BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Magisterial Appeal No. 6 of 2011

BETWEEN

DAMIEN OMAR CUMMINS **Appellant**

AND

COMMISSIONER OF POLICE **Respondent**

BEFORE: The Honourable Peter D.H. Williams, Chief Justice (Acting), the Honourable Sherman R. Moore, CHB and the Honourable Andrew D. Burgess, Justices of Appeal

2012: 26 January; 21 February; and 3 May

Mr. Michael Koeiman and Ms. Kristin Edwards for the appellant

Mr. Alliston Seale for the respondent

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DECISION

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PETER WILLIAMS CJ (Ag)

I. INTRODUCTION

[1] On 21 November 2011, Damien Omar Cummins pleaded guilty to four offences and was sentenced by Mr. Graveney Bannister, Magistrate for District "A", as follows: (i) unlawfully and maliciously wounding Police Constable 1705 Kirvin Roach contrary to ***section 17*** of the ***Offences Against the Person Act, Cap. 141***, sentenced to nine months' imprisonment; (ii) assaulting P.C. Roach with intent to prevent the lawful apprehension of himself contrary to ***section 27(a)*** of the said ***Act***, sentenced to three months' imprisonment to run concurrently; (iii) resisting P.C. Roach in the execution of his duty contrary to ***section 62(a)*** of the ***Police Act, Cap. 167***, sentenced to three months' imprisonment to run concurrently; and (iv) without lawful excuse damaging one shirt belonging to the Crown contrary to ***section 3*** of the ***Criminal Damage Act, Cap. 113B***, ordered to pay $40 for damage to the police shirt or to spend four days in prison to run concurrently. The appellant appealed on the ground that the sentences imposed were excessive. He was granted bail in his own recognizance of $500 with one surety in the like sum.

II. PRELIMINARY POINT

[2] On 26 January 2012, Mr. Koeiman raised as a preliminary point the fact that the Magistrate had not obtained a pre-sentence report and submitted that in the circumstances, pursuant to ***section 37(4)*** of the ***Penal System Reform Act, Cap. 139***, this Court must obtain and consider such a report. The ***subsection*** states that:

> "A custodial sentence which is passed in a case to which subsection (1) applies is not invalidated by the failure of a court to comply that subsection but any court on an appeal against a sentence
>
> *(a)* shall obtain a pre-sentence report if none was obtained by the court; and
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> *(b)* shall consider any such report obtained by it or by that court."

Subsection (1) provides that a court shall obtain and consider a pre-sentence report before forming an opinion that the offence was so serious that only a custodial sentence can be justified for the offence or where the offence is a violent or sexual offence only a custodial sentence would be adequate to protect the public from serious harm from the offender.

[3] A pre-sentence report is defined in ***section 37(5)*** as a report in writing which is made by a probation officer with a view to assisting the court in determining the most suitable method of dealing with an offender. ***Section 34(3)*** also provides that a court shall obtain a pre-sentence report before forming an opinion as to the suitability for the offender of a community service order or a combination order. A pre-sentence report will generally be helpful in determining the most appropriate sentence in cases other than those in which a custodial sentence is being considered.

[4] ***Section 37*** was considered by the ***Caribbean Court of Justice (CCJ)*** in ***R. v. Gittens (2010) 75 WIR 126*** at ***[17]***. The comment of the ***CCJ*** on the ***section*** was to the effect that this Court should obtain and consider a pre-sentence report before imposing a custodial sentence "unless the Court of Appeal was of the opinion that such a report was 'in the circumstances of the case' unnecessary". It follows that it is in this Court's discretion whether to impose or confirm a sentence without first obtaining a pre-sentence report. It must also be left to the good sense of the Magistrate to decide whether a pre-sentence report is required based on the facts and circumstances of the particular case.

[5] Mr. Seale, who appeared for the respondent at the ***CCJ*** in the ***Gittens*** case, agreed that the hearing should be adjourned to obtain a pre-sentence report and the Court so ordered.

