In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2016: N0: 1

FIONA M. MILLER
(Police Sergeant)

Appellant

-v-

THOMAS DIXON

Respondent

REASONS
(In Court[1])

Informant appeal on point of law- limits of appeal rights conferred by section 4 Criminal Appeal Act 1952-alternative remedy of judicial review-correct approach for determining whether evidence supports assault occasioning actual bodily harm or grievous bodily harm-correct procedure where mitigation raises defence

Date of Decision: April 27, 2017
Date of Reasons: May 3, 2017

Ms Maria Sofianos, Office of the Director of Public Prosecutions, for the Appellant
Mr Richard Horseman, Wakefield Quin Limited, for the Respondent

[1] The present Judgment was circulated to counsel without a hearing to hand down Judgment.

Introductory

1. By an Information dated August 24, 2016, it was charged that the Defendant/Respondent:

> "*On the 6th day of July 2016, in Pembroke Parish, unlawfully did grievous bodlily harm to Shawn Almeida*. ***Contrary to Section 306(a) of the Criminal Code***. "

2. The Respondent pleaded guilty to that charge in the Magistrates' Court (Wor. Archibald Warner) on November 21, 2016. The Learned Magistrate ruled that the facts relied upon by the Prosecution did not in law support the offence charged and entered a conviction for the lesser offence of assault occasioning actual bodily harm. The Respondent was sentenced as follows:

   - a fine of $3000 or three months' imprisonment (he was in custody for a short time following his initial arrest);
   - ordered to pay $5000 compensation to the complainant (this had been paid by the date of the appeal).

3. The Informant appealed on the following grounds:

> "***THAT*** *the Learned Magistrate erred in law, in misinterpreting the case of The Queen v Steve B. Symonds [2014] Bda LR 115 by finding that a fractured mandible could not amount to grievous bodily harm.*"

4. The initial aim of the appeal was not set aside the conviction and sentence and pursue a trial for the offence originally charged but to obtain guidance from this Court on the elements of the offence of grievous bodily harm as defined by Greaves J in *Queen v Steve B. Symonds* [2014] Bda LR 115. However, Mr Horseman successfully argued that this Court had no jurisdiction to entertain the appeal under section 4 of the Criminal Appeal Act 1952 because, *inter alia*, the ground of appeal did not involve "*a question of law alone*".

5. Having dismissed appeal on April 27, 2017, I now give reasons for that decision.

The nature of the decision of the Magistrates' Court

6. The offence occurred while patrons of the Docksiders Pub and Restaurant were celebrating the Portuguese victory over Wales in the Euro-2016 tournament on the sidewalk outside the premises. According to the Summary of Facts, the blows struck by the Respondent caused the complainant to suffer a "*closed head injury and a*

mandible fracture". This injury was supported by a medical report and the Complainant's Victim Impact Statement, which stated that he was off work for six weeks and had his jaw wired.

7. It is self-evident that in concluding that the injuries alleged did not reach the threshold of grievous bodily harm, apparently as a result of the mitigation advanced, the Learned Magistrate was making a finding on a mixed question of fact and law. The issue was clearly not determined by the Magistrates' Court on the basis of agreed facts. It is also obvious that the decision did not amount to an acquittal or any similar order which brought the proceedings to an end.

8. The entry of a conviction for the lesser offence than that to which the Defendant had entered a guilty plea seemingly occurred without the Respondent being required to elect to withdraw that part of the mitigation which was inconsistent with his plea or to face a trial. It also apparently occurred without treating the plea as equivocal and putting the Crown to its election as to whether to (a) proceed to trial on grievous bodily harm or (b) accept a plea to the lesser charge.

Informant's appeal rights

9. The Prosecution's right of appeal is limited to appeals which meet two criteria. The appeal must both (1) raise questions of law alone and (2) relate to decisions which result in an acquittal or a stay or other termination of the proceedings. Neither of these two requirements was met in the present case.

10. The Criminal Appeal Act 1952 provides in salient part as follows:

> "*4(1) A person who was the informant in respect of a charge of an offence heard before and determined by a court of summary jurisdiction shall have a right of appeal to the Supreme Court, in the manner provided by this Act, upon a ground which involves a question of law alone—*
>
> > *(a) where the information was dismissed, then against any decision in law which led the court of summary jurisdiction to dismiss the information;*
> >
> > *(b) in any other case, against any decision in law which led the court of summary jurisdiction, after convicting the defendant in those proceedings, to impose a particular sentence or to deal with him in a particular way.*
>
> *(2)For the purposes of this section, a decision of a court of summary jurisdiction in respect of a trial on an information—*

(a) discharging an accused person on the grounds that there is no case to answer;

(b) staying proceedings as an abuse of process; and

(c) issuing a ruling which would otherwise have the effect of terminating the trial,

shall be deemed to involve a question of law alone."

