COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
MCCrApp. No. 18 of 2022

B E T W E E N

Dashernique Gibson

Appellant

Vs

The Commissioner of Police

Respondent

BEFORE:	**The Hon Sir Michael Barnett, President, Kt** **The Hon Mr. Justice Jones, JA** **The Hon Mr. Justice Evans, Ja**
APPEARANCES:	**Mr. Ryszard Humes, Counsel for Appellant**
	Ms. Linda Evans, Counsel for Respondent
DATES:	**22 November 2022; 7 December 2022; 19 January 2023**

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Criminal Appeal – Appeal against sentence – Causing grievous harm - Acid attack – Sentence unduly severe – No antecedents - Whether the sentence is unduly severe- Section 15 of Court of Appeal Act

On 15 July 2019, Cynclair Mackey, the virtual complainant ("VC"), was at KC Bar located on East Street South. The VC was approached by Dashernique Gibson ("the appellant"), who was holding a cup that contained acid in her hand. The appellant threw the acid on the VC, which resulted in the VC sustaining serious injuries. The VC was taken to Princess Margaret Hospital, where she was treated. On 17 July 2019 the VC identified the appellant in a rogue gallery as the person who attacked her. The appellant was arrested and charged with the offence of causing grievous harm.

On 1 February 2022, the appellant was convicted of the said offence and sentenced to 7 years imprisonment. On 2 February 2022, the appellant filed an appeal against the learned Magistrate's decision on the grounds that (i) the sentence was unduly severe and (ii) that the learned Magistrate took factors into consideration that ought not to have taken and failed to consider factors which he ought to have considered during sentencing.

Held: Appeal allowed. Sentence of 7 years is quashed and a sentence of 3 years is substituted.

The decision of the learned Magistrate was manifestly unreasonable, especially as he appears to have ignored the fact that this was the appellant's first offence. Additionally, the circumstances in which a maximum sentence is imposed are necessarily rare as those are reserved for the most serious incidents.

A sentence of 3 years would meet the circumstances of this case. The sentence of the learned Magistrate is varied to that of 3 years.

Andie Taylor v The Commissioner of Police MCCrApp. No. 25 of 2021 considered
Arthur Baxter v Queen JM 1999 CA 14 considered
Decarla Bullard v Commissioner of Police MCCrAPP Side No. 65 of 2018 considered
Minique Bowe-Wyles v COP MCCrApp No.2 of 2020 mentioned
Prince Hepburn v Regina SCCrApp No.79 of 2013 mentioned
R v Brown [2022] EWCA Crim 1153 considered
R v Collins (Arthur) [2018] EWCA Crim 2515 considered
The Attorney General vs. Claude Lawson Grey SCCrApp. No. 115 of 2018 considered

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J U D G M E N T

Judgment delivered by The Honourable Milton Evans, JA:

BACKGROUND

1. The appellant, who had no antecedents, was convicted on 1 February 2022 by the Magistrate sitting in Court No.5 of the offence of causing grievous harm and was, on the same day, sentenced to 7 years in prison which is the maximum penalty which could be imposed by the Magistrate.

2. The particulars of the charge were that the appellant, on Monday,15 July 2019, sometime after11:00pm, while at KC's Bar located East Street approached Cynclair Mackey, the virtual complainant ("VC") with a cup in her (the appellant's) hand and threw the contents of the cup on the VC resulting in injuries to the VC .

3. In arriving at his decision to impose a 7 year sentence, the learned Magistrate identified the aggravating factors as follows:

> **1. The actions were unprovoked. At the time there was no fight and no weapon used by the Virtual Complainant.**
>
> **2. Intentional act as the Defendant had premediated her actions by bringing the acid to the bar and using it on the Virtual Complainant.**

3. The act was planned.

4. The Defendant knew that the results would be severe.

4. No remorse.

4. The mitigating factors identified by the learned Magistrate were:

1. Young age

2. Can be rehabilitated.

5. The learned Magistrate concluded that the aggravating factors far outweighed the mitigating factors.

6. The appellant filed a Notice of Appeal on 2 February 2022, which was subsequently amended on 18 November 2022. The Notice, as amended, challenges the sentence imposed on two specific grounds: (1) That the Learned Magistrate's sentence was unduly severe and (2) that the Learned Magistrate took factors into consideration which he ought not to have taken and failed to consider factors which he ought to have considered during the sentencing. There is no challenge to the conviction.

