

BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

Case No. 06 of 2008

BETWEEN:

THE QUEEN

and

FRANKLYN SMITH
TRAVIS SMITH

Appearances:

Ms Tamia Richards, Senior Crown Counsel and Ms Christilyn Benjamin, Crown Counsel
for the Crown

Mrs Margaret Price-Findlay of Price-Findlay & Co. for the Defendants

2008: May 05

2008: May 06

JUDGMENT ON SENTENCING

(Criminal law – wounding with intent – Defendant, Franklyn Smith pleaded guilty –
Defendant, Travis Smith pleaded non guilty – jury empanelled to try case against Travis
Smith- convicted by unanimous jury - sentence – matters to be considered)

- [1] **HARIPRASHAD-CHARLES J:** The defendants, Franklyn Smith and Travis Smith were charged with unlawfully and maliciously wounding William “Jerry” Smith with intent so to do contrary to section 163 of the Criminal Code (Act No. 1 of 1997) of the Laws of the Virgin Islands.
- [2] Upon their arraignment on 28th April, 2008, the defendant, Franklyn pleaded guilty while Travis pleaded not guilty. A jury was duly impanelled to try the case against Travis. On 30 April 2008, he was convicted by a unanimous jury of wounding with

intent. A sentencing hearing was held on 5 May 2008. Both defendants are now before the Court for sentencing.

The facts

- [3] The facts of this case have been succinctly encapsulated by the Crown in their written sentencing submissions to the Court. I can do no better than to gratefully accept them. The facts which the Jury accepted are as follows: on 13 February 2007, Franklyn and Travis unlawfully and maliciously wounded William with a machete. This incident occurred at the Sopher's Hole Marina on Frenchman's Cay in the area of Harbour Market, one of the businesses in that marina. William is a maintenance worker and is responsible for the general upkeep and security of the marina.
- [4] The incident resulted from an earlier altercation between William and Franklyn, where William told Franklyn that he could not ride his bike in the establishment and words were exchanged between the two men. Franklyn eventually left the area and William returned to his normal chores. About 10-15 minutes later, William saw Travis, who is Franklyn's younger brother, with the same bike and there was an exchange of words between the two of them. Travis walked away with the bike in the direction of Pussers whilst William continued with his tasks.
- [5] William then saw Junie Penn who told him something. By notice of additional evidence, had Franklyn not pleaded guilty the Crown had proposed to call Junie Penn as a witness. Franklyn had told Junie Penn that he was looking for William.
- [6] After Travis left in the direction of Pussers, William saw Franklyn about 5-10 minutes later. By this time, William was gathering his tools from around the compound. He went to get a rake from by a tree and saw Franklyn standing close by next to the Harbour Market entrance with a cutlass in his hand. Some words were exchanged and William held his rake swinging it from side to side. Momentarily, he took his eye off Franklyn hoping to see someone and that is when he received the first chop to his left

- [7] William dropped the rake and at that moment, he received a second chop to the same left hand on the outside part from the little finger area down to the wrist.
- [8] There was a pause in the chopping. William was walking away clutching his hand to his body when he heard a voice said "*Go finish chop his mother's scunt, go finish chop him up.*" William recognized the voice to be that of Travis, whereupon, he started to run when he felt a chop on his left heel. He did not stop. Fearful for his life, he continued on trying to flee from his attackers. He was about 3 hops from the wharf when he felt a chop on his right buttock. He saw no other way out but to jump over the wharf into the sea ahead.
- [9] When William came up from under the water, he saw both Franklyn and Travis standing on the wharf. Travis told William, "You think that you can go around doing people fuck." William told Franklyn, "You are the stupidest ass I have ever seen".
- [10] It is undisputed that Franklyn chopped William whilst Travis aided, abetted, counseled and procured the act by his words of encouragement.
- [11] William was taken to Peebles Hospital where upon stabilization, he underwent surgery for nearly 3-3 ½ hours. He sustained the following injuries:
1. a 15 cm laceration on the volar surface of the left little finger extending from the distal phalanx to the wrist involving the distal interphalangeal joint;
 2. displaced fracture of the base of the metacarpal of the left little finger;
 3. avulsed flexor tendon of the left little finger with inability to move the little finger;
 4. laceration of the muscles of the left little finger;
 5. A 4 cm laceration to the left ring finger on the ulnar side involving the flexor tendon to the left ring finger with inability to flex finger;

6. A 4 cm laceration over the left Achilles tendon transecting the tendon with inability to plantar flex the foot and
7. A 8 cm deep laceration to right buttock involving the muscles.

