[2010–12 Gib LR 363]

BONNICI v. R.

COURT OF APPEAL (Kennedy, P., Parker and Tuckey, JJ.A.):
September 13th, 2012

Criminal Procedure—appeals—appeal against sentence—no right of appeal against minimum term recommendation or jurisdiction for court to hear appeal—recommendation merely to assist Parole Board

Sentencing—life sentence—recommended minimum term—(a) court to decide determinate sentence would have passed (after mitigation and discount for guilty plea) if public safety had not required indeterminate sentence; (b) court to consider provisions for early release on licence/parole (but not remission provisions) and to follow English approach, i.e. usually 50% deduction; (c) appropriate reduction for time spent in custody—recommendation is only to Parole Board, who should not release prisoner unless risk to public minimal

The appellant was charged in the Supreme Court with attempted murder and wounding with intent to do grievous bodily harm.

The appellant had been at St. Bernard's Hospital where his daughter was being treated. Upon being refused access to the treatment area by a nurse, he had become aggressive and violent. He had attacked two doctors, assaulting one and stabbing the other in the back with a lock knife that had been in his possession, causing serious injury. He then assaulted a security guard, before being tackled by a police officer as he fled the hospital. The appellant was charged with wounding with intent to do grievous bodily harm and released on bail. About a year later, whilst on bail, he violently attacked the then Minister of Justice, as the Minister walked in the street holding hands with his young children, and attempted to kill him by stabbing him with a large kitchen knife. The Minister was taken to hospital with massive intra-abdominal bleeding and had to have his spleen removed. Without surgery he would have died within hours.

The offences were joined on the indictment and the appellant was charged, *inter alia*, with wounding and attempted murder. Before trial, the appellant was examined by a consultant forensic psychiatrist, who reported that he was suffering from a serious mental disorder and paranoia, but that he was fit to plead. Upon confirmation of his fitness to plead, the appellant pleaded guilty to both offences a few days before the trial. The pleas were accepted and the other counts were left on the file.

At the trial, the Supreme Court (Dudley, C.J.) sentenced the appellant to

life imprisonment for both offences, to run concurrently. The court recommended that the minimum period that should elapse before the appellant was considered for release on licence should be 17 years and 55 days. The court's recommendation had been based on five factors. First, had life sentences not been imposed, the court considered that the proper determinate sentences would have been 25 years for the attempted murder and 12 years for the wounding. Secondly, the sentences would have been reduced by 10% to reflect the appellant's guilty pleas. Thirdly, in setting the minimum recommended term, a further deduction would be made of one-third, to reflect the sentence remission of the Prison Regulations 2011, of which reg. 38(1) allowed maximum remission of one-third of a sentence. Fourthly, time spent on remand would be deducted from the total. Fifthly, the sentences would not be treated as consecutive but would be decided with reference to the totality principle. The appellant challenged that recommendation and the factors on which it was based, but did not appeal against sentence.

The appellant submitted that the Supreme Court had erred in its recommendation because (a) the 25-year sentence for the attempted murder failed to take into account his mental illness; (b) the 10% discount for his guilty pleas had been too low and should have been 33%, to reflect that they had been made as soon as his fitness to plead had been confirmed; (c) the court should not have followed the provisions for remission of sentence in the Prison Regulations 2011, reg. 38(1), as what was relevant was the minimum term, which was set at one-third of the sentence by the Prison Act 2011, s.54(1)(a); and (d) the court should have made the sentences concurrent.

The Crown submitted in reply that (a) the aggravating circumstances of the offence justified the 25-year starting point; (b) the court had been entitled to set the recommended term by reference to the provisions for remission of sentence in the Prison Regulations 2011, reg. 38(1); and (c) the court had been entitled to have regard to totality.

Held, dismissing the appeal:

(1) The appeal would be dismissed, as there was no right of appeal against a recommendation of a minimum term. The recommendation formed no part of the sentence, but merely assisted the Parole Board in deciding whether, and when, to release the appellant on licence, and the court had no jurisdiction to hear the appeal (para. 2–3; para. 15).

