IN THE COURT OF APPEAL OF BELIZE, A.D. 2011

CRIMINAL APPEAL NO. 15 of 2009

BETWEEN:

THE QUEEN	**Appellant**
AND	
ALBERT GARBUTT JR.	**Respondent**

—

BEFORE:

The Hon. Mr Justice Sosa	**-**	**President**
The Hon. Mr Justice Morrison	**-**	**Justice of Appeal**
The Hon. Mr Justice Alleyne	**-**	**Justice of Appeal**

Cecil Ramirez, Senior Crown Counsel, for the applicant.
Arthur Saldivar for the respondent.

—

11 March, 24 June 2011.

MORRISON JA

[1] This is an application by the Director of Public Prosecutions for leave to appeal against the sentence of a fine of $7,000.00, or in default imprisonment for three years, imposed by Gonzalez J on the respondent, upon his conviction on 31 August 2009 for the offence of dangerous harm. The application is made pursuant to sections 49(1)(c) and 49(2)(c) of the Court of Appeal Act.

[2] After hearing counsel for both sides on 11 March 2011, the application was granted by the court, and the hearing of the application was treated as the hearing of the appeal. The appeal was allowed and the sentence imposed by the court below was set aside. The court directed that all moneys paid towards satisfaction of the fine imposed under that sentence should be refunded to the respondent and imposed, in substitution therefor, a sentence of two years' imprisonment effective as from the 11th March 2011. The court directed that the respondent should immediately surrender himself to custody and promised to put its reasons for this decision in writing at a later date. These are the promised reasons.

[3] Between 21 and 26 August 2009, the respondent was tried before Gonzalez J and a jury, sitting in the Supreme Court in its Central Jurisdiction in Belmopan, on an indictment which charged him with the offences of attempted murder, and in the alternative, dangerous harm. The main witness for the Crown was Mr Evan Gillett, who was the victim of the attack alleged against the respondent. In July 2005, Mr Gillett resided at 7 Trio Street, Belmopan, with Mrs Denise Garbutt and her son, who were the ex-wife and son respectively of the respondent. Mr Gillett's evidence was that he and Mrs Garbutt had then had a relationship with each other for over a year. (While Mrs Garbutt said in evidence that they had by that time "broken off" their relationship, she described Mr Gillett as a friend and a "welcome visitor" to her home.) The respondent and Mr Gillett were previously known to each other, having attended school together at Belmopan Comprehensive School some years before.

[4] On 4 July 2005, the respondent was due to pay a scheduled visit to 7 Trio Street at some point in the evening, for the purpose of visiting his son, who was at that time approximately five years of age. As a result, Mr Gillett absented himself from the home from around 7:00 p.m. and went to visit his own father, where he remained for approximately two and a half to three hours. Upon his return to 7 Trio Street, he entered the house through the back door and, just as he had taken about three steps into the house, he felt a stab in his back. When he turned around, he saw the respondent, who was

armed with a knife, and a struggle ensued between them, during which Mr Gillett felt another stab in his back. The struggle continued, with Mr Gillett trying to wrest the knife from the respondent, who was for his part attempting to cut Mr Gillett's throat. The struggle in due course took both men into the living room of the house and finally out into the yard at the back of the house, where they both fell to the ground and where the respondent finally succeeded in cutting Mr Gillett's throat. Mr Gillett's last memory before subsequently getting awake in the Western Regional Hospital in Belmopan was of the respondent using his feet to stamp him in the right side of his face, as he lay on the concrete walk-way outside the house. He remained in hospital for about a week and thereafter had to attend at a private dental clinic in Belize City to have his jaw repaired, a procedure which took some three to four days.

[5] Dr Jesus Ken also testified for the Crown. He was a medical practitioner and general surgeon at the Western Regional Hospital and was treated by the court as an expert witness. Dr Ken's evidence was that, upon his examination of Mr Gillett in the hospital, he observed a stab wound to the left side of his body, two lacerations to his neck, a laceration to his forearm. In addition, his jaw was fractured and there were two stab injuries to his back, one of which had penetrated to a depth of more than two inches and was life threatening (or, as the doctor put it graphically, "fatal to life"). It was Dr Ken's view that, if Mr Gillett had not received medical attention when he did, he would have died. In his opinion, the injuries were inflicted by a sharp knife.

[6] In sworn evidence, the respondent put up a defence to the effect that, just after he had left his ex-wife's house on the evening in question, he thought he saw an intruder at the back of the house as a result of which he, turned back and found a strange man lying on a sofa in the living room of the house. That man, who subsequently turned out to be Mr Gillett, advanced on him with a knife and a struggle ensued between them, in which Mrs Garbutt somehow got involved. The respondent's evidence was that he then saw Mrs Garbutt making a stabbing motion, then stopping after a while. It seemed to him that Mr Gillett weakened. After an interval, the respondent testified,

during which his son got awake and was sent back to his room by the respondent, Mr Gillett then attacked him again and there was yet a further struggle, before the respondent ran off to his home. The respondent denied stabbing Mr Gillett, cutting his throat or doing anything at all to him.

[7] The jury found the respondent not guilty of attempted murder, but guilty of dangerous harm. This court has not been able to have the benefit of the material considered by Gonzalez J on sentencing, but in due course the judge imposed the sentence already described.

