sufficiently strong to raise a prima facie case of self-defence" if it was accepted. They observed that to invite the jury to consider self-defence upon evidence which did not "reach this standard would be to invite speculation."

- [24] As the sole arbiter of the facts and the law the Court has adopted a similar approach to these matters. The classic exposition of the law of self defence is contained in the much cited dictum of Lord Morris of Borth-y-gest in the case of **Palmer v The Queen** (1971) 1 All E.R. 1077, a decision

of the Privy Council sitting on an appeal from Jamaica: “It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation”.

- [25] And here is the crux of the case at bar. The evidence is that the Complainant attacked the Defendant with a stone and the Defendant proceeded to punch the Complainant. The Defendant himself admitted under cross examination that after the Complainant dropped the stone he continued to punch his uncle.
- [26] The Court notes that if the moment is one of crisis for someone in imminent danger, he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains, then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with the necessity of defence. Of all these matters the good sense of a jury will be the arbiter and without a jury the Court will be the sole arbiter. This Court has determined that after the Complainant dropped the stone, there was no longer a threat to the Defendant and at this point his punching the Complainant become unlawful and unjustifiable. And so his defence of self defence must accordingly fail at this juncture.
- [27] In considering Counts One and Two the Court finds that the evidence, the facts and an application of the law as set about the elements of Count Two have been proved. The Defendant is acquitted of Count One as the Court did not find the requisite *mens rea* proved.
- [28] The Defendant will be remanded into custody until his sentence.

Sentencing Remarks

- [29] The Defendant having been remanded was set to be sentenced on Monday 3rd July, 2023 and further adjourned to 4th July, 2023. The Crown helpfully provided the Court with a comprehensive sentencing brief.

The Law

- [30] The offence of inflicting grievous bodily harm is governed by section 22 of the **Offences against the Person Act, Cap. 300**. It provides a maximum sentence of five (5) years imprisonment.

The Sentencing Guidelines

- [31] The Court is guided by the Sentencing Guidelines of the Eastern Caribbean Supreme Court, 2019 for violent offences re-issued on 8th November, 2021.

First Stage

- [32] The first stage is for the Court to consider the consequences of the offence by assessing the harm caused. In this case, there was serious physical harm caused to the complainant Mr. Philmore George as he suffered multiple fractures to the face to include the area of the left eye and both cheeks. Any psychological harm caused may be assessed at the sentencing hearing if Mr. George elects to attend. At this time, it may be safe to place this case in Category 2 – High.

Second Stage

- [33] For the second stage the Court considers the seriousness of the offence by assessing the culpability of the offender. This offence falls into Level B as none of the factors listed in Level A are applicable.
- [34] Based on these two stages, the appropriate starting point based on the grid is 35% of the maximum sentence and this equates to 1 year and 9 months with a range between 1 year and 2 and a half years. The Court will therefore use an appropriate starting point as 1 year in prison.

Aggravating/Mitigating Factors

- [35] There are no aggravating in relation to the offence and the Court finds a mitigating factor is that there appears to have been a lack of premeditation on the part of the Defendant. It was an attack which occurred in the spur of the moment. Regarding the offender, an aggravating factor is the relationship between the Parties, the Defendant injured his uncle who is at least twice his age.
- [36] The Court considers the prevalence of these types of offences in this jurisdiction when formulating the sentence causing the sentence to scale upwards to act as a deterrent to the Defendant and also to others.
- [37] The Court therefore will toggle the 1 year in prison upwards to 14 months in prison.

Mitigation

- [38] The Court has heard Counsel O’Kola in his plea in mitigation. He indicated that he was of the view that there were other mitigating factors being extreme provocation and it being an isolated occurrence. He indicated that the trigger was what led to the Defendant’s behaviour.

- [39] In these types of matters, the Court recognizes that it is vested with the power to make an award of compensation to the Complainant where the Defendant is willing and able to make such a payment. This Court has exercised this discretion in many matters in recent years in that regard and has only awarded a custodial sentence if the circumstances of the case so warrant.
- [40] The compensation awards in similar cases have ranged from \$3,000 upwards with such awards being dependent on the physical and psychological harm caused to the Complainant and any other associated medical costs.
- [41] In a show of remorse he is to write a letter of apology to Mr. George his uncle. Said letter to be delivered to the DPPs Chamber for onward transmission to the Complainant. The letter is to be delivered no later than 7th July, 2023.
- [42] The Court is aware that the Defendant has no previous convictions. He is to pay his uncle compensation in the sum of \$3,000, \$600 per month on the last working day of each month and if in default of any payment 6 months imprisonment.

Ann-Marie Smith
High Court Judge

By the Court

Registrar