IN THE SUPREME COURT OF BELIZE

INFERIOR COURT APPEAL FROM MAGISTRATE'S COURT OF THE BELIZE JUDICIAL DISTRICT COURT

INFERIOR COURT APPEAL NO. 55 OF 2011

BETWEEN:

GLENSTON BERMUDEZ	**Appellant**
AND	
GONZALO CORREA D.C. #1085	**Respondent**

March 9 & 16, 2012.

BEFORE: Chief Justice Kenneth Benjamin.

Appearances: Mr. Hubert Elrington SC for the Appellant.
Mr. C. Rodriguez, Crown Counsel, for the Respondent.

JUDGMENT

[1] On April 29, 2011, the Appellant, Glenston Bermudez, pleaded guilty to two charges of threat of death contrary to section 238 of the Criminal Code, Cap. 101, and one charge of common assault contrary to section 44 of the Criminal Code, before the Magistrate sitting in the Belize Judicial District in Belize City. The Appellant was sentenced to six months' imprisonment on each charge.

[2] The charge was laid on April 29, 2011 on information and complaint of the Respondent. The particulars of the offence of threat of death were that the Appellant on the 28th day of April 2011 at Belize city in the Belize Judicial District, threatened Desiree Garcia and Aloma Arana by saying "TONIGHT YOU BETTER EAT GOOD

AND SLEEP GOOD BECAUSE I WILL END YOUR LIFE" with intent to put Desiree Garcia and Aloma Arana in fear of death.

[3] Upon arraignment, the Appellant, who was not represented, pleaded guilty to the three (3) charges and the pleas were accepted by the Magistrate. Having heard the facts stated by the Prosecutor, the Magistrate imposed a sentence of six months' imprisonment in respect of each charge.

[4] The Appellant has now appealed seeking the quashing of the decision of the Magistrate on the following grounds:

1. Some specific illegality in that the Appellant was wrongly advised to plea guilty and was told that the punishment was only a fine.

2. The sentence was unduly severe.

[5] At the hearing, learned Counsel for the Appellant eventually conceded that the first ground was not maintainable and consequently it was not pursued. The appellant ran afoul of the provisions of section 107 having pleaded guilty and confessed or admitted the truth of the accusations embodied in the charges; it was thus not open to him to embark on an attack on the conviction.

[6] The arguments were addressed to the second ground which complained of the sentences being unduly severe. The Appellant contended that a fine or lesser punishment ought to be substituted.

[7] In her reasons for decision, the learned Magistrate stated as follows:

> "… because of the circumstances and nature of the offences I am of the opinion that an imposition of a fine would be inappropriate, and a custodial sentence should be imposed.
>
> I take into consideration the fact that the defendant pleaded guilty and believe that one penalty should be imposed for the crimes under

> sections 238 and 44 of the Criminal Code, I therefore impose a sentence of six months' imprisonment for each to run concurrently."

The charges were dealt with summarily as provided for by the Criminal Code.

[8] Section 44 of the Criminal Code provides:

> "Every person who unlawfully commits a common assault upon any other person shall be guilty of a misdemeanour."

Section 238 of the said Criminal Code provides:

> "Every person who threatens any person with death with intent to put that person in fear of death or grievous harm is guilty of a misdemeanour."

The penalty for these offences of common assault and threat of death are listed in the Second Schedule of the Summary Jurisdiction (Offences) Act, Cap. 98 as being punishable as summary jurisdiction offences without the consent of the person charged. Accordingly, section 50(4) of the said Act renders a person convicted liable to a fine not exceeding three thousand ($3,000.00) dollars or to imprisonment for a term not exceeding twelve months.

[9] On behalf of the Appellant, attention was drawn to the record in which he stated in mitigation that he had a young daughter and that he is a Belize Defence Force soldier for 19 years. These matters were urged as indicative of the Appellant being gainfully employed and having the responsibility of a young child. Further, it was said that the Appellant took no steps to carry the threats into effect thus rendering the offences not in the category of aggravated cases. On that basis, it was submitted that the imposition of a custodial sentence was unduly harsh. The Court was invited to exercise its discretion and substitute a sentence of a fine or a bind over the Appellant to keep the peace.

[10] Learned Crown Counsel opens his arguments by inviting the Court to consider whether the Magistrate had exercised her discretion wrongfully. The Court was invited to engage in a balancing exercise taking into account the mitigating factors as against the aggravating factors after making a discount to allow for the plea of guilty.

[11] As mitigating factors, in addition to such as identified by the Magistrate, learned Crown Counsel added the Appellant's lack of antecedents and the fact that no weapon was involved. The aggravating factors were gleaned from the circumstances of the offences themselves and in this regard, it was highlighted that the Appellant attended at the place of work of the Complainants, who recently served as jurors in the capital trial of the Appellant's brother.

[12] The Court was referred to the case of **The Queen v Albert Garbutt, Jnr. – Criminal Appeal No. 15 of 2009**, an appeal by the Director of Public Prosecutions against a sentence imposed for the offence of dangerous harm. In giving reasons for substituting a custodial sentence for a fine imposed by the trial judge, Morrison, JA cited with approval the dictum of Carey, JA in **Director of Public Prosecutions v Slusher - Criminal Appeal No. 35 of 2004**. His Lordship stated:

> "In imposing sentence, a court is entitled, indeed obliged in performing a balancing exercise, to balance the seriousness of the crime with any mitigating factors which can properly be put in the scale. If, of course, the accused pleads guilty to the charge, that is a matter of some weight to be urged in favour of the accused.

