[2012] JMCA Crim 35

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO 26/2011

BEFORE: THE HON MRS JUSTICE HARRIS P (Ag)
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE McINTOSH JA

LLOYD NELSON v R

Dwight Reece instructed by Reece & Reece for the appellant

Miss Paula Llewellyn QC, Director of Public Prosecutions and Miss Cadeen Barnett for the Crown

10 February, 15 and 16 March 2012

ORAL JUDGMENT

HARRIS P (Ag)

[1] On 15 September 2011, the appellant pleaded guilty to an indictment which charged him with assault occasioning actual bodily harm in the Resident Magistrate's Court for the parish of Clarendon before Her Honour Miss Ann-Marie Nembhard. He was sentenced to 12 months imprisonment at hard labour. Before us is an appeal against the sentence imposed.

[2] Briefly, the facts of the case are that the appellant was employed as a security guard at the National Self Serve Wholesale in Clarendon. The complainant, Garth

Robinson, operates a handcart at the establishment. A dispute arose between the complainant and another handcart operator. The appellant intervened and an altercation developed between the appellant and the complainant, following which they both fell to the ground. The complainant got up and began attending to a customer who had earlier placed her purchases on his handcart. Soon after, the appellant approached the complainant and struck him on his forehead with a baton which resulted in the bruising and swelling of his forehead. The complainant inquired of the appellant his reason for hitting him. He responded by saying, "you know how long me want mash you up?".

[3] The complainant later made a report to the police subsequent to which the appellant was arrested and charged.

[4] The sole ground of appeal is that the sentence is harsh and manifestly excessive.

[5] Mr Reece submitted that the learned Resident Magistrate, by failing to properly direct her mind to the principles of sentencing as prescribed in ***R v Everald Dunkley*** RMCA No 55/2001 delivered 5 July 2002, erroneously imposed a custodial sentence on the appellant. In his skeleton argument, he submitted that the complainant's injury could not be regarded as ranking among the worst category to warrant the learned Resident Magistrate imposing the maximum three year sentence, as a starting point, to be discounted by mitigating factors. He argued that the complainant had suffered no serious injury, he was not hospitalized and he received $25,000.00 as compensation. It was the learned Resident Magistrate's intention to

have imposed a non custodial sentence, he argued, however, she erroneously learnt that the appellant had a previous conviction for assault and erred by taking into account that he had such a conviction which had not been confirmed by way of his criminal record. He further argued that the appellant had pleaded guilty but was never afforded the opportunity to advance a plea in mitigation. The sentence, he contended, is manifestly excessive and in all the circumstances a suspended sentence would be appropriate.

[6] In ***R v Everald Dunkley***, Harrison JA (as he then was) outlined the approach which should be adopted by a sentencer as to the appropriate sentence to be imposed. He said at page 3:

> "The sentencer commences this process after conviction by determining, at the initial stage, the type of sentence suitable for the offence being dealt with. He or she first considers whether a non-custodial sentence is appropriate, including a community service order. If so, it is imposed. If not, consideration is given to the other options, ranging from the suspended sentence to a short term of imprisonment. This is the approach adopted in England, and generally employed in Jamaica, as a useful guide to sentencing and outlined in the case of ***R v Linda Clarke*** [1982] 4 Cr. App. R(S) 197. That case recommended that after having considered the above options, the sentencer may consider:
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> > 'If a partially suspended sentence is inappropriate, what is the best possible total sentence which can be imposed bearing in mind the circumstances of the case and the record of the offender'." (Emphasis added)

He then went on to consider the factors which would influence the length of a sentence, when, at page 4, he said:

"The factors to be considered in mitigation of a sentence of imprisonment are, whether or not the offender has:

(a) pleaded guilty;
(b) made restitution or
(c) has any previous conviction.

These factors must be considered by the sentencer in every case before a sentence of imprisonment is imposed."