(2) However, the court would give guidance on the factors to be considered by the court when making a minimum-term recommendation. A three-stage approach should be followed. First, the court should decide what determinate sentence, taking into account the mitigating factors and any guilty plea, it would have passed if public safety had not required a life sentence. Secondly, the court should take into account the possibility of early release and parole, by attempting to discern what would have happened if a determinate sentence had been passed. Remission provisions, such as the Prison Regulations 2011, reg. 38(1), were irrelevant to

this exercise, but the Prison Act 2011, s.54(1)(a)—permitting a prisoner serving a determinate sentence to be released on licence after one-third of his sentence—should be taken into account. Nevertheless, Gibraltar courts should follow English authority that the usual approach should be to make a 50% deduction from the sentence when recommending the minimum term. Thirdly, the court should make a further deduction for time spent in custody. The Parole Board should have regard to such a recommendation, but could only release a prisoner if the risk to the public was minimal (paras. 4–5).

(3) Further, had it had jurisdiction to hear the appeal, the court would have held, applying the three-stage approach, that (a) 25 years' imprisonment had been an appropriate starting point, taking into account the nature of the attack and the appellant's mental health; (b) the 10% discount for his guilty plea had been too low and should have been 33%, to reflect that it had been made as soon as his fitness to plead had been confirmed; (c) a 50% deduction should then have been made to reflect the possibility of his being released on licence, and the one-third deduction had been too low; and (d) although it had been right to consider totality, the offences were committed about a year apart and, if determinate sentences had been passed, they should have been made consecutive. The recommended minimum term should, therefore, have been 12 years and 4 months, less the time spent on remand (paras. 15–16).

Cases cited:

(1) *R.* v. *Aitken*, [1966] 1 W.L.R. 1076; [1966] 2 All E.R. 453 (Note), followed.

(2) *R.* v. *Bowden* (1983), 77 Cr. App. R. 66, followed.

(3) *R.* v. *Sullivan*, [2005] 1 Cr. App. R. 3; [2005] 1 Cr. App. R. (S.) 67; [2004] EWCA Crim 1762, followed.

(4) *R.* v. *Szczerba*, [2002] 2 Cr. App. R. (S.) 86; [2002] Crim. L.R. 429; [2002] EWCA Crim 440, followed.

(5) *R. (Foley)* v. *Parole Board*, [2012] EWHC 2184 (Admin), followed.

Legislation construed:

Criminal Offences Act 1960, s.59(2): The relevant terms of this subsection are set out at para. 2.

Prison Act 2011, s.54(1)(a): The relevant terms of this paragraph are set out at para. 4.

Prison Regulations 2011, reg. 38(1): The relevant terms of this paragraph are set out at para. 4.

J. Causer for the appellant;
R.R. Rhoda, Q.C., Attorney-General, for the Crown.

1 **KENNEDY, P.,** delivering the judgment of the court: On April 11th, 2012, in the Supreme Court of Gibraltar, the appellant pleaded guilty to

two counts in an indictment which contained seven counts. The pleas were accepted, and the remaining five counts were ordered to be left on the file, not to be proceeded with without leave of the Supreme Court or the Court of Appeal. The first count to which the appellant pleaded guilty alleged that on November 6th, 2009, in Gibraltar, the appellant wounded Dr. Mahmood Khan with intent to do him grievous bodily harm. For present purposes, I refer to that as Count 1. The second count to which the appellant pleaded guilty alleged that on November 2nd, 2010 (just under a year later, and whilst on bail in respect of Count 1) he attempted to murder Daniel Anthony Feetham, at that time Minister for Justice in Gibraltar. I refer to that as Count 2. On April 16th, 2012, the Chief Justice imposed a sentence of life imprisonment in respect of each count. That is not challenged in this appeal, but the Chief Justice went on to recommend that the minimum period which should elapse before the appellant is released on licence should be 19 years, less 675 days spent on remand, a total of 17 years and 55 days. It is that recommendation, and the process by which the Chief Justice arrived at it, that Mr. Causer, for the appellant, challenges in this appeal.

Right of appeal?

