

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**COURT OF APPEAL**

**Criminal Appeal No. 19 of 2013**

**BETWEEN:**

**SHEKELIA JOHNSON**

**Appellant**

**AND**

**THE QUEEN**

**Respondent**

**Before: The Hon. Sir Marston C.D. Gibson, KA Chief Justice, The Hon. Kaye C. Goodridge, Justice of Appeal and The Hon. William J. Chandler, Justice of Appeal (Acting)**

**2019: June 18**

**2020: February 5, June 25**

**2021: November 10**

**Mr. Kendrid Sargeant for the Appellant**

**Ms. Krystal Delaney in association with Ms. Olivia Davis for the Respondent**

**DECISION**

**GOODRIDGE JA:**

**INTRODUCTION**

[1] This appeal arises out of an incident which occurred on 31 July 2009 between two neighbours in the rural part of Barbados. That incident led to the appellant being arraigned on 11 September 2013, on an indictment containing two counts: (i) causing serious bodily harm to Kim Newsam, contrary to **section**

**16 of the Offences Against the Person Act, Cap. 141, (Cap. 141), and (ii) inflicting serious bodily harm on the said Kim Newsam, contrary to section 17 of Cap. 141.**

- [2] The appellant pleaded not guilty to both counts. At the end of the trial on 17 September 2013, the jury found her not guilty of the first count, and guilty of the second.
- [3] On 15 November 2013, the judge sentenced the appellant to 3 years' imprisonment, suspended for 3 years. The judge also ordered the appellant to pay Ms. Newsam compensation in the amount of \$8,010.00 within 48 months, failing which she would be liable to return to court to be dealt with in accordance with the law. No penalty was stipulated if the appellant failed to pay the compensation within the specified time or at all.

## **THE FACTS**

- [4] The facts can be stated shortly. On the night in question, just as Ms. Newsam had returned home from work, the appellant launched an unprovoked verbal attack/assault on her and threatened to beat her if she came back outside of her home.
- [5] Later that evening Ms. Newsam ventured outside in order to retrieve articles from her vehicle. The appellant jumped from a wall on which she was sitting and kicked and cuffed Ms. Newsam, causing her to fall to the ground. The

appellant then dragged Ms. Newsam by her hair into the middle of the road and continued to assault her until persons intervened and stopped the attack.

[6] As a result of the fall, Ms. Newsam suffered broken bones in her right leg, as well as injuries to her right knee. She was admitted to hospital where she spent 15 days during which time she had to undergo surgery to her leg. She received physical therapy for 6 months.

[7] Ms. Newsam incurred expenses and lost wages as a result of the injuries which she suffered. She now has arthritis in her knee, will need pins in her leg for the remainder of her life and has been left with a long and disfiguring scar on her leg.

## **THE APPEAL**

[8] By notice of appeal filed on 3 December 2013, the appellant challenged her conviction and sentence on the following grounds:

- “1. The verdict was unsafe and unsatisfactory.
2. The sentence was excessive in all the circumstances of the case in relation to the compensation order.”

[9] The appeal was not pursued with any vigour by the appellant’s then counsel which resulted in the delay in the hearing of the appeal. Subsequent to that counsel’s death, Mr. Kendrid Sargeant, attorney-at-law, took over the conduct of the matter.

- [10] In the written submissions filed on 2 October 2019 by Mr. Kendrid Sargeant, counsel indicated that the appeal against conviction would be abandoned. This was confirmed by Mr. Sargeant during the hearing of the appeal.
- [11] On 12 November 2019, after hearing the submissions of counsel, this Court allowed the appeal against the compensation order. Our reasons for so doing are set out later in this decision.
- [12] However, the Court determined that it should give consideration as to whether this was an appropriate case for the exercise of its power under **section 16D (4)** of the **Penal System Reform Amendment Act, No. 2010-10 (Act No. 2010-10)**. To assist the Court in this regard, we ordered (1) the appellant to file an affidavit of means on or before 26 November 2019 and (2) an updated pre-sentence report. The matter was adjourned until 5 February 2020.
- [13] The affidavit was not filed by the appellant until 4 February 2020. The Court could not proceed with the matter on the adjourned date and a new date was set.
- [14] It must be acknowledged that the onset of the COVID-19 pandemic and the subsequent proclamation of a public health emergency in Barbados resulted in delay in the continued hearing of this appeal during that period when certain restrictions were imposed on the public's movements in an effort to contain the spread of the virus.

[15] On 25 June 2020, this Court resumed the hearing of this matter.