III. THE MAGISTRATE'S COURT PROCEEDINGS

[6] The transcript of the Magistrate's Court proceedings does not disclose that the prosecution sergeant gave an outline of the facts of the offences following the guilty pleas. Instead, the complainant P.C. Roach gave evidence. His evidence was that on 20 November 2011 as a result of a report made by Ms. Olivia Sealy of Westbury, St. Michael, he went to the appellant's residence. He approached the house with Sergeant 501 Ewin Norville. He told the appellant of the report made by Ms. Sealy, the mother of the appellant's child. He told the appellant that he was arresting him on suspicion of committing the offences against Sealy of assault and bodily harm, trespassing and criminal damage. He cautioned him and the appellant replied, "I ain't do she nothing she is a liar". He arrested the appellant and as he held his hand the appellant cuffed him to the left side of his head. He felt pain in that area immediately. He held on to the appellant who tried to escape via the bedroom door. He and the appellant fell as he struggled to apprehend him. During the struggle he received a bite to his left arm and two punctures, one to his forehead and the other under his right eye.

[7] He called for assistance as Sergeant Norville was blocked off from entering the house by other family members. Sergeant Norville called for further assistance but the appellant escaped from his grasp and fled. P.C. Roach's police shirt was torn in several places. He attended hospital, was treated and discharged. He also received follow up treatment at Dr. Murray's office. With regard to the bites, the court saw the swelling under the Constable's eye where he was bitten. P.C. Roach was not cross-examined nor was his evidence challenged.

[8] The appellant was represented in the Magistrate's Court by Mr. Ma'at. The court recorded counsel's mitigation as follows:

> "Mr. Cummins is 36 years old [he was 27] employed at Bico. No time wasted judicial plea of guilty to some offences and has pleaded guilty to matter involving Police. My client has offered an apology in open court. Mr. Ma'at for non-custodial sentence because he is a father. Justice must be tempered with mercy. Mr. Damien Cummins say he is very sorry to injury to the Police *(sic)*. I was a little hot headed."

The Magistrate noted at the back of the wounding charge sheet what the appellant seems to have told him, namely, "I got a little aggressive and we had a scuffle for a few minutes".

[9] We quote in full the reasons which the Magistrate gave for his decision:

> "Guilty Plea considered, Penal Reform Legislation. Assaults such as biting a Police must be deterred. The public must allow Police to exercise their lawful authority without assaults and exposure to this kind of behaviour. A sentence must be proportionate to the crime committed, and must reflect disdain for the climate of attacks on Police whilst acting in the execution of their duties. An immediate custodial sentence is necessary in this case. Biting Police. Count #1 9 months' imprisonment. Resisting Police 3 months' imprisonment, violent struggle. Damage to Police shirt $40 or 4 days' imprisonment, times to run concurrent.
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> This sentence is to deter the accused and others from committing offences such as these. The sentence for each of the above counts to which a plea of guilty was entered has been considered separately."

IV. THE PRE-SENTENCE REPORT

[10] On 15 February 2012, Mr. Owen Birch completed the Probation Officer's Pre-Sentence Report. The appellant is 27 years old (born 1984-11-13) and has been in regular employment since leaving school. He has been employed as a porter (logistics clerk, according to the charge sheets) at BICO Limited for nine years. His supervisor at BICO stated that he was "an industrious, versatile and reliable worker who could be called upon at a moment's notice to work in any section of the company". Mr. Birch concluded his Report as follows:

> "Damien Cummins was raised in a crowded household under impoverished conditions for a period of his life. His parents tried their best to provide for him and his siblings with the assistance of the Welfare Department until they reached a stage of stability.
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> At age eighteen the subject started to associate with negative characters in his community who abused marijuana and this continued until age twenty-four. Damien's apparent change of behaviour and his acceptance of his parental role appear to suggest a level of maturity in his decision making.

School officials commented on Damien's aggressive attitude despite commending him for his football prowess, but this aggression appears to have continued throughout his life resulting in his coming into conflict with his former spouse and ultimately the law.

Mr. Cummins accepts responsibility for his actions and acknowledges that he has an anger management problem that needs to be addressed. To his credit the subject has been gainfully employed for the past nine years and has been described as hardworking and reliable despite his afore-mentioned shortcomings.

The subject has expressed remorse and asks for leniency when sentencing."

[11] In his oral evidence Mr. Birch explained the facilities which would be available to the appellant in the event that the Court was considering a non-custodial sentence. He stated that in relation to anger management the Probation Department had two facilities available to it, the Psychiatric Hospital and the Centre for Counselling Addiction Support Alternative (CASA). He stated that the appellant could be placed on probation for a probationary period under special conditions and ordered, subject to his consent, to attend an anger management facility.

