

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

SAINT LUCIA

CRIMINAL CASE NO. SLUCRD 2009/0484

BETWEEN:

THE QUEEN

Claimant

AND

BRAD AUGUSTIN

Defendant

Appearances:

Mr. Maurice K. Compton Counsel for the Defendant
Mr. Giovanni James Crown Counsel for the Crown

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2012: April 30
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JUDGMENT ON SENTENCING

[1]. CUMBERBATCH, J. : The defendant was indicted by the Director of Public Prosecutions on the 10th March 2010 for the offence of causing maim to Ferrel Activehill (the Virtual Complainant) on Saturday April 11th 2009. At his trial before a jury he was convicted on the 2nd November 2011 for the offence as indicted.

[2] **THE FACTS**

On the day in question the defendant and one Randy Activehill, the brother of the Virtual Complainant had a disagreement which involved bottle throwing. Some 12 hours later that day the defendant was seen by the Virtual Complainant armed with a cutlass and attacking his brother Randy and he intervened to separate them. After they were separated Randy Activehill ran away. The defendant then proceeded to attack the Virtual Complainant who was unarmed and inflicted injuries to him. The Virtual Complainant was transported to the St. Jude's Hospital and the following injuries were observed upon medical examination by Dr. Sherwin James:

Nature and Extent of Injury:	Right side of the head is a deep laceration down to the bone with a small bone chip. Right superior eyelid and cornea cut down the centre
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Probable Effects of Injuries:	Left mid axitar region of the chest with a superficial laceration of 8cm long. The left forearm with a laceration to the anterior region approximately 5cm long
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Nature of Trauma Which Caused Injury:	Physical assault
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Opinion on Instrument if any Which Caused

Injury:	Sharp
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Opinion of Degree of Force Used:	Severe
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The Virtual Complainant was later taken to the Victoria Hospital where the Dr. Williams found that there was a total rupture of the globe of his right eye. The remnants of the globe were removed and the Virtual Complainant thereafter suffered from a total loss of vision to his right eye.

[3] **THE HEARING**

The court upon the conviction of the defendant ordered that a Pre-Sentence Report be prepared. This report disclosed that the defendant grew up with his maternal grandmother after his parents migrated from the island when he was in his infancy. His mother returned to the island at or around the time when he wrote his common entrance examinations. However when his father returned it was clear that he suffered from severe mental health issues. The defendant's experiences with his father were to say the least traumatic and on one occasion he was locked up in a house by his father for days and had to be rescued by the police. From time to time the defendant had to be escorted home by the police to avoid being captured and tormented by his mentally ill father.

[4] The report goes on to state that as a teenager the defendant exhibited behavioral problems as he started using marijuana at age of 14 and associated with persons of questionable character. He was described as defiant and his relationships with his mother and siblings were plagued with quarrels and fights. At school the defendant's behavior is described as unruly and on occasions he was suspended for getting into fights.

[5] Defence Counsel Mr. Compton who appeared for the defendant subsequent to his conviction commented on the background information as stated in the Pre-Sentence Report. In his written submissions counsel states that notwithstanding the variance in versions as to how this incident occurred, it is agreed that the defendant did inflict the grave injuries on the Virtual Complainant

which resulted in the complete loss of his right eye. He referred the court to the dictum of Sir Dennis Byron C.J. in the landmark case of Desmond Baptiste v R and submitted the following to be the aggravating and mitigating circumstances herein:

THE AGGRAVATING FACTORS

1. The nature and degree of violence used during the altercation being several slashes to the person of the Virtual Complainant;
2. The Virtual Complainant suffered the loss of his right eye due to the injuries suffered;
3. The Defendant's admission that he often used drugs such as marijuana and drinking alcohol which may or may not have contributed to his aggression during the altercation.

"Sentencing is a two-stage process. It requires consideration of both the aggravating and mitigating factors. The court must seek to determine what sentence fits the offence. Further, can that sentence be reduced in light of the mitigating factors relating to the offender?"

THE MITIGATING FACTORS

1. The Defendant's only previous conviction (assault) stems out of the same altercation for which he is being sentenced now and not a separate violent incident.
2. The Defendant's upbringing coupled with the traumatizing behavior of his father turned vagrant will necessarily have had an adverse effect on the strongest of young minds.