THE LAW

7. In the case o**f Decarla Bullard v Commissioner of Police** MCCrApp. No. 65 of 2018, this Court (differently constituted) observed as follows:

> "**37**.**The manner in which the Court of Appeal approaches the review of sentences imposed in the court below is pretty well settled. In Caryn Moss v The Director of Public Prosecutions; The Director of Public Prosecution v Caryn Moss SCCrApp. & CAIS Nos. 230 & 238 of 2018 the Court (differently constituted) explained:**
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> > **"86… In approaching matters of this nature we are always mindful of the principle that an appellate court should be slow to interfere with the exercise of trial judge's discretion and should not interfere unless some error in principle has been disclosed. This principle is as old as the guidance given by Lord Hewart, LC in the case of *Gumb*s (1927) 19 Cr. App. R. 94 where he stated as follows:**
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> > > **"*Two principles from time to time have been mentioned in this Court, and in some cases they may have to be considered together.***

> ***One is that this Court never interferes with the discretion of the Court below merely on the ground that this Court might have passed somewhat different sentence: for this Court to revise sentence there must be some error in principle."***

8. In **Andie Taylor v The Commissioner of Police** MCCrApp. No. 25 of2021, I stated:

> **"13. We are fully aware of the principle that this Court never interferes with the discretion of the Court below merely on the ground that this Court might have passed a somewhat different sentence: for this Court to revise a sentence there must be some error in principle. This error in principle has been recognized as primarily a situation where the sentencing Judge takes into consideration matters which he ought not to or fails to give consideration to matters which were relevant to a proper exercise of his discretion. Obviously where the sentence is clearly wrong in law for example it is in excess of jurisdiction or where it is outside the bounds of established guidelines without justification this Court will interfere.."**

SUBMISSIONS, DISCUSSION AND CONCLUSIONS

9. I preface my comments by noting that the throwing of acid is a serious offence. **The UK Crown Prosecution Service** explains that:

> "acid and other corrosive substances (for example, bleach or ammonia) may be used as weapons to attack victims. Acid and corrosive substance attacks have a devastating effect on victims, and when thrown on to the victim's body - usually their face - cause the skin and flesh to melt, sometimes exposing and dissolving the bones below. The long-term consequences of acid or corrosive substance attacks may include blindness, permanent scarring of the face and body, and social and psychological difficulties"

10. Mr. Humes argues that the 7 year sentence was unduly severe as the learned Magistrate failed to give due consideration to the fact that the Appellant had no previous convictions. Further, that offences of this nature have never attracted a 7 year sentence. In these circumstances, he contends that the 7 year sentence is outside the range of sentences for matters of this type.

11. Counsel further submitts that the learned Magistrate erred in his consideration of what he termed aggravating circumstances. Firstly, he notes that the Magistrate observed that the Appellant could have killed the VC. Counsel contends there was no basis for this finding as the medical evidence revealed that although the injuries were serious, they were not life threatening and the Crown did not choose to charge the appellant with attempted murder.

12. Mr. Humes submits that the starting point for a sentence in matters of this nature should be an order for probation. In support of that submission he refers to the case of **Minique Bowe-Wyles v COP** MCCrApp. No.2 of 2020. He contends that in that case this Court (differently constituted) upheld a conviction and probation order for the offence of causing grievous harm. However, in my view, that case is not helpful as the sentence, in that matter, was the result of a plea agreement.

13. In the present case, Ms. Linda Evans, who appeared for the Crown, accepted that the sentence was too severe in the circumstances of the case. In her written submissions of 6 December 2022, she submitts that the matter should be remitted to the learned Magistrate for resentencing.

