IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA 25 of 2011
IND 1 of 2011
C#09024/2010

BEFORE

Rt Hon Sir John Chadwick, President
Hon Dr Abdulai Conteh, Justice of Appeal
Rt Hon Sir Anthony Campbell, Justice of Appeal

ON APPEAL FROM THE GRAND COURT

BETWEEN

MORRIS ANTHONY BROWN

Applicant

-and-

HER MAJESTY THE QUEEN

Respondent

Ms Lucy Organ of Samson & McGrath for the Applicant
Ms Tanya Lobban-Jackson instructed by the Director of Public Prosecutions for the Crown

Hearing: 3 April 2012
Reasons released: 25 April 2012

JUDGMENT
Revised from transcript and Approved

Sir John Chadwick, President:

1. In November 2011 Mr Morris Brown was convicted after a trial before Justice Cooke, sitting without a jury, on a count of causing grievous bodily harm, contrary to section 204 of the Penal Code (2007 Revision). He was sentenced to a term of two years imprisonment. He now seeks leave to appeal against both conviction and sentence.

2. The offence for which the applicant was tried and convicted was committed in the course of a fight on 14 July 2010 at a construction site at the Grand Caymanian Hotel Resort, West Bay. The complainant, Mr Giovanni Marshall, and the applicant were construction workers on that site. It seems that there had been some history of animosity between them. The circumstances in which the fight took place can be described briefly. The complainant had become involved in an argument with a female worker on the site, referred to in the evidence as "Wingie", who was employed there to clean windows. During the course of that argument, Wingie pointed a window scraper into the complainant's face. He tried to disarm her and there was a struggle. The applicant intervened and punched the complainant in the face. Following a struggle, the complainant fell to the ground. It was alleged that, while the complainant was on the ground, the applicant kicked him in the ribs and directed several kicks towards his face.

3. In the course of that incident, the complainant seems to have used his hands in an attempt to shield his face. He suffered injuries to both wrists, which resulted in his lower arms being encased in plaster for some three to four months; seriously incapacitating him during that period, but not, on the evidence, leading to permanent damage. The parties were separated and the complainant was taken to hospital.

4. Mr. Brown seeks to appeal from his conviction. In relation to that application he is unrepresented.

5. In his reasons for judgment on 30 September 2011, the judge carefully set out the evidence that had been given before him and came to the conclusion that the principal defence advanced on behalf of the applicant could not succeed in this case. The judge said this:

> "I remind myself that it is for the prosecution to satisfy me so I feel sure that the defendant was not acting in self-defence. I find that the defendant did not believe that in kicking the complainant while he was on the ground it was necessary to defend himself in such a manner. He could not have honestly so believed. The prosecution has made me feel sure that the defendant did not kick in belief that it

was necessary to defend himself. Accordingly, self-defence does not arise."

6. The judge made a number of other findings. He found that the complainant, Mr. Marshall, did receive injuries from the fight. He referred to injuries to the complainant's side and to his ribs; but identified, as the most significant, the injuries to his wrists. Those injuries, the judge found, necessitated both the complainant's arms being in casts from July to October; so that "he could not lift a teacup or a spoon". So the judge was satisfied that there was really serious bodily harm. He found that it was the applicant, Mr Morris Brown, who had inflicted those injuries to the wrists while the complainant was on the ground, trying to ward off the kicks which, in the way in which he demonstrated in evidence, were aimed at his face.

7. We have had the benefit of the applicant's written submissions, which he set out in a letter dated 16 January 2012 addressed to His Excellency the Governor; and have listened carefully to his oral submissions before this Court. Having taken those submissions into account, we are not persuaded that there is any ground upon which an appeal against conviction could succeed. The judge heard the evidence and made findings of fact which were plainly open to him. We refuse leave to appeal against conviction.

8. The application for leave to appeal against sentence is made on the applicant's behalf by counsel, Ms. Organ. She had appeared for Mr Morris Brown at the trial. We are grateful to her for her assistance, given – in relation to the appeal - at short notice. She submits that the sentence of two years' imprisonment was manifestly excessive.

