

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 114/69 and 115/69.

B E F O R E: The Hon. President
 The Hon. Mr. Justice Fox
 The Hon. Mr. Justice Smith (Ag.)

R. v. FIDEL BANTON and MICHAEL BANTON.

Mr. P. Atkinson for the applicant.

Mr. Horace Edwards, Q.C. for the Crown.

13th MAY, 1970.

FOX, J.A.,

This is an application for leave to appeal against conviction and sentence in the St. Catherine Circuit Court on the 6th of October, 1969. The applicants, Fidel Banton and Michael Banton, were charged on an indictment containing five counts. Fidel Banton was charged on the first count with causing grievous bodily harm with intent. Fidel Banton, Michael Banton, Gladstone James and Frederick Bryan were charged on the second count with wounding with intent. All four accused were charged on the third count with causing grievous bodily harm with intent. On the fourth count all four accused were charged with malicious destruction of property -- malicious damage to a shop and the stock therein. The fifth count charged Fidel Banton with common assault.

The Crown's case rested upon evidence which described a fracas which took place on the night of the 25th of December, 1968, in the shop of one Herbert Schleifer. Assisting him in the shop on this night was his wife Agatha. Assisting the Schleifers as a bar tender and in maintaining order was the complainant, Michael Lewis.

In the course of that night, the evidence showed that Fidel Banton was the aggressor in an altercation with Mrs. Schleifer. This resulted in his being put outside of the shop by Lewis. Fidel Banton returned to the bar part of the shop where Mrs. Schleifer was and ordered a drink. She refused to serve him because he had not paid for previous drinks. That was the occasion for the start of another quarrel. Mrs. Schleifer was hit in her forehead by Fidel Banton. He was accosted by Michael Lewis, who attempted to put him out of the shop. A struggle took place between Lewis and Fidel Banton. The door of the bar became closed in some way. The other accused, Michael Banton, Gladstone James, and Frederick Bryan, broke

a window and came into the room where the struggle was taking place between Fidel Banton and Lewis. Other persons also came through this broken window. In the course of the melee which ensued Lewis received injuries on his arm and in his chest, which he said were inflicted by a knife used by Fidel Banton. All four accused also attacked HERBERT SCHLEIFER and he was struck by a bottle in his forehead. The four accused then started to throw bottles on the building and at the stock in the shop. This is the broad outline of the facts upon which the Crown's case was based.

Before us, Counsel attempted to argue that the verdict was unreasonable having regard to the evidence. In support of this contention he commenced by pointing out that the various complainants were not corroborated as to all the actions of the accused by the witnesses who were present. The Court observed that in a dynamic situation such as that, which developed, with several persons present, and obvious excitement, it was only to be expected that the witnesses would not all see the same thing. Counsel at that stage abandoned the appeal against conviction and addressed us on the question of sentence.

Fidel Banton was found guilty on counts one, two, three, and four. On count one he was sentenced to three years hard labour; on count two, seven years hard labour, on count three, three years hard labour, and on count four, one year hard labour. Fidel Banton alone was charged on count five, and he was found not guilty on that count. Michael Banton was found guilty with his brother Fidel on count three, and was sentenced to three years hard labour. He was also found guilty on count four, and sentenced to one year hard labour.

Counsel submitted that the sentence of seven years hard labour passed upon Fidel Banton was manifestly ^{and that} excessive. This showed that there has been an error by the learned trial judge in applying the principles relevant to sentencing. Counsel emphasized the youth of the applicant, the fact that he had a sense of responsibility, and that he was dedicated in his school life and in his work. There is no evidence of any dishonesty. Counsel stressed the fact that this incident occurred in a fracas. The applicants were not criminals but were the victims of passion. Both applicants could receive immediate work after the expiration of their period

of sentence, and this too was in their favour.

We have given careful consideration to the submissions that the sentence of seven years on Fidel Banton is manifestly excessive. It is useful to state the well-known principles which should guide a Court in deciding what is an appropriate sentence to pass on a prisoner. In R. v. Kenneth John Ball, 35 C.A.R. p.165, Mr. Justice Hilbery said;

" It appears to us appropriate that we should restate the principles which must guide a Court in deciding what is the right sentence to pass on a prisoner. In the first place, this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that this Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then this Court will intervene."

We are not satisfied that this sentence was manifestly excessive, and we are unable to conclude that in passing it the learned trial judge erred. At the trial, after Lewis was injured and when he was lying prostrate on the ground, pretending to be unconscious, he heard Fidel Banton threaten to take his head off. Banton was restrained from this ghastly act by the counsel of one of the other accused that Lewis was already dead and it was therefore unnecessary to decapitate him. This evidence reveals a viciousness on the part of Fidel Banton which the learned trial judge could not have failed to notice, and which he was entitled to take into account in passing sentence. Also Michael Lewis was injured in his chest by a stab wound with a knife. This wound caused a collapse of the chest ^{lung} cavity, and was serious.

In relation to counts one and three, we have noticed that in the course of the summing-up, the learned trial judge did not leave it to the jury, as an alternative to the offence of causing grievous bodily harm with intent, the lesser offence of common assault. We think that in all the circumstances, that was a proper alternative to be left to the jury, particularly in view of the fact that the injuries to Mr. and Mrs. Schleifer, caused by a blow from a bottle in the forehead, were in respect of each complainant,

complainant, of slight consequence.

We think, therefore that this alternative of common assault could have been left to the jury. If it had been so left, the jury could very well have selected this milder alternative as the offence on which to bring in verdicts. We think that in this situation, the offence for which the accused was found guilty should have been regarded by the learned trial judge for the purpose of sentence as nothing more than common assault on both counts.

If he had so considered, the proper sentence would have been twelve months hard labour. Consequently, in relation to counts one and three, although we do not disturb the convictions, we alter the sentences to 12 months hard labour in respect of each accused. On counts two and four, the application of Fidel Banton is dismissed and the convictions and sentences affirmed. In relation to count four involving Michael Banton, the application is dismissed, and the conviction and sentence affirmed. All sentences of course, are to run concurrently as the learned trial judge directed. We further order that the sentences of both applicants are to commence as from the first of February, 1970.