11. This Court accordingly had no jurisdiction to entertain the appeal and it could only be dismissed.

Informant's alternative remedy of judicial review

12. Where no right of appeal exists, judicial review ought in principle to be available to a defendant and an informant alike. No consideration was given to this option in the present case and the issue did not properly arise as the appeal was not brought to set the impugned decision aside. The alternative remedy to amplify the Informant's limited rights of appeal has been alluded to before: *Cox-v-The Queen* [2014] Bda LR 2 at paragraph 45 (Hellman J); *Angela Cox (PC)-v-Duckett* [2009] Bda LR 42 at paragraph 13 (Bell J, as he then was).

Guidance on what constitutes grievous bodily harm

13. It is not possible for me to provide more than very general guidance on what constitutes grievous bodily harm in the context of the present case. There is an unresolved dispute about the gravity of the injury and the appeal record does not contain the Learned Magistrate's reasons for entering a conviction for actual bodily harm rather than grievous bodily harm.

14. *In Queen v Steve B. Symonds* [2014] Bda LR 115, Greaves J held that the UK Charging Standard Guideline was of assistance. He summarised the principles as follows:

> "*7…For example, upon a choice between assault and actual bodily harm, assault maybe preferred where there are grazes, scratches, abrasions, minor bruising, swellings, reddening of skin, superficial cuts, a black eye; actual bodily harm may be preferred in cases of loss or broken tooth or teeth, temporary loss of sensory functions/ consciousness, extensive multiple bruising, displaced broken nose, minor fractures, minor not superficial cuts requiring medical attention, stitches, psychiatric injury more than fear, distress or panic, proved by expert evidence; grievous bodily harm and wounding would include injuries resulting in permanent disability or permanent loss of sensory function, injuries more than minor, permanent visible disfigurement, broken or displaced*

bones, limbs, fractured skulls, compound fractures, broken cheek bone, jaws, ribs, etc, injuries causing substantial loss of blood causing transfusions, injuries requiring lengthy treatment or incapacity, psychiatric injuries proved by appropriate expert evidence." [Emphasis added]

15. The Informant's complaint was that a "fractured mandible" (or fractured jaw) clearly fell on the right side of the line as far as the charge laid is concerned. Ms Sofianos is in general terms obviously right. Such an injury would clearly justify laying the charge which was laid and could potentially support a conviction as well, subject to the right of an accused person to argue by way of defence at trial whether the injury was in fact "more than minor".

16. In my judgment the charge of grievous bodily harm appears on the face of the appeal record to have been appropriately laid in the present case. The Summary of Evidence in referring to "*a jaw fracture (two places)*" alleged facts sufficient to justify a plea of guilty being entered and accepted. This did not deprive the Respondent of the ability to challenge the gravity of the injury by way of mitigation, of course.

The appropriate procedure when a defence is advanced by way of mitigation following a guilty plea

17. It often happens that a guilty plea is entered and submissions are advanced by way of mitigation which in fact disclose a defence to the charge. Where this occurs, the accepted practice is that the defendant is advised by the court that if they maintain the line of mitigation which raises the defence, their guilty plea will be vacated. The defendant is thus required to elect whether or not to withdraw the assertions amounting to a defence or to maintain them and require the Prosecution to prove the charge. If the plea is vacated, it does not mean that a trial must take place. Where a conviction for a lesser charge is an option, then the Prosecution will be entitled to elect whether to pursue a trial or accept a plea to the lesser offence which is unambiguously admitted by the defendant.

18. It is unclear why the plea was not vacated altogether in the present case. If it had been, the Prosecution (bearing in mind that compensation was being offered by the Respondent) would in my judgment have been somewhat hard-nosed to insist upon pursuing the grievous bodily harm charge. The outcome which resulted in the present case was far from a perverse one, especially since the Respondent had fully satisfied the obligations arising in relation to the two financial penalties imposed upon him.

19. Nevertheless, the procedure adopted with the Court unilaterally entering a plea to a lesser offence without the Prosecution's consent was plainly wrong. As Ground J (as he then was) stated in a case where the defendant was acquitted because the Magistrates' Court found that the Summary of Evidence did not support the charge

which had been admitted, *Philip Taylor (Police Sergeant)-v-Pesci* [1997] Bda LR 58 (at page 3):

> "*In my judgment there was a fundamental error in the course adopted by the learned Magistrate.*
>
> *Where a Magistrate, or for that matter any Judge, refuses to accept a plea of Guilty he should then direct that a plea of Not Guilty be entered and proceed to try the matter in the normal way.*"

Conclusion

20. For the above reasons, on April 27, 2017, the appeal of the Informant was dismissed, although the important point of law raised has been resolved in favour of the Appellant.

Dated this 3rd day of May, 2017 _____
IAN RC KAWALEY CJ