9. The judge's reasons for sentence were expressed shortly. He said that he started with his finding that the defendant had exhibited "a reprehensible display of unbridled aggression". That led the judge to take the view that this was a case in which a custodial sentence was necessary in order to make it known that the "viciousness of the attack", as he put it, would not be tolerated. He said that the

defendant was "out to kick out the complainant's teeth or to mutilate his face"; and that the court took "a very, very dim view" of that. He went on to say this:

> "So in all the circumstances, taking into account all the nice things that are being said about him, although one of the persons did speak about his insolence and so forth, the sentence of the court is two years' imprisonment."

Other than that, there is nothing to indicate why the judge thought that two years imprisonment was the appropriate sentence.

10. Ms Organ has referred us to the United Kingdom Sentencing Guidelines Council guidelines in relation to offences of this nature. There are two versions of the guidelines that are before us: the first issued in February 2008, and the more recent version issued in 2011. There is little of difference between them in the context of this case. In the earlier guidelines, there is an indication that an assault which results in particularly grave injury, but where no weapon was used, would be likely to attract a sentence in the range of between twelve months and three years. In the more recent guidelines, the tariff for an offence in Category 2 - a category defined as greater harm involving serious injury but lower culpability or lesser harm and higher culpability - would be in the same range: one to three years' custody. The less serious category, Category 3, described as "lesser harm and lower culpability", would attract a community order or a sentence of up to 51 weeks in custody.

11. This is a case which involved serious harm (to the complainant's wrists), but a relatively low level of culpability. There was no use of a weapon; a lack of premeditation; and, plainly, some degree of provocation arising from the history of ill-will between the parties and the applicant's perception that the complainant was assaulting a female co-worker. Plainly, the applicant over-reacted; but this was not an unprovoked attack on a stranger. Taking those factors into account, it seems to us that the appropriate starting point would have been at the lower end of the one to three years' sentencing bracket appropriate to a case of this nature.

12. In reaching that conclusion, we have had regard to the decision of this Court in *R v Alvin Winston Brown,* [Appeal No. 30 of 2008], in which judgment was delivered orally on 2 September 2009. In that case, the Court of Appeal reduced from five years to three and a half years a sentence imposed for the offence of causing grievous bodily harm. There are three features of that case which need to be noted. First, the injury inflicted was very serious, in that it involved a retinal detachment of the right eye, likely to be permanent such that the complainant might lose vision in the eye altogether. Second, there was a concession, recorded in the judgment, that if the appellant had pleaded not guilty and gone to trial, the sentence which would have been imposed after trial would have been some four to five years' imprisonment. That would be rather higher than that indicated in the UK Sentencing Guidelines Council guidelines, to which the Court of Appeal was not referred. Third, notwithstanding that concession, the Court seems to have proceeded (without explanation) on the assumption that, after a trial, the sentence imposed would have been between five and six years; and from that starting point deducted a discount for a guilty plea which brought the sentence down to three and a half years. In our view, the decision in *Alvin Brown* needs to be viewed with some caution.

13. In the present case, of course, the applicant pleaded not guilty and sentenced following conviction after a trial. There is, therefore, no discount in the present case for a guilty plea. There is, on the other hand, powerful mitigation. The social inquiry report describes him as, hitherto, a man of unblemished character: he is regarded as at a very low risk of re-offending. Indeed, the social inquiry report recommended, strongly, that this was a case for a non-custodial disposal of the matter. He has been employed almost continuously since leaving school. He is married with two children and is living with his wife and family.

14. As we have said, it seems to us that the starting point in this case should have been at the lower end of the sentencing range of one to three years indicated in the Sentencing Guidelines Council guidelines. Taking the mitigation factors into

account, we are satisfied that a sentence of some twelve months would have been appropriate in this case.

15. Accordingly, the application for leave to appeal against sentence is allowed. The appeal against sentence is allowed. The sentence of two years' imprisonment is quashed and set aside. Given the possibility that a sentence of twelve months would put Mr. Brown under the threat of deportation, the sentence which we impose, in place of the sentence imposed by the judge, is 51 weeks imprisonment.