## **ISSUE NO. 1 WAS THE COMPENSATION ORDER EXCESSIVE**

### **The Submissions of Counsel**

[16] Mr. Sargeant submitted that the compensation order imposed by the judge was excessive for the following reasons. Counsel argued that **section 16B (1)** of **Act No. 2010-10** requires a court when determining whether to make a compensation order to make an inquiry into the means of the offender.

[17] He contended that the judge was aware from the pre-sentence report that the appellant was unemployed and received financial support from her father and maintenance from her daughter's father. Notwithstanding that fact, the judge proceeded to make the compensation order without making sufficient inquiry of the appellant as to her ability to pay compensation.

[18] Mr. Sargeant submitted further that a court should not make a compensation order if the defendant does not have the financial means to pay the compensation. In support of his submissions he cited **R v Jai Normanton [2003] EWCA Crim. 959, Archbold Criminal Practice and Procedure 2010 edition, para 5 - 4223 p 810, R v Mortimer [1977] Crim. LR 624.**

[19] Counsel's final submission was that where some procedural requirement has not been complied with by the judge, the sentence should be quashed. He relied upon **R v Marquis [1974] 59 Cr. App. R. 228.**

[20] In response, Ms. Krystal Delaney, counsel for the respondent, submitted that the judge applied correct principles when she imposed the order on the appellant. Although acknowledging that the judge did not speak to the appellant about her means, counsel argued that the judge made it clear that she had the information needed and that there was nothing to be gained by asking the appellant further questions about her means.

[21] In this regard, Ms. Delaney submitted that the judge had the benefit of the following:

- (i) a pre-sentence report as required by the **Act No. 2010-10** which stated that the appellant was unemployed but had sent out applications in search of employment;
- (ii) the evidence of Dr. Chayne Williams as to the extent and treatment of the appellant's injuries; and
- (iii) Ms. Newsam's evidence as to her undergoing physical therapy, the expenses incurred and the wages lost because of the injury.

[22] Counsel pointed out that the judge was aware at the time of sentencing that any civil claim which could have been brought by Ms. Newsam against the appellant was already statute barred.

[23] Ms. Delaney argued that the compensation order was appropriate for the following reasons:

- (i) the attack was unprovoked and sustained;
- (ii) the complainant suffered serious, disfiguring injuries;
- (iii) the complainant had to undergo surgery and several months of physiotherapy for her injuries;
- (iv) as a result of the injuries, she has developed arthritis;

- (v) she has suffered pain and suffering and financial losses for which she had not been compensated.

[24] Counsel also submitted that the appellant was a first time offender and the mother of a young child at the time of sentencing. Therefore, the compensation order was the most appropriate sentence to do justice to the parties, having regard to all circumstances of the case.

[25] Alternatively, Ms. Delaney submitted that if the Court was minded to quash the compensation order, it should consider imposing a custodial sentence on the appellant or exercising its powers under **section 16A (4) of Act No. 2010-10** and make a compensation order.

## **DISCUSSION**

[26] The appellant was convicted of causing serious bodily harm, an offence which is punishable by up to 10 years' imprisonment by virtue of **section 44 of Cap. 141**.

[27] Where a person has been convicted of an offence punishable by imprisonment, in addition to the sentence fixed by law, a sentencing court is empowered by **section 16A (2) of Act No. 2010-10** to make a compensation order requiring the offender to pay compensation for any personal injury, loss or damage resulting from the offence.

[28] According to **section 16A (4) of Act No. 2010-10**, a compensation order shall be of "such amount as the court considers just and reasonable in the

circumstances having regard to any evidence before it and any representations made by or on behalf of the offender or by the prosecutor.”

[29] In exercising the power under **section 16A (2)**, the sentencing court must comply with **section 16B (1)** which provides:

“(1) In determining whether to make a compensation order and the amount to be paid in respect of the order, the court shall have regard to the means of the offender as far as his means can be ascertained or are made known to the court.”

[30] As can be seen from the above, **Act No. 2010-10** imposes the following obligations on a sentencing court which is considering whether to make a compensation order:

- (i) first, the court must ensure that it has detailed information about the precise injuries suffered by the complainant; and
- (ii) second, the court must satisfy itself that the defendant has the means available or will have the means available to pay the compensation within a reasonable time.

[31] It must be noted that the provisions of **Act No. 2010-10** are similar to sections 130 to 134 of the Power of Criminal Courts (Sentencing) Act, 2000 of England.

