

IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 29/2017

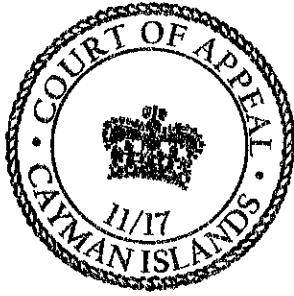
IND.40/17

SC#02796/17

BETWEEN:

GARFIELD SILBURN JR.

Appellant



- and -

Her Majesty the Queen

Respondent

BEFORE:

**The Rt. Hon Sir John Goldring, President
The Rt. Hon Sir Bernard Rix, Justice of Appeal
The Rt. Hon Sir Alan Moses, Justice of Appeal**

Date of Hearing:

Wednesday, 31 October 2018

Appearances:

Mr. John Furniss, Attorney-at-Law for the Appellant
Mr. Garcia Kelly for the DPP for the Respondent

JUDGMENT

Transcript of oral judgment dated 31 October 2018

Approved and Released 10 December 2018

GOLDRING, PRESIDENT:

1. On 28 July 2017 the applicant, who was then 21, pleaded guilty before the Grand Court to two offences. Count 1 was of causing grievous bodily harm with intent, contrary to section 203 of the Penal Code (2013 Revision). The victim was Police Constable Wade Gordon. Count 2 alleged assault occasioning actual bodily harm, contrary to section 216 of the Penal Code. The victim of that assault was another police officer, namely, Police Constable Pamella Hurd-Davis.

2. On 18 September 2017 Mr Justice Quin sentenced the applicant to ten years' imprisonment on count 1, two years concurrently on count 2.
3. He now seeks, first, an extension of 17 days in which to file his appeal and second, leave to appeal against sentence. We have indicated that we shall extend time. We also grant leave.

The facts

4. On 25 May 2017 at about 12:09, the two officers responded to a call for assistance at 15 Mangrove Avenue in George Town in respect of an offence of burglary. They began searching the area for the applicant. They saw a vehicle which matched the description that they had. They approached it. The applicant was standing nearby with a garden hose, washing the upper part of his body. He said he was the driver, that the car had broken down and he was trying to fix it.
5. He was informed of allegations made against him, and told he was under arrest for the offence of burglary. PC Wade Gordon started to put handcuffs on the applicant. The applicant punched him in the face. There was a struggle. The applicant continued to punch PC Gordon several times. They both fell to the ground. The applicant continued punching in the face. Police Constable Hurd-Davis attempted to intervene. The applicant kicked her in the stomach. The applicant then got up and stomped on PC Gordon in the chest. He kicked him in the head several times. PC Gordon then held the feet of the applicant to prevent any further attacks. The applicant fell to the ground a second time. This time he proceeded to choke PC Gordon. The officer's eyes were bulging. He was losing consciousness. PC Hurd-Davis hit the applicant in the head with a radio which she was holding and managed to pull him off the other officer. The applicant ran. He was pursued and apprehended a few metres away. He was ultimately placed in the police vehicle.

6. There were serious consequences as far as PC Wade Gordon was concerned. He initially complained of blurred vision in the right eye. He had had previous retinal detachments in that eye. He lost his vision in that eye. He required retinal detachment repair overseas.
7. There was, at the time of the hearing, an email from the officer setting out the ongoing effect of the injuries. In short, two operations had failed to attach the retina. At the time of sentencing, a third was contemplated. There is no further up-to-date evidence.
8. As far as the woman officer was concerned, she suffered a swollen hand and fingers, some reduced range of movement, but no significant injuries.
9. When interviewed, the applicant declined to answer any questions.
10. The applicant had some 12 previous convictions between 2013 and 2015. They included offences of threats to kill and attempted rape. He had been released from prison very shortly before this offence, having served three years' imprisonment for the attempted rape.

The judge's approach to the sentence

11. We refer first to the relevant definitive guideline in England and Wales, which the judge stated he was applying. The main issue in this appeal is whether he was correct to place the offending within category 1 as opposed to category 2 of that guideline. Before Mr Justice Quin, the Crown had submitted it was a category 2 offence, the defence, a category 3 offence, that is to say, an offence of lesser harm and lower culpability. Mr. Furniss, on behalf of the applicant realistically does not suggest this was a category 3 offence.