[8] Mr Ramirez, who appeared for the Director, submitted that the sentence imposed by the trial judge was unduly lenient in the circumstances. He pointed out that the respondent had been convicted after a trial and that this was a case of serious injuries, which had resulted in Mr Gillett's hospitalisation. He referred us to the decision of this court in **Director of Public Prosecutions v Mehetibel Slusher (Criminal Appeal No. 35 of 2004,** judgment delivered 18 October 2005), in which the Director's appeal against a sentence of $5,000.00 and in default five years' imprisonment for the offence of dangerous harm had been allowed and a sentence of two years' imprisonment substituted. The victim's injury in that case (a six inch long injury to the left parietal area involving skin, subcutaneous tissue, the muscular sheath and a corresponding indentation to the skull) had been inflicted by the use of a machete. Mr Ramirez accordingly submitted that the injuries in that case were less serious than those suffered by Mr Gillett in the instant case.

[9] Mr Saldivar for the respondent sought to distinguish **Slusher** and submitted that the matter of the appropriate sentence in this case was a matter for the judge and that the sentence ought not to be disturbed. He suggested that the respondent had had no criminal motivation in returning to Mrs Garbutt's home on that evening and that, even in serious cases, a non-custodial sentence might sometimes be in order, depending on the individual circumstances of the particular offender. Further, the respondent was a person with family responsibilities, which he has been fulfilling.

[10] Mr Saldivar also referred us to a text by Mr John Sprack, formerly Reader in the Inns of Court School of Law, on 'A Practical Approach to Criminal Procedure' (10th edn), in which the author discusses (at para. 21.12 – 21.16) what he describes as "offence seriousness…[which] is the primary criterion for a custodial sentence". Mr Sprack refers to a decision of the Court of Appeal of England and Wales in **R v Howells [1998] Crim LR 836**, in which Lord Bingham CJ identified some of the factors affecting offence seriousness to be borne in mind by sentencing judges "in approaching cases on or near the custody threshold". These are listed by Mr Sprack (based on **Howells**) as follows (at para. 21-16):

> "i) the nature and extent of the defendant's criminal intention;
>
> (ii) the nature and extent of any injury or damage caused to the victim;
>
> (iii) whether the offence was premeditated or spontaneous;
>
> (iv) any provocation to which the offender was subjected;
>
> (v) any personal injury or mental trauma suffered by the victim, particularly if permanent (such a feature would usually make an offence more serious than one which inflicted financial loss only);
>
> (vi) any previous convictions of the offender and any failure to respond to previous sentences;
>
> (vii) whether the offence was committed on bail."

[11] Mr Sprack then goes on to set out the mitigating factors relating to the offender, to which Lord Bingham CJ referred as matters which ought normally to be taken into account in deciding whether to impose a custodial sentence in borderline cases. These are:

> "(i) an offender's admission of responsibility for the offence, especially where reflected in an early plea of guilty and accompanied by hard evidence of genuine remorse (e.g., an expression of regret to the victim and an offer of compensation);

(ii) where offending was fuelled by addiction to drink or drugs, a genuine self-motivated determination to address the addiction, demonstrated by taking practical steps to that end;

(iii) youth and immaturity;

(iv) previous good character;

(v) family responsibilities;

(vi) physical or mental disability;

(vii) the fact that the offender had never before served a custodial sentence."

[12] In our view, these are all highly relevant considerations, particularly carrying as they do the added authority that any judgment of Lord Bingham CJ naturally attracts. However, we also think that it is right to observe that these factors, albeit elaborated on in greater detail in **Howells**, are entirely in keeping with what was stated by Carey JA, speaking for this court, in **Slusher**, when he said this (at para. 6)::

> "In imposing sentence, a court is entitled, indeed obliged in performing a balancing exercise, to balance the seriousness of the crime with any mitigating factors which can properly be put in the scale. If, of course, the accused pleads guilty to the charge, that is a matter of some weight to be urged in favour of the accused."

[13] In the instant case, it appears to us that, even on a cursory examination, the respondent falls short on several of these factors. To take the potentially mitigating factors first, we accept that the respondent may be able to pray in aid a few of them. Thus, we are prepared to assume in his favour that he was previously of good character, that he has never before served a custodial sentence and that he does have family responsibilities (and in this regard, at any rate, it is fact that he is attentive in at least some respects to the welfare of the son of whom he and Mrs Garbutt are parents). However, there is no evidence at all that the offence was fuelled by an

addiction of any sort or that his judgment was impaired by youth and immaturity or by physical or mental disability. Of perhaps greatest significance is the fact that, not only did the respondent not enter a plea of guilty at his trial, but there is absolutely nothing to suggest that there has been any indication from him of genuine remorse (indeed, Mr Saldivar had to be reminded by the court more than once during his argument that the matter was now at the sentencing stage).

[14] As regards the factors relevant to the question whether or not a custodial sentence should be imposed, we fear that the respondent's scorecard is even less promising than it is on the mitigating factors. This is a case of what appears on the face of it to have been a completely unprovoked attack by the respondent, which caused Mr Gillett injuries so serious that they could have cost him his life. While there is no evidence of any permanent sequel to these injuries, the respondent by his behaviour on the evening in question demonstrated, in our view, a vicious criminal intention.

[15] In these circumstances, we are satisfied that the Director has made good her contention that the sentence imposed by Gonzalez J, without any explanation that can be discerned from the record, was unduly lenient. In substituting a sentence of two years' imprisonment, we consider that while it is clear that Mr. Gillett's injuries were significantly more serious than that of the victim in **Slusher**, it is nonetheless right to take into account in the respondent's favour the fact that the offence in the instant case was committed as long ago as 2005. While this is obviously not a mitigating factor, it appears to us nevertheless to be a relevant consideration to be borne in mind in determining what length of sentence the respondent should now be obliged to serve.

[16] It is for these reasons that the court on 11 March 2011 came to the decision already set out in para. [2] above.

_____

SOSA P

_____

MORRISON JA

_____

ALLEYNE JA