[32] We consider it useful to look at the English perspective on the rationale for compensation orders. This is reflected in the dictum of Scarman LJ in **R v Inwood, 60 Cr. App. R 70, CA**, where he stated at p73:

“Compensation orders were not introduced into our law to enable the convicted to buy themselves out of the penalties for crime. Compensation orders were introduced into our law as a convenient and rapid means of avoiding the expense of resort to civil litigation when the criminal clearly has means which would enable the compensation to be paid. One has to bear

in mind that there is always the possibility of a victim taking civil proceedings, if he be so advised. Compensation orders should certainly not be used when there is any doubt as to the liability to compensate, nor should they be used when there is real doubt as to whether the convicted man can find the compensation.”

[33] Similarly, in **Barney (1991) 11 Cr. App R (S) 448**, the English Court of Appeal stated:

“It must never be thought that the convicted man can buy his way out of imprisonment or any part of it. The significance of an offer to pay compensation is that it may be treated as some token of remorse on the defendant’s behalf as well as redressing the private loss of the victim. To that extent and no further it sounds in the sentencing exercise. But it must be clearly recognized that compensation orders are otherwise wholly independent of that exercise.”

[34] It must also be noted that any compensation which is ordered should be payable within a reasonable time, generally not over a period exceeding 2 years. Further, if there is no realistic possibility of the compensation order being complied with, for example where the defendant is serving a custodial sentence, then such an order should not be made **Webb (1979) 1 Cr. App R (S) 16**.

[35] In our opinion, a similar philosophy underpins the introduction of compensation orders into the panoply of sentencing options available to judges in this jurisdiction. By this means, a victim of crime who has suffered personal injury, loss or damage may recover compensation without having to resort to civil proceedings. Such a course is particularly appropriate and properly reflective of personal responsibility since it is the offender who is

being required to pay compensation to the victim, rather than the state having to do so through a compensation scheme.

[36] In the present case, the judge had before her detailed information as to the injury and loss suffered by Ms. Newsam. Thus, the first requirement was satisfied. However, the question which we must ask ourselves is whether it was established on the evidence that the appellant had the financial means to pay compensation in light of the material before the court.

[37] According to the record, when the matter resumed on 15 November 2013, counsel for the appellant, the late Dr. Waldo Ramsay QC, invited the judge to consider **sections 16A (4) and 16B (1) of Act No. 2010-10**. The following exchange then occurred between Dr. Waldo Ramsay QC and the judge:

“DR. RAMSAY QC: But those provisions, as I was trying to say indicate that the Court --- if the Court is minded to deal with a compensation order, it has to look at the evidence adduced before the Court or found by the Court itself, pertaining to the financial circumstances of the evidence (sic) offender.

THE COURT: Yes, the Court is well aware of the sections.

DR. RAMSAY QC: Very well, madam. And the Court will bear those things in mind, or shall bear those things in mind in sentencing. Thank you very much, madam.

THE COURT: You wish to inform the Court what you think the financial circumstances of your client are?

DR. RAMSAY QC: Yes, madam. I can either do it myself or have her give evidence from there, if you think that is appropriate.

THE COURT: Pardon?

DR. RAMSAY QC: I can either indicate by virtue of my instructions or have her give evidence from the-----

THE COURT: I don't need her to give evidence. The Probation Officer has told the Court what her situation is regarding employment or lack of employment, what her views are with respect to certain jobs that she may have had. So the Court has a fair idea and knows that she is unemployed.

DR. RAMSAY QC: Very well then, madam.

THE COURT: All right, which is perhaps what, if you put her on the witness stand, she would say the same thing. She is unemployed. We know that.

DR. RAMSAY QC: Yes, indeed, madam.

THE COURT: We also know certain things about how she lives. She lives with her grandmother, in the comfort of her grandmother's home. She also--- will in my remarks mention what I have found from what I know, what has been told to the Court. So the Court is well aware of its obligations under the Penal System Reform Act. The Court has no intention of being unfair to your client, but your client has committed, and in the view of the jury, an offence for which this Court is obligated to determine how to deal with her, having regard to the law, having regard to everything set out in the sections of the law that you have just highlighted to the Court. So the Court is going to deliver its sentence. I am grateful to you for reminding me of my obligations of which I was already aware, and I am about to deliver my sentence.

DR. RAMSAY QC: Very well, madam.

THE COURT: Thank you. Is there anything further you wish to say, madam?

CONVICTED WOMAN: No, ma'am.

THE COURT: Thank you.”