14. Section 14 of the Court of Appeal Act ("the Act") gives litigants before the Magistrate Courts the right to appeal to the Court of Appeal against decisions made by Magistrates. Section 15 of the Act then confers the following powers of this Court when dealing with those appeals:

> **"15. (1) The court, upon an appeal under section 14, may adjourn the hearing of the said appeal, and may upon the hearing thereof-**
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> > **(a) subject to subsection (2) of this section, allow the appeal on any of the grounds set out in subsection (1) of section 14;**
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> > **(b) dismiss the appeal;**
> >
> > **(c) vary or modify the decision of the magisterial court;**
> >
> > **(d) remit the matter with the opinion of the court thereon to the magisterial court; or**
> >
> > **(e) make such other order in the matter as it may think just, and may, by such order, exercise any power which the magisterial court might have exercised, and such order shall have the same effect and may be enforced in the same manner as if it had been made by the magisterial court.**

> **(2) The court may notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if the court considers that no miscarriage of justice has actually occurred." [Emphasis added]**

15. I am unable to see the utility in remitting this matter back to the Magistrate, nor do I see the prejudice which would befall either party if we were to exercise our powers under section 15 of the Court of Appeal Act. In these circumstances, as we have before us all the relevant information and have had the benefit of submissions, I am prepared to exercise the power conferred by section 15 of the Act.

16. As was noted earlier, the 7 years imposed by the learned Magistrate is the maximum sentence which he could lawfully impose for the offence of which the Appellant was convicted. The law establishs a maximum, but not a mandatory maximum as such the offence can be dealt with within a range. It is the duty of the sentencing Magistrate in each case to determine where in that extended range of sentencing possibilities to place the particular offender, bearing in mind the well established principles of sentencing, the circumstances of the offender and other relevant considerations. See. **Prince Hepburn v Regina** SCCrApp No.79 of 2013**.**

17. The decision of the learned Magistrate, in my view, was manifestly unreasonable, especially as he appears to have ignored the fact that this was the Appellant's first offence. Additionally, the circumstances in which a maximum sentence is imposed are necessarily rare as those are reserved for the most serious incidents. Further, the Magistrate suggested that the appellant showed "no remorse". It is not clear to me the basis for that statement as in the mitigation plea the appellant "apologized" for her actions.

18. Mr. Humes submitts that he was unable to find any local case where a magistrate had imprisoned a convicted person for a similar offence where a corrosive liquid was utilized. That may be the result of the lack of reporting of cases determined in the Magistrate's Court. However, what is clear is that there has been no established guidelines relative to these matters. It follows that the appropriate sentence will have to be culled from the particular circumstances of each case.

19. In the case of **The Attorney General vs. Claude Lawson Grey** SCCrApp. No. 115 of 2018, Sir. Michael Barnett observed that:-

> **"41. In considering whether a sentence is unduly lenient or unduly harsh, in my judgment, the Court of Appeal is entitled to look at previous sentences imposed by courts in The Bahamas as well as to sentences imposed by courts in other parts of the common law world. The principles of sentencing are common throughout the common law**

> **world and our western societies have more in common with each other than differences. We all face similar problems such as increased crimes, domestic violence, drugs and gang warfare.**
>
> **42. Whilst we need not "slavishly follow" decisions of other courts in other countries, we cannot be so provincial and insular that we cannot benefit from the experience and wisdom of other courts in sentencing policy."**

20. In **R v Brown** [2022] EWCA Crim 1153, an 18 year old after a guilty plea had been sentenced to 7 years for throwing a corrosive acid on a 16 year old during an argument, causing injury to his face and eyes. He was also in possession of a knife which he threatened the victim with. Finally, he sought to attack police officers with the knife who were effecting his arrest. The appellant had six previous convictions for nine offences spanning from 12 December 2018 to 20 January 2021. On appeal, the court varied his sentence observing as follows:

> **"18. In the present case, notwithstanding the apparent seriousness of the offending, the appellant was aged 17 at the time. The judge was required to have regard to the sentence the appellant would have received at that age. This must have been considered by the judge as it is highlighted in the prosecution note for sentence and the citations of R v Ghafoor [2002] EWCA Crim 1857. In our judgment, having assessed the adult sentence after a trial, the custodial term should have been discounted by one-third. Therefore, having balanced the other factors to reach 8 years, that should have been reduced by one-third and then by 25% to 4 years. The judge was right to make a finding of dangerousness and to assess that the public would best be protected by the making of an extended sentence. Indeed such a finding is not challenged; it was open to the judge to make such an order.**
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> **19. Therefore, we vary the sentences on count 1 to an extended sentence of 6 years, the custodial element to be 4 years' detention in a young offender institution and the extended licence to be 2 years. To that extent, this appeal against sentence is allowed." [Emphasis added]**