[12] William bled profusely from all wounds. He also experienced excruciating pain. He was hospitalized for a period of 2 weeks from 13 February – 27 February 2007. Upon his discharge from the hospital, he was unable to return to work immediately.

[13] As a result of the injuries he sustained, William will suffer some long term effect. In her evidence, Dr Marjorie Yee Sing, a well-respected and proficient medical surgeon in this Territory stated that William will suffer long term disability in the two fingers that were injured, as there would be some stiffness and loss of movement in the fingers. In addition, he is likely to develop early arthritis in the fingers. It was also recommended that William should have further surgery on the fingers but in the meantime, physiotherapy would assist with the stiffness.

[14] William testified that he has lost the use of two of his fingers. He demonstrated his inability to make a fist and stated that as a result of these injuries, he cannot do some of the duties that he could have done before the injuries and it usually takes him longer to do his tasks.

[15] On being told of the report, Franklyn admitted to Inspector Ariel Cameron that he chopped William while Travis denied any involvement in the incident.

Plea in mitigation

Franklyn Smith

[16] Learned Counsel, Mrs Price-Findlay, in her passionate plea in mitigation, sought compassion and clemency from the Court. She urged the Court not to impose a custodial sentence as Franklyn had been on remand for approximately 9 ½ months prior to his release on bail.

[17] She produced letters from 4 persons; each of whom attested to the good character of Franklyn. They all described him as a good-natured, quiet and hard-working individual.

[18] Franklyn was given an opportunity to speak and he expressed profound remorse at what occurred on that fateful afternoon.

Travis Smith

[19] Mrs Price-Findlay also sought leniency on behalf of Travis. Whilst he did not physically chopped William, he aided, abetted, counseled and procured Franklyn to commit that gruesome act on the day in question. In simple terms, he encouraged and assisted in the commission of the offence. In law, he is equally culpable.

[20] He brought his cousin, Ms Daniel to give evidence as to his good character. In a nutshell, she stated that he is a quiet person; does not speak too much and acts as her baby-sitter from time to time. In short, she has demonstrated her trust of him.

[21] Like Franklyn, Travis expressed his contrition to William for the injuries he suffered.

The victim, William Smith

[22] William was afforded an opportunity to speak. Looking at the defendants, in an accusatory voice, he asked "what have I done for you to chop me up like this? He said "that's all I need to know." When asked whether he would like compensation for the injuries he suffered, William answered "All I would like is justice." He said that he was an able worker who worked hard and earned sufficient money so compensation was not what brought him to court. He said that he cannot perform some of the tasks that he could have done before the injuries.

Submissions by the Crown

[23] As is customary in this jurisdiction, the Crown helpfully identified the aggravating as well as the mitigating factors in this case and also provided some sentencing

guidelines for the offence of wounding with intent. Some of the aggravating factors as set out in Blackstone's Criminal Practice are:

1. abuse of trust (domestic setting);
2. deliberate kicking/biting;
3. extensive injuries;
4. group action;
5. prolonged assault;
6. offender in position of authority;
7. on hospital, medical or school premises;
8. premeditated act;
9. use of weapon;
10. victim particularly vulnerable;
11. victim serving the public.

[24] Some of the aggravating factors which are present in the instant case are:

1. use of a weapon (a machete);
2. premeditated act (After first incident with the bike, Franklyn left the area and returned some 20 minutes later armed with a cutlass);
3. group action (Franklyn chopped whilst Travis encouraged); and
4. extensive injuries (e.g. bleeding profusely from all wounds, underwent 3 - 3 ½ hrs surgery, spent 2 weeks in hospital, unable to return to work immediately, left hospital on crutches, heel in cast, long term loss of mobility in injured fingers).

Mitigating Factors

[25] Some of the mitigating factors which were identified in respect of Franklyn are as follows:

1. Plea of guilty at the first available opportunity;

2. No previous similar convictions. However, his criminal record shows a conviction on 1 November 2002 for obstructing a police officer and disorderly conduct. He was fined \$200.00 or two months imprisonment;
3. Young man of 33 years of age.

[26] In respect of Travis, the mitigating factors are identified as follows. He is a young man, 28 years of age with no previous convictions although his criminal record shows that he had seven previous convictions. However, they are all spent and for all intent and purpose, he is treated in law as a person who has not committed or been charged with any of those convictions: see section 50 (1) of the Criminal Justice (Alternative Sentencing) Act 2005¹ in conjunction with Schedule 4 of the said Act.²

Sentencing Guidelines

English Authorities

[27] The Court was also provided with a plethora of English as well as cases from this jurisdiction which has tremendously assisted me in coming to the appropriate sentence.