- [38] However, despite the judge’s assertion that she was aware of her obligations under the Act and that the appellant was unemployed, the judge nevertheless proceeded to make a compensation order against the appellant without further investigation by way of examining the appellant.
- [39] In our opinion, it was the responsibility of the judge to satisfy herself that the appellant had the means available to pay the compensation within a reasonable time. The appellant was unemployed and there is nothing in the record to indicate that there was evidence before the judge which showed that the appellant had the financial wherewithal to satisfy the order.
- [40] Having regard to the above, we are of the view that the judge failed to carry out an adequate inquiry into the financial means of the appellant prior to determining that the compensation order should be made. According to **R v Phillip, 10 Cr. App. R (S) 419**, where there has not been sufficient inquiry into an offender’s means, a compensation order may be set aside.
- [41] We considered that the legal basis on which the compensation order ought to be made was lacking, and in the circumstances and it is for this reason that this Court allowed the appeal and set aside that order.

**ISSUE NO. 2 SHOULD THIS COURT MAKE A COMPENSATION ORDER**

[42] Having reached the above conclusion, this Court then considered whether it should exercise the power given to it by **section 16D (3)** and make a compensation order. That section provides:

“(3) When hearing an appeal the Court of Appeal may by order confirm, vary, annul or set aside a compensation order and, where appropriate, make a compensation order if the Court of Appeal considers it just and reasonable to do so in the circumstances.”

[43] Consequently, we ordered a pre-sentence report and directed the appellant to file an affidavit setting out her means and any other financial or relevant information which could be of assistance to the Court and which would satisfy **section 16 (B) (1) of Act 2010-10**.

**The Affidavit of the Appellant**

[44] In the affidavit filed on 4 February 2020, the appellant deposed that she is the mother of a daughter who is 12 years old and that the child’s father provides for her. The appellant stated that her father who is a retiree occasionally gives her \$100 from his pension to buy food. She indicated that she does not have a steady income nor does she have a bank account.

[45] She also deposed she has been seeking permanent employment but has not been successful to date. However, she provided no details in this regard. She further stated that over the years she has had a number of jobs which were for short periods.

[46] The appellant deposed that in early January 2020, she secured a part time job at a private residence for a period of 6 weeks and expected to earn between \$1,195.20 to \$1,792.80. No further information was made available to the Court as to whether there had been any change in her circumstances since February.

### **The Pre-Sentence Report**

[47] This report traced the appellant's childhood, educational and employment background. It indicated that the appellant has a number of Ordinary Level certificates. The probation officer stated that the appellant is not permanently employed but has had various short term jobs. An interview conducted with one of the appellant's former employers revealed that she was commended for her work ethic, punctuality and good grooming.

[48] The report continued that, despite the incident, the appellant's grandmother reported that Ms. Newsam remains respectful towards her and even assists her when she can. Also, Ms. Newsam indicated that she still experiences pain occasionally and uses pain killers for the same. She stated that she harbours no malice against the appellant and does not wish the appellant to receive a custodial sentence as it would not be of benefit to the appellant's daughter. Ms. Newsam revealed that she hoped that the decision on the issue of compensation would reflect what is fair and just.

[49] The officer noted that the appellant expressed regret that the incident escalated the way that it did but no mention was made of remorse with respect to the injuries suffered by Ms. Newsam.

## **DISCUSSION**

[50] The complainant, Ms. Newsam, was the subject of an unwarranted physical attack by the appellant which caused her serious injury and has left her with intermittent pain. The time within which the appellant was originally ordered to pay compensation was 4 years. We have taken into account the information provided in the pre-sentence report and in the appellant's affidavit. It is clear to this Court that, while the appellant has not secured permanent employment, she is adept at obtaining short term placements as evidenced by the material before us. This convinces us that she is able to pay compensation in spite of the paucity of her present means. In the premises, we are of the view that the appellant ought to be given a reasonable time within which to pay the said compensation. We have determined that 1 year is reasonable.

[51] Given the pain and suffering which the complainant endured and will continue to endure in the future, the attitude displayed by the appellant towards the complainant as outlined in the pre-sentence report, and when regard is had to all the circumstances, we are led to the conclusion that this is an appropriate case for the exercise of this Court's discretion in ordering the payment of

compensation. We have weighed all the factors including the appellant's means and capacity to earn and have determined that a compensation order in the amount of \$3,000.00 would be just and reasonable.

## **DISPOSAL**

[52] It is therefore ordered as follows:

1. The appeal against conviction is dismissed.
2. The appeal against the imposition of the compensation order of 13 November 2013 is allowed and the order is set aside.
3. The appellant shall pay compensation to the complainant in the amount of \$3,000.00 on or before 29 November 2022.

Chief Justice

Justice of Appeal

Justice of Appeal (Acting)