In the case of **Garbutt**, the Court described as highly relevant considerations to be taken into account as mitigating factors the following matters gleaned from the judgment of Lord Bingham, CJ in **R v Howells [1998] Crim. L.R. 836**:

> "(i) an offender's admission of responsibility for the offence, especially where reflected in an early plea of guilty and accompanied by hard evidence of genuine remorse (e.g., an expression of regret to the victim and an offer of compensation);

(ii) where offending was fuelled by addiction to drink or drugs, a genuine self-motivated determination to address the addiction, demonstrated by taking practical steps to that end;

(iii) youth and immaturity;

(iv) previous good character;

(v) family responsibilities;

(vi) physical or mental disability;

(vii) the fact that the offender had never before served a custodial sentence."

In that case, the following passage by Lord Bingham, CJ in **Howells** (at p. 838) was also referred to by Morrison, JA:

> "In approaching cases which were on or near the custody threshold, courts would usually find it helpful to begin by considering the nature and extent of the defendant's criminal intention and the nature and extent of any injury or damage caused to the victim. Other things being equal, an offence which was deliberate and premeditated would usually be more serious than one which was spontaneous and serious than one which was spontaneous and unpremeditated or which involved an excessive response to provocation; an offence which inflicted personal injury or mental trauma, particularly if permanent,, would usually be more serious than one which inflicted financial loss only."

The foregoing matters were identified as factors to be borne in mind by a sentencing Court when deciding whether or not to impose a custodial sentence.

[13] The legislature has classified the offences of assault and threat to kill as misdemeanours amenable to summary conviction and in its wisdom has provided an alternative of a fine or imprisonment with upper limits. This range of punishment is to enable the sentencing Magistrate to exercise his or her discretion as to the level of punishment. It is the object of sentencing that the punishment should fit the crime

committed. It is for this reason that sentencing is approached as a balancing exercise where the mitigating factors peculiar to the offender are weighed against the aggravating features of the offence and the offender; this approach assists in informing the sentencer as to whether the threshold for a custodial sentence has been reached and if so what length of sentence would satisfy the justice of the particular case.

[14] In the present case, the mitigating and aggravating factors were identified in the course of argument. It is also fair to say that the Magistrate did not explicitly refer to all such factors in her reasons. A general reference to the circumstances and nature of the offences was made as the basis for the imposing of a custodial sentence in preference to a fine. I pause here to say that it is good practice, for the information of the offender, the public and, of course, for an appellate Court, that reasons for sentence be set out in such detail as to explain a decision to imprison a convicted person or to impose some other form of punishment. It is recognised that, in the more serious cases, the decision to incarcerate an offender may be more readily apparent, in which situation the focus would then be on justifying the length of sentence.

[15] As I see it, the facts underlying the offences for which the Appellant pleaded guilty elevate the punishment attracted above the usual level in such matters. By this, I am referring to the fact that the complainants were targeted for their service as jurors and were specifically approached at their place of employment. It can be surmised for obvious reasons, that the Appellant took note of the identity of the jurors sitting on his brother's case and he was deliberate in ascertaining where they worked. This calculated act goes towards the undermining of the system of justice which, for the large part, depends in respect of the more serious matters, upon ordinary citizens serving as jurors.

[16] The classical principles of sentencing were identified by Lawton, LJ in the case of **The Queen v James Henry Sargeant (1974) 60 Cr. App. R. 74** at p. 77 as retribution, deterrence, prevention and rehabilitation. His Lordship stated:

> "Any judge who comes to sentence ought always to have those four classical principles in mind and apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing."

It is with the element of deterrence that the Court is concerned in this case. Deterrence both of the Appellant as well as of potential offenders. The former is self-explanatory and the latter goes to the preservation of the integrity of the criminal justice process. Jurors must enjoy the comfort of knowing that they can perform their important civic duty without fear of threat or any more serious form of intimidation. It is for this reason, I am ad idem with the learned Magistrate that the offences ought to attract penalties of terms of imprisonment.

[17] Having pleaded guilty, the Appellant would be entitled to a discount of sentence, usually treated as one-third as a rule of thumb in the absence of a compelling reason to justify the withholding of the discount. The seriousness of the offences attended by the potential effect on the jury system operates as an aggravating factor sufficient to tip the scale counter to the mitigating factors. The cases are thereby moved across the threshold into the realm of a custodial sentence.

[18] The Appellant is of previous unblemished record. He has a daughter for whom I am prepared to accept that he supports and maintains. His military service is commendable although it is disappointing that he failed to display the discipline which the Belize Defence Force imparts and represents in its role and mission.

[19] The punishment meted out must fit the crimes involved. In my considered view, the imprisonment duration need not be lengthy but more in the nature of a "short, sharp knock." Therefore, I hold that the sentences ought to be reduced.

[20] In the premises, the appeal is allowed. It is ordered that the sentence be reduced to three months in respect of each offence, with the sentences to take immediate effect and to run concurrently with each other.

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KENNETH A. BENJAMIN
Chief Justice