[28] In **A-G's Ref (No. 33 of 1997)**³, the Court of Appeal stated that a custodial sentence would almost always be required for this type of offence. The normal sentencing

¹ Section 50 (1) states "Subject to the provisions of this section, where a person has been convicted of or sentenced for an offence or offences of which he was convicted, if the relevant period in Schedule 4 applicable to the sentence has elapsed, the conviction of that person is spent and that person, in respect of such conviction, shall be treated for all purposes in law as a person who has not committed or been charged with or the subject of that conviction."

² Schedule 4 (1) states "If the sentence was one of more than six months but not more than thirty months imprisonment, detention in a youth custody or training centre the relevant period is seven years from the date of conviction; if the sentence was six months or less imprisonment, detention in a youth custody or training centre, or a fine the period is five years from the date of conviction; if the sentence was suspended, the period is the same as if it had been immediate."

Subsection (2) states: "If the offender was conditionally discharged, placed on probation, or made the subject of a care order, or an attendance centre order, the relevant period is two years from the date of conviction or that for which the order remains in force, whichever is longer."

³ [1998] 1 Cr. App. R (S) 352.

bracket in the UK is in the range of three to eight years, although sentences over eight years are upheld in particularly grave cases.

[29] In **A-G's Ref (No. 23 of 1990)**⁴, the offender, at a New Year's Eve party in a public house, struck the victim on the back of the head with a bottle, and then pushed the broken bottle into his cheek and towards his neck. A sentence of 18 months imprisonment was said by the Court of Appeal (at p. 578) to be "undoubtedly excessively lenient". The minimum appropriate sentence on the facts was said to be four years, and the sentence was so increased, though Lord Lane CJ noted that something less than four years might have been proper if the offender had pleaded guilty.⁵

[30] In **A-G's Ref (No. 15 of 1998)**⁶, the offender and the victim had been drinking together when an argument ensued between them. The offender struck the victim in the face with a pint glass, causing multiple lacerations and requiring surgery. He pleaded guilty to wounding with intent and received a sentence of six months. The Court of Appeal said that the lowest possible sentence was a period of two and a half years.

[31] In **A-G's Ref (No. 14 of 2000)**⁷, the offender was convicted of wounding with intent. He had struck the victim in the face with a beer glass causing deep laceration which required 44 stitches and would result in permanent scarring. Roch LJ said that the sentence after a contested case of this sort was between four and six years. On the facts where the injuries were severe and the offender had no effective mitigation, two years was unduly lenient and a sentence of five years should have been passed.

⁴ (1990) 12 Cr. App. R (S) 575.

⁵ See also *Martin* (1992) 13 Cr. App. R (S) 303.

⁶ [1999] 1 Cr. App R (S) 209.

⁷ [2001] 1 Cr. App R (S) 55.

Eastern Caribbean Supreme Court (B.V.I) Authorities

- [32] In **The Queen v. Wayne Fahie**⁸, the offender was charged with wounding with intent contrary to section 17 of the Offences against the Person Act Cap. 53 of the Laws of the Virgin Islands 1991 and unlawful wounding contrary to section 19 of the said Act. The offender had a personal relationship with the complainant for 11 years. On 17 July 1997, the offender attacked and assaulted the complainant with a weapon, to wit a cutlass. As a result of the assault, she suffered very serious injuries namely (a) a total amputation of her left hand just above the wrist, (b) laceration to the forehead about 1 ½ inches, (c) 1 inch laceration of posterior aspect of scalp and (d) multiple laceration of left upper limb. The offender pleaded guilty to both counts. The case occurred before the coming into force of the Criminal Code 1997 when the maximum penalty that could have been imposed for the offence was five (5) years imprisonment. The offender was sentenced to four (4) years imprisonment. He was also ordered to pay compensation of \$25,000 to the complainant.
- [33] In **The Queen v. Elton Beazer & Denroy Stevens**⁹, the two offenders were both charged with two counts of causing bodily harm with intent contrary to section 163 of the Criminal Code of the Laws of the Virgin Islands. Both men, whilst drinking at a bar on Virgin Gorda, assaulted two barmaids. The men used sticks and their fists repeatedly, beating the barmaids, beginning in the bar and ending in an adjacent marina. Both men pleaded guilty to the first and second counts of causing grievous bodily harm. They were sentenced to seven (7) years on each count to run concurrently. Both offenders appealed their sentences to the Court of Appeal. On appeal, the sentence of Elton Beazer was reduced to five (5) years but the Court upheld that of Denroy Stevens.
- [34] Another case of wounding with intent is **The Queen v. Alexander Wheatley**.¹⁰ The offender was charged with two (2) counts of using an explosive substance with intent contrary to section 172(a) of the Criminal Code 1997 of the Laws of the Virgin Islands

⁸ BVI High Court Criminal Case No. 8 of 1998 [unreported].