3. Defendant was unrepresented at trial and his limited education suggests he may well have been better placed to defend or to not defend himself had he been acting in concert with Legal Counsel.

[6] Mr. Compton urged the court to consider the positives in the Pre-Sentence Report namely that the defendant is remorseful and has sought to turn his life around since the birth of his son. He also submits that though the mitigating factors may not outweigh the aggravating ones they are however pertinent and worthy of appreciation.

[7] Crown Counsel Mr. James contends that the court must take into account in the sentencing process the aggravating factors which he states are as follows:

- a. Previous conviction for wounding albeit that it arose from the same incident in which he was convicted for wounding the Virtual Complainant's brother.
- b. Defendant was engaged in an altercation with the Virtual Complainant's brother in the morning and about twelve hours had passed when he armed himself and attacked the Virtual Complainant's brother.
- c. Defendant slashed the Virtual Complainant several times when the Virtual Complainant tried to separate the fight between the Defendant and his brother.
- d. The Virtual Complainant suffered the loss of his right eye following a cutlass attack.

[8] Mr. James also comments on the contents of the Pre-Sentence Report as it relates to the defendant's behavior as a teenager and his use of marijuana and alcohol from an early age. He refers the court to the decision of Benjamin J in The Queen v Lenzie Polemis which he considers to be on all fours with the case at bar as a precedent for what ought to be an appropriate sentence.

[9] In his written submissions Mr. Compton sought to distinguish the Polemis decision from the case at bar in the following respects:

- **Age Disparity** – **Lenzie Polemis** (supra) was twenty-seven years old while Brad Augustin was twenty years old. He would not have been as mature or learned in the ways of life having just emerged from his teenage years.
- **Upbringing** – It is accepted that the Defendant in **Lenzie Polemis** (supra) grew up with both parents in Micoud, both of whom worked in some capacity. On the other hand Brad Augustin was not afforded the stability of such a household.
- **Reputation** – The defendant in **Lenzie Polimis** (supra) was known in his area as a bully, a trouble maker and a wicked person albeit coupled with possible mental issues. Further, he was thought of as a risk to the community because of his violent tendencies and the numerous reports of threats and violence made to police concerning him. In the case of Brad Augustin, we have no such community apprehension subject to the divisive effects of such a heinous injury in a small community.
- **Legal Counsel** – In the case of **Lenzie Polemis** (supra) the Defendant was able to relax somewhat precariously on the abilities and determination of his Attorney in putting forward his defence. On the other hand Brad Augustin for reason not known to me decided to handle the task of his defence unaided by solicitor counsel. In the least one would argue that his limited knowledge of the Court, it's processes, the Law and it's evidential portals or gateways would have necessarily hindered him but for the wise assistance of the Honourable Court, through Your Lordship.

[10] **THE LAW**

I accept Defence Counsel's submission that the court ought to follow the guidelines of retribution, prevention, deterrence and rehabilitation as enunciated by Sir Dennis Byron in *Desmond Baptiste v R*. In that decision Sir Dennis approved and applied the said guidelines as laid down by Lawton L.J in the case of *R v Sergeant*. I will now apply them to the case at bar.

[11] **RETRIBUTION**

The evidence before the jury was that the Virtual Complainant who attempted to act as a peacemaker in a dispute between his brother and the defendant was savagely attacked by the defendant. There is evidence that the Virtual Complainant was unarmed and attempted to disarm the defendant before he received the injuries from which he now suffers. In the opinion of the doctor who attended to the Virtual Complainant the degree of force used to inflict the injuries was severe.

In the *Sergeant* decision Lawson LJ opined that:

'...society through the courts, must show its abhorrence of particular types of crimes, and the only way the courts can show this is by the sentences they pass'

[12] **DETERRENCE**

The defendant has one previous conviction for wounding which arose out of the incident with the Virtual Complainant's brother and which was determined in the District Court. Though the defendant had in his teenage years acquired the reputation for being involved in fights this is essentially his first breach of the law. The Pre-Sentence Report reveals that the defendant smokes marijuana and consumes alcohol and since his incarceration resorts to cigarettes.

[13] Though there is no evidence that at the time of the commission of this offence the defendant was under the influence of either of the two substances aforesaid the court cannot ignore the fact that the use of these substances may act as a trigger to recidivism.