2 The first question which we have to consider is whether the appellant has any right to appeal against a recommendation. It is clear that in Gibraltar a judge who imposes a discretionary life sentence is not required by statute to make any recommendation of the kind made in this case. Even when the life sentence is mandatory, s.59(2) of the Criminal Offences Act 1960 says only that when imposing the sentence the court "*may* at the same time declare the period which it recommends to the Governor as the minimum period which in its view should elapse before the Governor orders the release of the offender on licence . . ." [Emphasis supplied.] Going back to the time when recommendations of this kind used to be made in England without any statutory framework, it is possible to find clear authority for the proposition that there is no right of appeal against such a recommendation (see *R.* v. *Aitken* (1) and *R.* v. *Bowden* (2)). In *Aitken*, Marshall, J. said that "any representation, if made, should be made to the Home Secretary," who was then the person responsible for deciding if the prisoner should be released. In *Bowden*, where the recommendation was made pursuant to permissive wording identical to s.59(2) of the Criminal Offences Act, Lord Lane, C.J. said (77 Cr. App. R. at 68) that—

> "the wording of that section makes it perfectly plain to our mind that the recommendation is something for the Secretary of State to consider, with all the other matters, when the time comes. To say that this part of the sentence is plainly wrong, and to go further and say, even if it is true, that a release before the expiration of the minimum

period is so rare that the recommendation amounts to a part of the sentence is an argument which we regard as untenable."

3 In England the position has changed so as to remove from the executive and transfer to the judiciary (assisted by the Parole Board) the power to decide when a life sentence prisoner shall be released. That has not happened in Gibraltar, but clearly it assists the Governor to know the views of the sentencing court, so we consider that when passing a discretionary or a mandatory sentence the trial judge should make a recommendation, and he or she should explain how he reaches the figure which he recommends. So, in our judgment, the Chief Justice was right to do what he did in this case.

Arriving at a recommendation

4 How then should a judge arrive at a recommendation? It seems to us that the sensible course is to follow the approach required in England to set the minimum term. That approach involves three stages:

(a) The court must decide what the appropriate determinate sentence would have been for the relevant offence or offences had the court not felt it necessary, in the interests of public safety, to pass a sentence of life imprisonment. Ascertaining the appropriate determinate sentence will take into account the gravity of the offences and any mitigating factors, such as mental illness or a plea of guilty.

(b) Having arrived at the appropriate determinate sentence, the court should than take account of early release provisions and provisions in relation to parole. In Gibraltar, by the Prison Regulations 2011, reg. 38(1), a prisoner serving a sentence of imprisonment of more than five days may—"on the ground of his industry and good conduct, be granted remission of not more than one third of the term of [his] sentence" and the Minister for Justice, acting on the advice of the Parole Board, may, by the Prison Act 2011, s.54(1)(a), release on licence—"a person serving a sentence of imprisonment or detention for a determinate period, after such person has served not less than one-third of his sentence, or six months, whichever expires the later." At this stage the sentencing judge is trying to indicate what would probably have happened if the defendant had been given a determinate sentence and it is not possible to be precise, but the usual approach in England is still to discount the determinate sentence by 50% (*R.* v. *Szczerba* (4); *R.* v. *Sullivan* (3); and *R. (Foley)* v. *Parole Board* (5). In *Sullivan* it was held ([2005] 1 Cr. App. R. 3, at para. 7) that—

"in order to compare a minimum term with a determinate sentence it is necessary approximately to double the determinate sentence. This is because in the case of a sentence of a final duration the offender is either released or eligible for parole at the half way stage."

In *Foley* (5), Treacy, J., giving the judgment of the court, said ([2012] EWHC 2184 (Admin), at para. 64): "In the case of an indeterminate sentence the punitive element is normally regarded as having been reached at the half way point of the sentence." In our judgment there is no reason not to adopt the same approach in Gibraltar.

(c) A further deduction should be made for time spent in custody on remand, awaiting trial.

5 That three-stage approach will enable the sentencing judge to arrive, by a structured route, at a figure which he can recommend as the time which should elapse before the Parole Board should even consider whether to advise the Minister to exercise his powers under s.54(1)(a) of the Prison Act. It is not, and is not intended to be, an indication of when the prisoner will be released. The Parole Board can only advise in favour of release if the risk to the life and limb of others is no more than minimal (see Schedule 1, para. 2 of the Prisons Act) and with a mentally ill prisoner that may never happen.

The facts of this case

6 Before looking at how the Chief Justice arrived at his recommendation in the present case, we need to say a little about the facts, but as they are well known and have received much publicity we can be quite brief.