21. It is at once obvious that **Brown's** case involved more serious circumstances than the present case. However, the present matter, in my view, involves a serious offence and the

circumstances are troubling. I am unable to agree with Mr. Humes' submission that a fine or probation would be appropriate to meet the justice of this case. This was a premeditated crime committed in a cold and calculating way. This must necessarily be a significant aggravating factor.

22. Another case involving the use of Corrosive substance is **Arthur Baxter v Queen** JM 1999 CA 14. In this case, the Court of Appeal of Jamaica took the view that a sentence of 25 years in the particular circumstances was not excessive. The jury convicted the appellant of causing grievous bodily harm arising from an incident which occurred in September, 1988, when the appellant flashed a liquid onto the left side of the complainants face and shoulder. She fainted and later regained consciousness in the Casualty Department of the University Hospital. She was admitted and remained in the Burns Unit of the hospital for three months.

23. The doctor described the injury as chemical burns involving the left side of the complainant's face including her left eye. There were smaller patches of burns affecting the left upper chest and the left shoulder. He described the liquid as either sulphuric or caustic acid. The burns were third-degree burns which affected the full thickness of the skin. The chemical damaged the eyeball of the left eye. After undergoing many surgical procedures involving the eye and the eyelids the complainant lost sight in her left eye. The appellant appealed his sentence on the basis that the sentence of 25 years was manifestly excessive. In rejecting that argument the court said:

> **"Sentences must have some relationship to the seriousness of the offences, the circumstances under which they were committed, and of course the antecedents concerning the person to be sentenced. The offences committed in this case, and the manner in which they were committed in our view warranted the sentences imposed by the learned trial judge, and in these circumstances, we cannot say that they were manifestly excessive."**

24. In the case of **R v Collins (Arthur**) [2018] EWCA Crim 2515, the English Court of Appeal dealt with a similar issue. In that case the material sentences were passed in respect of five counts of causing grievous bodily harm with intent to cause grievous bodily harm, contrary to section 18 of the Offences Against the Person Act 1861. In respect of each of these counts the applicant was sentenced to extended sentences of 25 years' imprisonment concurrent, consisting of a custodial term of 20 years and an extended licence period of 5 years.

25. Collins had thrown a highly corrosive acid on several persons causing injuries**.** Lord Justice Simon writing for the Court which dismissed Collins' application for leave to appeal stated as follows:

> "**45. We accept that these were severe sentences but these were exceptionally serious offences and severe sentences were fully justified. <u>The judge was entitled to sentence on the basis that the applicant had entered the nightclub with highly concentrated acid in his possession which he had thrown three times in a crowded space at the victims' face</u>. Five victims were caused really serious bodily harm and nine further victims were caused actual bodily harm." [Emphasis added]**

26. It is accepted that both **Baxter** and **Collins** were tried on indictment, but the principle relative to the premeditated nature of the offence is apposite to this case. The Appellant herein carried the acid to the VC's place of work with the intent to use it on her and did use it to cause serious injury. This was not done in a heated fight, but was a calculated act. Courts must send a message that this type of behavior is unacceptable in this society. It is for this reason that a prison sentence is appropriate in this case. It is clear, however that the imposition of the maximum of seven years was not the appropriate response to meet the justice of this case.

27. In my view, a sentence of 3 years would meet the circumstances of this case and I would therefore vary the learned Magistrate's sentence to that of 3 years. The order of the Court, therefore, is that the sentence of 7 years is quashed and a sentence of three years, is substituted such sentence to run from the date of conviction.

The Honourable Mr. Justice Evans, JA

28. I agree.

The Honourable Sir Michael Barnett, P

29. I also agree.

The Honourable Mr. Justice Jones, JA