⁹ BVI High Court Criminal Case No. 9 of 2001 [unreported]

¹⁰ BVI High Court Criminal Case No. 17 of 2001 [unreported]

as well as wounding with intent to do grievous bodily harm, contrary to section 163 of the said Criminal Code. He, whilst being arrested by three officers of the Royal Virgin Islands Police Force stabbed a woman police constable in her back with a knife. He pleaded guilty to all three (3) counts and was sentenced to two (2) years imprisonment on each count to run concurrently.

[35] In **The Queen v. Kevin Frett**¹¹, the offender was charged with causing grievous bodily harm with intent contrary to section 163 of the Criminal Code 1997 of the Laws of the Virgin Islands and unlawful and malicious wounding contrary to section 164 of the said Criminal Code. The victim suffered hot oil burns as a result of the attack. The offender pleaded not guilty to both counts but was found guilty at trial. He was sentenced to three (3) years' imprisonment.

[36] In **The Queen v. Evans Joseph**¹², the defendant and others were charged with the attempted murder and wounding with intent of a prison officer. The others were acquitted while the defendant was convicted of wounding only. The defendant had previous convictions. He was sentenced to six (6) years imprisonment to run concurrently with another sentence that he was serving.

[37] In **The Queen v. Springette and Pemberton**¹³, Springette and Pemberton were charged with wounding with intent. They had attacked the complainant at the Multi-Purpose Sports Complex after the complainant had spoken to them about their presence in a restricted area. They pleaded not guilty at trial but were found guilty by the jury. They were ordered to pay the complainant \$20,000 in compensation. They were sentenced to fines of \$1,000 each.

Court's considerations

¹¹ BVI High Court Criminal Case No. 12 of 2002 [unreported]

¹² BVI High Court Criminal Case No. 10 of 2005 [unreported]

¹³ BVI Criminal Case No. 23 of 2005 [unreported]

- [38] Wounding with intent is a serious offence. The maximum penalty under section 163 of the Criminal Code 1997, as amended, is life imprisonment. This in itself reflects the gravity of the offence.
- [39] With the encouragement and assistance of Travis, Franklyn, armed with the machete hotly pursued William. William ran for his life. As he ran, he continued to receive blows; one slicing his left heel and the other, a 8 cm deep penetrating laceration to his right buttock. In order to save his life, he plunged in the sea. When William rose from the water, both defendants were there; Franklyn, still armed with the machete and Travis taunting him. These two defendants displayed no respect for law and authority on the afternoon in question. They did not care less whether William was simply doing his job. They were not troubled by the fact that their presence with a machete in the scenic Frenchman Cay might have deterred tourists and this in turn, could have a negative repercussion on the economic stability of this Territory.
- [40] The callous and heartless attack on William was unwarranted. It is time that the young men of this Territory learn that patience is virtue. It is time for them to respect laws, rules and regulations. It is also time for them to discard dangerous weapons and learn to restrain their anger. Had they obeyed William on the day in question, they would not be standing in the dock with sad faces seeking leniency. It is a bit too late. The damage is done. William has suffered debilitating injuries which will continue to affect him for the remainder of his life. According to the medical expert, he will develop early arthritis.
- [41] It is the duty of the Court to send out a strong signal that violence has no place in this territory and offenders will be severely punished. I think that the only way the Courts can effectively show this is by the sentences they pass which are aimed at ensuring that the wrongdoer does not repeat the offence and that potential criminals get the message that society will not condone or tolerate such criminality.

[42] Having said all of that, in determining the appropriateness of sentence, the Court bears in mind the four classical principles of retribution, deterrence, prevention and rehabilitation. These principles are well-known and need no further narration.

[43] Unquestionably, the injuries which William sustained are serious though not life-threatening and correspondingly, the sentence ought to be a severe one. I was urged by Mrs Price-Findlay not to impose custodial sentences and to make an award of compensation and impose a fine or some alternative sentence in keeping with the spirit of the Criminal Justice (Alternative Sentencing) Act 2005.

The sentence

[44] Balancing all the factors in this case including the matters which were urged in mitigation, I sentence you, Franklyn Smith to 3 years imprisonment and Travis Smith to a similar length of incarceration of 3 years.

[45] I have also considered that the aggravating features in this case far outweigh the mitigating factors. In the case of Franklyn, the 9 ½ months spent on remand awaiting trial was also taken into consideration.

Indra Hariprashad-Charles
High Court Judge