12. Category 1 and category 2 offences both require what is described as "*greater harm, serious injury must normally be present*". It is agreed that the loss of the sight in an eye amounted to such injury. A category 1 offence also requires "*higher culpability*". A category 2 offence, as relevant to the present case, reflects a defendant's "*lower culpability*". The judge found there was higher culpability for the reasons we shall shortly set out.

13. The guideline states:

*"The court should determine the offender's culpability and the harm caused, or intended, by reference **only** to the factors below (as demonstrated by the presence of one or more). These factors comprise the principal factual elements of the offence and should determine the category"*.

14. The guideline then sets out the "*statutory aggravating factors*" which indicate higher culpability as well as those which indicate lower.

15. As relevant to the present case there is one factor indicating higher culpability; namely, the "*use of a weapon or weapon equivalent, for example, shod foot*". There is no doubt that the applicant both kicked the officer in the head several times and stomped on his chest. A factor indicating lower culpability was said to be the lack of premeditation.

16. The guideline goes on to state that:

"Having determined the category, the court should use the corresponding starting points to reach a sentence within the category range below... a case of particular gravity, reflected by multiple features of culpability in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out below".

17. The starting point for a category 1 offence is 12 years, with a range of nine to 16 years. The starting point for a category 2 offence is six years with a range of five to nine years.
18. The factors indicating increasing seriousness are set out under the heading Step 2. The statutory aggravating factor, which undoubtedly applied here, is:

"Previous convictions, having regard to

A) the nature of the offence to which the conviction relates and its relevance to the current offence; and,

B) the time that has elapsed since the conviction".

19. Other aggravating factors include *"ongoing effect upon the victim"* and *"Offence committed against those working in the public sector or providing a service to the public"*, in other words, a police officer.

20. In placing the offending into category 1, the judge said this (25/23):

"In this case, we have serious harm. In terms of culpability this was a sustained violent attack. In my view, it was of an extreme nature".

21. The judge then went on to set out the facts. He referred to the very serious nature of the injury. He finished by stating:

"In my view, it is a category 1, that is 12 years starting point, with a range of 9 to 16 years".

22. He then went that on to say:

"In my view, this is a case of particular gravity which merits an upward adjustment. Furthermore, there is an additional aggravating factor was that the assault was carried out on a police officer who was only carrying out his duty. It has to be said that our police officers protect our community. They are committed to looking after our safety and the safety of our property. This was a sustained and violent attack which could easily have resulted in the death of Officer Gordon. This assault strikes at the rule of law and it should shock all law-abiding persons within the Cayman Islands. It was a very serious assault with intention to cause grievous bodily harm. It did cause grievous bodily harm. He may have started off by resisting arrest, but it ended up with him almost killing a police officer".

The grounds of appeal

23. Mr. Furniss is critical of the observations regarding the possibility of the officer being killed.

24. While not seeking to minimise the seriousness of what happened, Mr. Furniss submits the judge was wrong to place the offending within category 1, although he did accept in the course of argument, that it was open to him to do so. He was wrong to take as a starting point 12 years. He should have taken 6. If the case was at the top end of category 2, about which, as we understand it, Mr. Furniss does not strongly disagree, the judge could have taken something in the terms of nine years and reduced it for the early guilty plea.

25. He submits moreover that there was a danger of double-counting by placing the offence within category 1 and then further increasing sentence by taking those features which had placed it there as aggravating features.

Our conclusion

26. In our view, the judge was entitled to place the offence within category 1. The kicking and stomping entitled him to do so. The judge was also right to refer to the aggravating features. The applicant has a serious record for offences of violence. He had recently been released from custody. The attack continued over a period of time. It involved greater violence than was necessary to effect an escape from the police officers. At one stage the officer was losing consciousness as the applicant held him about the neck. Had the other officer not intervened, one dreads to think what the consequences might have been. The applicant plainly knew, he was attacking a police officer.

27. The sentencing range was, as the judge rightly said, nine to 16 years after a trial with a starting point of ten.

28. We have concluded that while the very top of the range of permissible sentences for this offending, the judge was entitled to pass the sentence he did. As it was put by Mr. Kelly on behalf of the respondent, this was gratuitous degradation of an officer over a period of time.

29. Finally, the judge was correct to say what he did about the importance of the work of the police in a community such as the Cayman Islands.

30. In the circumstances, while we were prepared to grant leave to appeal against this sentence, we dismiss it.