[7] In ***Dunkley,*** the learned Resident Magistrate imposed a sentence of 12 months for the offence of obtaining money by false pretences. This offence carries a three year maximum period of imprisonment. In imposing the sentence of 12 months imprisonment, the learned Resident Magistrate discounted the three year period by 24 months. The appellant's appeal against sentence was allowed and a sentence of six months imprisonment was imposed. Harrison JA said at page 6:

"We are of the view that the appellant in this particular case did not qualify to be classified as deserving the maximum sentence of three (3) years discounted by the mitigating factors, to arrive at the sentence of twelve (12) months that was imposed. The offence with which this appellant was charged could never be described as '... the most serious example' of that offence. The learned Resident Magistrate was obviously mistaken. For that reason alone we found the sentence to be manifestly excessive and unreasonable."

[8] In the present case, the learned Resident Magistrate, in sentencing, said as follows:

"The Court considered the following mitigating factors in considering the question of sentence.

The Appellant has pleaded guilty to this offence. He has not sought to have the Court embark on a trial in this matter. The Court views his plea of guilty as an acceptance of responsibility for what he has done and as an expression of remorse. The Court is mindful of the fact that an Accused person is entitled to a one third reduction in his sentence in these circumstances and the Appellant will receive the benefit of his plea of guilty.

The Court also takes into account the fact that the Appellant has been gainfully employed.

The injury received by the complainant was not as serious as it could have been. There is no permanence to the injury he sustained or any permanent disability resulting therefrom.

The Appellant has compensated the complainant for his medical expenses in the sum of Twenty Five Thousand Dollars ($25,000.00).

AGGRAVATING FACTORS

On the other hand the Court considered the following aggravating factors.

The Appellant has one previous conviction recorded against his name for the same type of offence – Assault Occasioning Actual Bodily Harm. This is in similar circumstances where he used a baton to inflict injuries to another.

The court was informed of this by the Appellant himself. As the Court listened to the Appellant the Court formed the view that the Appellant is of the impression that he can use physical violence against another with impunity so long as he pays out money. That is exactly what has happened in the instant case.

Up until that point the Court was intending to impose a non-custodial sentence. It is in light of this previous conviction for the same type of offence committed in

similar circumstances, that the Court imposed a custodial sentence."

[9] A sentence of three years is the maximum term which a Resident Magistrate is authorized to impose for the offence of assault occasioning actual bodily harm for which the appellant was charged. The learned Resident Magistrate correctly recognized that the appellant, having pleaded guilty, was entitled to a discounted sentence. However, she erred in arriving at the 12 month sentence by discounting the maximum sentence by two thirds. This does not accord with the principle laid down in **Dunkley .**

[10] It is significant that the learned Resident Magistrate expressed the view that a non-custodial sentence would have been appropriate but for the appellant's admission that he had a previous conviction for a similar offence. It has come to our attention, through the Director of Public Prosecutions, that the appellant, on a previous occasion, had been indicted for malicious destruction of property for which a fine of $20,000.00 was imposed. However, a copy of the criminal record in confirmation of a conviction was not produced.

[11] The appellant, by way of an affidavit, complained that he did not admit having any previous convictions. The learned Resident Magistrate, in an affidavit in response, which was requested by the court, stated that the appellant admitted that he was previously charged with assault occasioning actual bodily harm and told her that he had pleaded guilty and "paid some money". Even if he had admitted a conviction for a similar offence, the learned Resident Magistrate, before sentencing, was duty bound

to have obtained his criminal record to substantiate that conviction. In addition, as rightly submitted by Mr Reece, she should have informed him that he had a right to advance a plea in mitigation, he having pleaded guilty.

[12] We have taken into account the fact that the appellant by the entry of his guilty plea, had not wasted the court's time, and that the injuries sustained by the complainant were not serious. We have noted that the complainant had been compensated by way of the payment to him of $25,000.00 to meet his medical expenses. We are of the view that the sentence of 12 months imprisonment at hard labour had been wrongly imposed. It is manifestly excessive and should be set aside.

[13] The appeal is allowed. The sentence of 12 months imprisonment is quashed. A sentence of six months imprisonment is substituted therefor which is suspended for 12 months.