V. THE APPEAL

[12] The ground of appeal was that the sentences imposed were excessive. We granted leave to appeal pursuant to ***section 3(3)(c)*** of the ***Criminal Appeal Act, Cap. 113A*** as the matter warranted a hearing and consideration of the proper sentence in the circumstances of the case. There are three issues that we have to decide: first, did the facts and circumstances of the offences and the offender reach the threshold for a custodial sentence; second, if they did, was the sentence excessive; and third, if they did not, what was the appropriate sentence.

[13] A person convicted summarily of wounding under ***section 17*** or of assault with intent under ***section 27*** of the ***Offences Against the Person Act*** is liable by ***section 44(b)*** to imprisonment for a term of two years or to a fine of $2,500 or to both. A person convicted summarily of resisting the police under ***section 62*** of the ***Police Act*** is liable by the said ***section 62*** to a fine of $1,000 or to imprisonment for 12 months. A person convicted summarily of damaging property under ***section 3*** of the ***Criminal Damage Act*** is liable by ***section 9(3)*** to imprisonment for 2 years or to a fine of $2,000 or to both.

[14] Mr. Koeiman submitted (as did counsel below) that a non-custodial sentence would be the most appropriate way of dealing with the appellant. He also stressed the "rehabilitative function" of the ***Penal System Reform Act***. He conceded that the offences for which the appellant was convicted were not "trivial or trifling in nature". He informed the Court that the appellant had no previous convictions. He relied on the favourable pre-sentence report. He also relied on the fact that the appellant was in steady employment and that the appellant was highly regarded by his employer. In the circumstances, he stated that the Court "should be loath to unnecessarily derail the course on which the appellant appears to be travelling".

[15] Counsel referred to the appellant's apology to P.C. Roach in open court and to his remorse. Counsel was of the view that the Magistrate was handicapped by not having a pre-sentence report. He submitted that a non-custodial sentence would provide a platform for rehabilitation; that a probation order which entailed supervision and a requirement to attend anger management treatment would meet the justice of the case without disrupting the appellant's employment of nine years. He concluded that for a summary offence a probation order of reasonable duration rather than a custodial sentence ought to be imposed.

[16] Mr. Seale submitted that the Magistrate was correct to impose a sentence of imprisonment. He stated that the long-standing employment of the appellant did not provide a bar to a custodial sentence otherwise unemployed criminals would be treated materially differently from those employed. He continued that if the appellant wished to maintain his employment it was important for him in the circumstances not to have engaged in criminal conduct. Counsel found particularly aggravating the fact that the conduct of the appellant in relation to which the police had been called by the mother of the appellant's child was similar to the conduct perpetrated by the appellant against the police. He emphasised that the courts must show that assaults on police officers will not be trivialised or tolerated.

VI. DISCUSSION

[17] The first matter to consider is offence seriousness. Wounding a police officer is a serious offence. Where police officers have been called to do their duty and keep the peace, the fact that they have been the victims of an attack is a very substantial aggravating factor. Offenders therefore who use physical violence against the police should generally expect a custodial sentence.

[18] In view of the fact that we have been unable to find in this jurisdiction any reported cases of assaults on policemen, we refer to the English Sentencing Guidelines Council's new guideline for assault offences, "Assault Definitive Guideline", published on 16 March 2011. The circumstances of the offence in this case fall into the category of lesser harm and lower culpability. However, a factor increasing the seriousness of the offence and an aggravating factor is created when the offence is committed against a person working in the public sector or providing a service to the public.

[19] In ***R. v. Joseph [2009] EWCA Crim 1406***, the English Court of Appeal reduced sentences of 6 months each imposed in respect of two offences of assaulting a police officer to sentences of 5 months. The officer was "head-butted" by the appellant who pleaded guilty. In ***R. v. Taylor [2009] EWCA Crim 1085***, the appellant injured the police officer's thumb which required him to be off work for 6 weeks. The English Court of Appeal reduced the sentence of 20 months' imprisonment for assaulting the police officer to a sentence of 15 months.

