CAYMAN ISLANDS
CRIMINAL FORM 18
RULE 50(1) & 51(1)

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Criminal Appeal No. 24 of 2010
(Indictment No. 7/10)
(C#0777/09)

Between:

HER MAJESTY THE QUEEN

Respondent

- and -

GAIL MICHELLE ROSS

Appellant

NOTIFICATION TO AUTHORITIES OF RESULT OF APPEAL

To: The Attorney General

This is to give you notice that **GAIL MICHELLE ROSS** having sought leave to appeal against *her* CONVICTION and sentence passed upon *her* by the Grand Court on the 28th day of July 2010, as set out below:

Indictment # 7/10 (count 1)

CAUSING GREVIOUS BODILY HARM
4 years imprisonment.

The Court of Appeal has this **13th day of April 2011** given judgment therein to the effect following:

1. **Appeal allowed.**
2. **Conviction on count one quashed.**
3. **Appellant sentenced on Count 2 of Indictment 7/10 (Inflicting Grievous Bodily Harm) to 2 years imprisonment. Sentence to run from date of conviction (28th July 2010).**
4. **Time spent in custody to be taken into account.**
5. **Transcript of judgment to be released.** (31st May 2011)

Dated this 3rd day of May, 2011

Registrar

CAYMAN ISLANDS COURT OF APPEAL

3. There is, however, an unusual feature in this case. When the matter came before this Court in the course of last week, it was drawn to our attention that there was some ambiguity in the jury's verdict.

4. Ms. Ross had been charged on two counts. The first was the count under section 203 of the Penal Code, to which I have already referred. The second was a count of inflicting grievous bodily harm (*simpliciter*) contrary to section 204 of the Penal Code. The lesser offence was not put to the jury following what was perceived to be their verdict on the more serious offence.

5. The judge had been careful to direct the jury, correctly, as to the elements required in the two offences with which the defendant was charged. He had made it clear that in order to convict of the offence under section 203, it was necessary that they should find that she had intended to cause grievous bodily harm. He said this:

> "If you are to come to the conclusion that she did not intend to cause really serious bodily harm, then it would be open to you to convict her, if you accept the prosecution's case that she had no lawful excuse open to her to convict on the lesser count of inflicting grievous bodily harm.
>
> Now, you may wonder if there is any legal magic about the word 'intention'. There is none."
>
> You look at what took place, and then as a matter of common sense, you answer the question. What was the intention?"

6. The jury retired at 11:44. They came back a little later with a jury question as to a majority verdict and, after a further retirement, returned at 11 minutes past 2:00. The Clerk of the Court asked:

> "Members of the jury, on the first count of causing grievous bodily harm, do you find the defendant . . . guilty or not guilty?"

The Foreman's response was "Guilty"; and that that was the verdict of them all. The Clerk then sought to put, to the jury the second count of inflicting grievous bodily harm in relation to Ms. Ross; but she was stopped by the judge.

7. Counsel for Ms. Ross then raised this point:

> "My Lord, I'm sorry but I know that it was put as count 1, but it was read as 'causing grievous bodily harm' and the words 'with intent' were not -- I just want to make – "

The Court interrupted him:

> "Let's stick to the -- she said 'count 1'"

Counsel:

> "She did say 'count 1', but I'm just concerned because the words 'with intent' were not put."

8. The Court then invited the Foreman to stand and said this:

> "Your first count in respect of Gail Ross in which she is charged with causing grievous bodily harm with intent to cause grievous bodily harm, how do you find her?"

The foreman answered:

> "We find her guilty to causing [grievous] bodily harm."

The Court:

> "That's what you found her guilty of?"

The Foreman:

> "Yes, sir."

9. Unfortunately, that interchange did not resolve the problem. It could be said that, on a strict interpretation of the language in which the question was put and the response, the jury found Ms Ross guilty of "causing" grievous bodily harm (within section 203) rather than "inflicting" grievous bodily harm (within section 204). But the jury's foreman's answer does not enable this Court, and did not enable the trial court, to be satisfied that the jury had really intended to convict her of causing grievous bodily harm *with intent*. There is a doubt on the face of

the transcript whether the jury did appreciate fully the need to be satisfied that Ms Ross had the necessary intent to justify a conviction under section 203.

10. . That point having been raised on this appeal, the Crown accepts that Ms. Ross should have the benefit of that doubt. In those circumstances, the Crown accepts that it would be appropriate for this court to quash the conviction on Count 1. Mr. Furniss (who appears for the appellant) accepts, that having quashed the conviction under Count 1, this court has a power to substitute a conviction under Count 2 for the lesser offence under section 204. He informed the Court that, if that were done, his client would not seek to pursue an appeal against a conviction under Count 2 on the ground that that verdict was unsafe and unsatisfactory: that is to say, she would not pursue an appeal on the basis that a conviction was against the weight of the evidence in relation to self-defence.

11. We are satisfied that the conviction on Count 1 should be quashed; and that this Court should substitute a conviction on Count 2.

12. We turn, therefore, to the appeal against sentence. The judge sentenced Ms Ross on the basis that she had been convicted of the more serious charge under Count 1. One option open to the Court would be simply to substitute the conviction on Count 2 and remit the matter to the Grand Court for sentence on Count 2. Neither counsel urges us to take that course; for the good reason that the judge, Justice Cooke, is off-island and it is by no means clear when, if at all, he would be available to deal with a matter which in any event would have last been in his mind in July 2010.

13. In those circumstances, we have taken the view that the proper course is for this court to consider what the appropriate sentence on Count 2 would be. That is, to some extent, an artificial exercise. It is necessary to assume that the appellant attacked the victim with a meat cleaver without intending to cause him grievous bodily harm. That is an assumption which has some degree of unreality about it. Nevertheless, given the circumstances that have arisen, that is the assumption that has to be made.

14. The maximum sentence following conviction of an offence under section 203 is life imprisonment: the maximum sentence following conviction of an offence under section 204 is seven years' imprisonment. That difference marks the Legislature's view as to the difference in severity between the two offences.

15. If we were sentencing, *de novo*, we would have been likely to reach a conclusion that an appropriate sentence for the offence under section 204 in the circumstances of this case was in the region of two and a half to three years. That would accord with the guideline sentencing range of one to three years under the English practice; and would reflect the fact that, on any view, an attack with a meat cleaver, even if not accompanied by intent to cause grievous bodily harm, is a serious offence. But we have to keep in mind that this offender has already been sentenced once; she is now in a position where (through no fault of her own) she is facing the sentencing process for a second time. Further, having been sentenced on the more serious offence to a term of four years, she could reasonably expect a marked difference in the sentence on the lesser offence.

16. In those circumstances, we are satisfied that the sentence which this Court should now impose is a sentence of two years' imprisonment to run from the date of conviction, with time spent in custody before conviction to be taken into account.

MR. FURNISS: Thank you, sir. It was only a small amount, I think. She was on bail for a period having been in custody, sir, for a short period of time.

THE COURT: Two years from the date of sentence with such period as she was in custody to be taken into account.

MR. FURNISS: Thank you, sir. I'm much obliged.

Chadwick P

Forte JA

Campbell JA