7 On November 6th, 2009, the appellant, who is now 42, was at St. Bernard's Hospital with his daughter, whose hand needed to be seen by a paediatrician. The appellant tried to go into the treatment area of Accident & Emergency, and was refused access by a nurse. He ran at her and pushed her, so that she flew across the corridor, collided with a wall and fell to the floor. At this time, the appellant was shouting that he wanted Rodriguez and that he was going to kill him. Dr. Rodriguez had previously seen the appellant, and the appellant believed that the doctor had failed to diagnose a stroke. Dr. Nadeem and Dr. Khan then came into the area, and tried to calm the appellant. He knocked Dr. Nadeem to the floor and kicked at his head and face. Dr. Khan tried to restrain the appellant, but he was pushed into a treatment cubicle and knifed in the back. He held up a chair to defend himself from further attack. The appellant then emerged from the treatment cubicle brandishing a knife and demanding to know where Dr. Rodriguez was. Dr. Rodriguez was within earshot, but was told not to reveal himself. A security guard tried to intervene and was assaulted. The appellant then left, and was leaving the hospital when Police Insp. Field arrived and, with conspicuous bravery, tackled the appellant. There was a violent struggle, another police officer joined in, and eventually the appellant was subdued and handcuffed. A blood-stained lock knife was found in his trouser pocket. The attack on Dr. Khan was the offence of wounding with intent to do grievous bodily harm to which the

appellant pleaded guilty, and which I have referred to as Count 1. Dr. Khan's injuries were serious. Speedy medication saved his life, and he remained in hospital for 11 days, but that was not the end. He was found to be suffering from post-traumatic stress disorder, and to be scared and suspicious of people. In April 2012, he was still unable to work, and his whole life has been badly damaged.

8 After a time the appellant was granted bail, and, about a year later, at about 1.45 p.m. on Tuesday, November 2nd, 2012, Mr. Feetham, then Minister of Justice, was walking along a street in the centre of Gibraltar with a young child holding each of his hands, and other children with him. Suddenly the appellant stabbed Mr. Feetham from behind, using a large kitchen knife, and with such force that Mr. Feetham was thrown forward to the ground. He turned over onto his back and shouted for the children to run away. The appellant, who was still on the attack said repeatedly "you people don't stop messing with me and my daughters, and you don't leave me alone." He kicked Mr. Feetham in the leg and came at him again with the knife, stabbing him in the calf muscle, and trying to stab him in the chest or throat. Mr. Feetham managed to grab the blade of the knife, cutting his fingers, but the appellant persisted in trying to stab him. At one stage, the appellant bit Mr. Feetham on the forearm. Eventually Mr. Feetham managed to get full control of the knife and throw it out of reach, but the appellant did not give up. He head-butted Mr. Feetham, but eventually he was pulled away. As the appellant has admitted by his plea, he was attempting to kill Mr. Feetham, and he nearly succeeded. Mr. Feetham was taken straight to hospital. There was massive intra-abdominal bleeding, and his spleen was removed. Without surgery he would not have lived for more than 1–2 hours. The appellant was assessed by the Mental Welfare Officer and by a consultant psychiatrist. He was said to be fit for interview, but refused to be interviewed.

Medical exam

9 Before the trial, the appellant was examined by Dr. Kenney-Herbert, a consultant forensic psychiatrist, who made extensive enquiries and prepared a lengthy report which we have all read. Dr. Kenney-Herbert said that—"David Bonnici was able to understand the charges he faces and enter a plea to each charge, instruct counsel, challenge a juror and in my opinion follow evidence in court." Dr. Kenney-Herbert continued:

> "[I]t is within this context of undiagnosed mental illness, with marked delusional thinking and some characteristics of a paranoid personality disorder, that the two sets of serious alleged offences occurred . . . Both incidents appear to have been conducted with a high degree of rage, which in my opinion was fuelled by several

> years of untreated psychosis, which resulted in his becoming increasingly paranoid, frustrated, hostile and at high risk of acting aggressively. Although in my opinion both sets of offences were overwhelmingly fuelled by untreated psychosis, in my opinion it could not be said that by reason of mental disorder he was incapable of knowing the nature of the act or that it was wrong or contrary to the law . . . In terms of diagnosis, certainly the defendant has, and continues to suffer from, a serious mental disorder. As described in this report, this disorder has led to him suffering from psychosis. In my opinion the most likely diagnosis is of paranoid schizophrenia . . . In my opinion Mr. Bonnici would benefit from full and on-going psychiatric treatment for his mental illness."