[20] ***R. v. Moore (1993) 14 Cr.App.R.(S.) 273*** and ***R. v. Casey [2000] 1 Cr.App.R.(S.) 221*** were more serious cases that attracted longer custodial sentences. In ***Moore's*** case police officers were kicked and punched as a result of which they suffered minor injuries. The English Court of Appeal dismissed an appeal against a sentence of two years' imprisonment. In ***Casey's*** case a police officer was punched in the face and head. The English Court of Appeal allowed the appeal against the sentence of three years' imprisonment and substituted a sentence of two years and three months. It would seem that in most of the cases a custodial sentence was appropriate.

[21] However, some of the cases resulted in a non-custodial sentence. In ***R. v. Poulton [2006] EWCA Crim 2153***, the appellant was a man of previous good character, with a good job in the IT department of a leading bank and a stable home. He spent the Saturday night prior to his grandfather's funeral drinking to excess. His brother got into a fight, which two police officers attempted to resolve. The appellant in a misguided attempt to protect his brother approached a female police constable and struck her on her head causing her to fall and sustain bruises. He also assaulted the other police officer. The pre-sentence report confirmed the appellant's remorse and recommended a community order. The report also stated that the appellant would lose his job (which he did) if he lost his liberty. The appellant was given an overall sentence of 8 months' imprisonment for two offences of

assault.

[22] The English Court of Appeal did not accept the submissions of counsel for the appellant "that this was a case which did not pass the threshold for an immediate custodial sentence" because "anybody who assaults a police officer struggling to do his or her duty and causes injury, even if not serious or long-lasting injury, must expect the court to consider an immediate custodial sentence". However, the court took "a merciful course" in view of the fact that the appellant "spent several weeks in prison", "the assaults were very short lived; they involved no weapon and they were a misguided attempt by the appellant to protect his brother from people he did not realise were police officers". In the circumstances, the court quashed the sentences of imprisonment and substituted for them a community order with the requirements to perform unpaid work and to be subject to a curfew. The appellant offered to make "reparation to the officers" and compensation orders were made in the total sum of £500.

[23] In the instant case, the Magistrate took into account the appellant's guilty plea and the ***Penal System Reform Act***, which requires restraint in imposing a custodial sentence unless the offence is so serious as to warrant such a sentence. He was of the view that the sentence should reinforce respect for lawful authority and disdain for attacks on the police. The sentence should also deter the appellant and others from similar offences.

[24] The appellant had no previous convictions. Obviously, he had no conviction card and the Magistrate would have taken that fact into account but there was no statement of the weight given to that fact. He was in steady employment since leaving school and was employed with the same employer for the past nine years. The transcript of the proceedings does not disclose these facts. There was also before the court no information as to the personal circumstances of the appellant. Unlike the Magistrate this Court had the advantage of a pre-sentence report, evidence from Mr. Birch and a full mitigation from Mr. Koeiman.

[25] We are of the view that it is the duty of counsel in mitigation to bring to the attention of the judicial officer all the material facts and circumstances that will enable the judicial officer to make an informed decision as to the appropriate sentence to impose. Where the convicted person is unrepresented, it will be necessary for the judicial officer to make such enquiry of the offender's background and attitude to the offence as to be able to determine the facilities which might be suitable for the offender, given his or her characteristics and needs.

[26] We have therefore reviewed the sentences especially in the light of the information before us. The courts will recognise mitigating factors of assaults against persons in authority, such as "immediate and genuine remorse, a plea of guilty, previous good character and the personal circumstances of the offender, particularly those relevant to his state of mind at the time": ***R. v. McNally [2000] 1 Cr.App.R.(S.) 535***. A timely guilty plea is now not only a mitigating factor but really a separate factor that on its own warrants a significant discount on sentence: see ***R. v. Richard Leon Hurley, DPP's Reference No. 2 of 2010, unreported decision, 8 July 2011*** at ***paragraphs [91]*** and ***[92]***. The court must also observe the guideline that rehabilitation is one of the aims of sentencing: ***section 41(2)1*** of the ***Penal System Reform Act***. Taking these factors into consideration, we have formed the opinion that the Court should not impose a custodial sentence.