[14] **PREVENTION**

I have already considered the defendant to be a first offender. There is no evidence before me to enable me to conclude that he is to be considered a danger to the society.

[15] **REHABILITATION**

The Pre-Sentence Report indicates that the defendant has since the birth of his son appeared to have decided to turn his life around. Indeed the defendant in the words of the Probation Officer appeared to be willing and seems motivated to live a life free from crime. By all indications the defendant seems genuinely remorseful for his conduct.

[16] The Pre-Sentence Report is however bereft of a report of the defendant's conduct whilst on remand at the Bordelais Correctional Facility and of a victim assessment statement. There is no stated reason for these significant omissions. However there is nothing before me to contradict the defendant's stated intention to cease his criminal activities and become a law abiding citizen.

[17] I have taken into consideration all the circumstances in this case and have examined counsel's submissions and find the following to be the aggravating and mitigating factors herein:

AGGRAVATING FACTORS

1. The seriousness of the injuries inflicted on the Virtual Complainant. He's now without his right eye and is maimed for life.
2. The determination by the defendant to inflict injuries on someone despite the Virtual Complainant efforts to diffuse the situation.

MITIGATING FACTORS

1. The defendant is a first offender.
2. The defendant's remorse appears to be genuine.
3. The defendant has accepted responsibility for the injuries inflicted to the Virtual Complainant.

[18] FINDINGS

I have examined the aggravating and mitigating factors taking into consideration all the circumstances of this case. I have also considered the submissions on the law and evidence by counsel on both sides. In carrying out the necessary balancing exercise of the aggravating and mitigating factors I find that the aggravating factors significantly outweigh the mitigating ones.

[19] I do not find the fact that the defendant was unrepresented by counsel to be a mitigating factor as this case involved no complex issues of law. It was no more than a case of an alleged cutlass attack by the defendant on an unarmed man with devastating consequences. In any event counsel was candid enough to tell the court during the sentencing hearing that the defendant had spurned an offer by his family to retain counsel for his representation.

[20] SENTENCE

Mr. Compton in his written submissions has in a succinct manner sought to distinguish the case of R v Polemis from the case at bar. I accept that there was a disparity of age between the two offenders however in the eyes of the law they were both adults. I would however concur with counsel that the defendant Lenzie Polemis did not endure the traumatic experiences as did the defendant as hereinbefore stated. Though he could not be characterised as the proverbial choir boy figure the defendant is not considered to be a menace or a danger to the society. On the

question of the availability or lack thereof of legal representation I have already opined aforesaid and in that regard say no more.

- [21] One significant difference between the Polemis decision and the case at bar is that this is a trial case while Polemis pleaded guilty to the lesser count of grievous harm.
- [22] This evidence in this case disclosed a vicious and unprovoked attack on the unarmed Virtual Complainant by the defendant. The lacerations to the Virtual Complainant extended from his head, chest, left forearm, back and the loss of his right eye.
- [23] I have considered the genuine remorse expressed by the defendant and the opinions in the Pre-Sentence Report as it relates to the positive prognosis for the defendant's rehabilitation. I have also considered the recommendations for probation but cannot escape the fact of the absence of a victim impact assessment which would have placed the court in a better position to balance and evaluate whether a non-custodial sentence would be appropriate in all the circumstances.
- [24] In the circumstances I am reminded of the dictum of Lawson LJ in R v Sergeant that society through the courts, must show its abhorrence of particular types of crimes, and the only way the courts can show this is by the sentences they pass. Thus I find it inevitable that the court must impose a custodial sentence not only to show its abhorrence of this type of offence with its resulting consequences but also to serve as a deterrent to those would be offenders who may seek to settle disputes in like manner.
- [25] The maximum prescribed sentence for this offence is 20 years imprisonment. I find that a benchmark of 15 years imprisonment to be appropriate in the circumstances. The court will deduct ... years for the defendant's remorse and ... for his hitherto clean criminal record. Accordingly the defendant is sentenced to a period of .. years imprisonment. He will receive the long term

psychotherapy treatment to address his behavioural and psychosocial functioning, as recommended in the Pre-Sentence Report. The defendant will also be credited with all time spent on remand awaiting sentence.

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FRANCIS M. CUMBERBATCH
HIGH COURT JUDGE