Dr. Kenney-Herbert gave evidence before the Chief Justice in accordance with his report and was not examined.

The Chief Justice's approach

10 Having decided to pass life sentences on both Counts 1 and 2, the Chief Justice considered what the appropriate sentence would have been in respect of each count if the matter had gone to trial. In respect of Count 1, the attack on Dr. Khan, he said that the sentence would have been 12 years' imprisonment. For Count 2, the attempted murder of Mr. Feetham, he said that the sentence would have been 25 years. Both were clearly very grave offences and it is difficult to find any mitigating features, other than the appellant's mental illness, to which the Chief Justice said that he had regard.

11 For the pleas of guilty, the Chief Justice allowed a discount of 10%, because they were tendered only days before trial.

12 To arrive at the figure which he proposed to recommend as the minimum period to elapse before the appellant is released on licence, the Chief Justice then applied a deduction of a third to reflect the fact that in Gibraltar prisoners can only earn a remission of one-third of their sentence. The Chief Justice then considered whether the sentences should be served consecutively, but considered it inappropriate to recommend consecutive minimum terms, so he settled upon one overall minimum period of 19 years, before deducting the time on remand, namely 675 days, to produce a recommended minimum period of 17 years and 55 days.

The appellant's submissions

13 Mr. Causer, for the appellant, makes what are essentially four submissions:

(a) The 25-year starting point for the offence of murder was too long, and made insufficient allowance for mental illness.

(b) When making allowance for the pleas of guilty the Chief Justice should have allowed one-third and not only 10%, because those pleas were entered as soon as the appellant's lawyers had medical evidence showing that he was fit to plead.

(c) When allowing for early release provisions the Chief Justice was wrong to make a discount of only one-third. Mr. Causer submits that the discount should have been two-thirds.

(d) The Chief Justice should not have made the sentences "semi-consecutive."

The Crown's submissions

14 For the Crown, the Attorney General submits:

(a) that the 25-year starting point in respect of Count 2 was appropriate having regard to the gravity of the attempted murder, committed whilst on bail, and that the sentence range in the United Kingdom would have been between 27 and 35 years;

(b) that when making allowance for early release provisions the Chief Justice was entitled to do as he did, but in another court the allowance made was 50%; and

(c) that the judge was entitled to conflate the minimum term as he did, to have regard to totality.

The Attorney-General made no submission in response to Mr. Causer's submission as to the proper impact of the pleas of guilty.

Our comments

15 As we said at the outset, we have no jurisdiction to hear this appeal, but we can make certain observations which may be of some assistance when the recommendation of the Chief Justice is considered hereafter:

(a) Despite the appellant's mental health we see no reason to criticize the starting point of 25 years for the attack on Mr. Feetham, a public official walking with children, by a man carrying a knife who was already on bail. In our judgment, it falls within paras. 4 and 5 of Schedule 21 to the English Criminal Justice Act 2003.

(b) We agree with Mr. Causer that the appellant was entitled to a full one-third discount for his plea of guilty, entered as soon as his legal advisers had medical evidence showing that he was fit to plead.

(c) For the reasons already given, we consider that the starting point

when making allowance for early release provisions, including the possibility of parole, could properly have been 50%.

(d) The judge was right to consider totality, but these were serious offences committed a year apart. If determinate sentences had been passed they should have been made consecutive.

Conclusion

16 When full allowance is made for the pleas of guilty entered in respect of Counts 1 and 2 the sentences become 8 years, and 16 years and 8 months, respectively. If ordered to be served consecutively, that would result in 24 years and 8 months, before the reduction of 50% to allow for possible early release. That would bring the total down to 12 years and 4 months, from which the 675 days in custody would need to be deducted to arrive at the time we would have recommended should pass before the case should even be considered by the Parole Board. When, if ever, it may be safe for the appellant to be released, is not something we can decide.

Appeal dismissed.