[27] The more difficult issue to determine is an appropriate sentence to substitute in place of the custodial sentence. It must be remembered that the ***Penal System Reform Act*** which commenced on 15 May 2000 was passed as stated in its preamble "to enlarge the powers of criminal courts to pass in proper cases sentences other than sentences of imprisonment". The courts should where appropriate be guided by the pre-sentence report and the expert evidence of the probation officer. Mr. Birch has explained the facilities that would be available to the appellant in the event that the Court considered that a non-custodial sentence would be just and reasonable in the circumstances. From his evidence it seems clear that the appellant would benefit more from a long period of rehabilitation in his present home and work environment than from a much shorter period of such treatment in custody. The hope is that the appellant would become a rehabilitated person.

VII. DISPOSAL

[28] We consider a non-custodial sentence appropriate in the special circumstances of the case based on the information disclosed to this Court on the offences and the offender. However, we wish to state emphatically that offences involving physical violence against police officers, public officials who work in institutions, such as doctors and nurses and other persons in authority, will be viewed very seriously by the courts and will generally attract a custodial sentence. It is important for the courts to deter as best they can, attacks on police officers as well as interference with them in the execution of their duties. The importance of respect for law in an orderly society must be maintained.

[29] The Court thinks that in this case different sentences should be passed. The Court is of the view that it should make a compensation order against the appellant in favour of P.C. Roach. The compensation that a magistrate can award in the circumstances of this case is provided for in the ***Magistrate's Courts Act, Cap. 116A***. ***Section 72*** gives the magistrate power to award such compensation as the magistrate may seem just and reasonable. The section also provides that the magistrate shall not award compensation unless the complainant consents. By ***section 73*** the magistrate may on conviction make a compensation order for personal injury, loss or damage resulting from the offences in such amount as the magistrate considers appropriate having regard to any evidence and representations made. In determining whether to make a compensation order and the amount to be paid the magistrate shall have regard to the means of the offender. We have therefore taken into account the personal injury and the means of the appellant to the extent that he is in steady employment. ***Section 74*** restricts the compensation payable under a compensation order to an amount not exceeding $5,000.

[30] The Court is also of the view that having regard to the circumstances it should make a probation order as provided for in ***section 3*** of the ***Probation of Offenders Act, Cap. 146***. We are satisfied that in accordance with ***section 33(1)*** of the ***Penal System Reform Act*** the offences are serious enough to warrant a probation order. A probation order is an individualized community order and is particularly suited to the facts of this case in that the appellant admits that he has an anger management problem and probation would afford him the opportunity to obtain professional help under supervision. Moreover, a probation order would facilitate rehabilitation of the appellant.

[31] A further consideration is that ***section 3*** of the ***Criminal Records (Rehabilitation of Offenders) Act, Cap. 127A*** provides for a non-custodial sentence to be spent or expunged from the records after a rehabilitation period of 5 years provided that the appellant has not been convicted of any other offence during the period. The appellant after the said period can apply to be treated for all purposes as a person who has not been convicted of the offences.

[32] In compliance with ***section 3*** of the ***Probation of Offenders Act*** the Court is required to and has explained to the appellant the effect of the order and that if he fails in any way to comply with the order or commits another offence he is liable to be sentenced for the original offence. The Court has obtained the appellant's expression of willingness to comply with the provisions of the order.

[33] The sentences of imprisonment are therefore quashed. In respect of the four offences, the Court substitutes the sentences imposed by the Magistrate as follows:

(i) **unlawfully and maliciously wounding:** the appellant is ordered to pay compensation to P.C. Kirvin Roach in the sum of $2,500 to be paid on or before 31 August 2012 or be imprisoned for nine (9) months;

(ii) **assaulting with intent:** the appellant is placed on probation for a period of two (2) years from the date of this decision and is required during that period to submit to the supervision of the probation officer, to attend an anger management facility and undergo such treatment as the probation officer considers necessary for securing his good conduct and preventing a repetition of the offences or the commission of other offences. If there is a breach of the probation order the appellant is to pay $1,000 forthwith or be imprisoned for six (6) months;

(iii) **resisting in the execution of duty:** the appellant is convicted, reprimanded and discharged;

(iv) **damaging one shirt:** the appellant is to pay compensation to the Crown in the sum of $40 forthwith or be imprisoned for seven (7) days.

Chief Justice (Acting)

Justice of Appeal

Justice of Appeal