Judgment 7/2011 **Joe Willis de Garis and Daniel Steven Kaines - Court of Appeal (Criminal Appeals 415 and 416) - 16th March 2011**

Assault, perverting the course of justice and grievous bodily harm – application for leave to appeal against sentence – where the evidence was fairly strong, a discount of 25% for a guilty plea would not be interfered with – sentences in respect of separate victims but at the same time and part of the same incident should have been concurrent and not consecutive – the two consecutive sentences each of two years replaced by concurrent sentences each of four years – totality principle – aggregate sentence on de Garis reduced from 8 years to 7 years.

IN THE COURT OF APPEAL OF GUERNSEY

The 16th day of March, 2011 before Sir John Nutting Bt QC, presiding, James Walker McNeill QC and Michael Cameron St John Birt, Bailiff of Jersey

DANIEL STEVEN KAINES

Appellant

-v-

THE LAW OFFICERS OF THE CROWN

Respondents

In the matter of the application for leave to appeal by the Appellant from the sentences of five years and six months' imprisonment, imposed on him by the Royal Court on 3rd February 2011.

THE COURT, having, on 15th March 2011, heard Advocate Christopher Green for the Appellant and Crown Advocate Fiona Russell, thereon, GAVE JUDGMENT this day in the terms attached hereto and:-

1. GRANTED LEAVE to appeal;

2. ALLOWED the appeal to the extent that the sentences were varied by substituting concurrent sentences of four years' imprisonment for the consecutive sentences of two years on each of the two counts in the First Indictment; and

3. MADE NO CHANGES to the sentence on the Second Indictment.

such that the total sentence remained one of five and a half years' imprisonment; and

4. GRANTED the application for legal aid.

K H TOUGH
Registrar of the Court of Appeal

IN THE COURT OF APPEAL OF GUERNSEY

The 16th day of March, 2011 before Sir John Nutting Bt QC, presiding, James Walker McNeill QC and Michael Cameron St John Birt, Bailiff of Jersey

JOE WILLIS DE GARIS

Appellant

-v-

THE LAW OFFICERS OF THE CROWN

Respondents

In the matter of the application for leave to appeal by the Appellant from the sentences of eight years' imprisonment, imposed on him by the Royal Court on 3rd February 2011.

THE COURT, having, on 15th March 2011, heard Advocate Rachel Eeles for the Appellant and Crown Advocate Fiona Russell, thereon, GAVE JUDGMENT this day in the terms attached hereto and:-

5. GRANTED LEAVE to appeal;
6. ALLOWED the appeal to the extent that the sentences were varied by
    (i) Substituting concurrent sentences of four years' imprisonment for the consecutive sentences of two years on each of the two counts in the First Indictment; and
    (ii) Substituting a sentence of three years' imprisonment, to run consecutively, for that of four years on the count in the Third Indictment,

    such that the total sentence was reduced from eight years' imprisonment to seven years; and
7. GRANTED the application for legal aid.

K H TOUGH
Registrar of the Court of Appeal

Approved Judgment 16.03.2011

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

CRIMINAL DIVISION – APPEAL NO 415 & 416

16th March, 2011

Before: **Sir John Nutting Bt QC**

James Walker McNeill QC

Mr Michael Cameron St John Birt

Between: **Joe Willis De Garis** **(First Applicant)**

Daniel Stephen Kaines **(Second Applicant)**

v

Law Officers of the Crown **(Respondent)**

Advocate R B Eeles appeared for the First Applicant

Advocate C J Green appeared for the Second Applicant

Crown Advocate F Russell appeared for the Crown

Authorities referred to:

This is the Judgment of the Court

BIRT, JA

1. On 21st January 2011 Joe De Garis (aged 24) and Daniel Kaines (aged 22) appeared before the Royal Court (Judge Finch and Jurats) for sentencing. On the first indictment they were both charged with two counts of assault, one on Martin Hallett and one on Roger Hatwell; on the second indictment Kaines was charged with doing an act tending to pervert the course of justice; and on the third indictment De Garis was charged with inflicting grievous bodily harm on another. De Garis was also in breach of a suspended sentence of 10 months imprisonment imposed for offences of possessing a bladed article and resisting the police.

2. The Royal Court imposed a total sentence of 8 years imprisonment on De Garis and 5½ years on Kaines. Both applicants now seek leave to appeal against their sentences.

Factual Background

3. The first indictment involves a combined beating by the two applicants of two older men. The offences occurred on 5th June 2010 in Room 305 St Martins Residential Hotel, which was occupied by Stephen Honey, the father of Kaines. On the day in question Hatwell and Hallett had been drinking with Honey in his room. At about 9pm Kaines, De Garis and Kaines' girlfriend joined them and started drinking as well. It appears that Honey was either asleep or passed out and therefore did not witness what occurred.

4. According to Hallett, he started to nod off intermittently while sitting in a chair. He was awoken by a blow from Kaines to his head near his left eye. It was a hard blow. It seems that what caused this attack was that Hatwell had at some point commented to Hallett about the age of Kaines' girlfriend. De Garis intervened and pulled Hallett out of his chair. De Garis then struck Hallett more blows to his head causing his eye to swell saying "This is for calling me a wanker". Hallett believes that Hatwell was being attacked at the same time. He thought he heard the term 'paedophile' being used. De Garis then straddled Hatwell, punched him at least four more times and also head-butted him a number of times. He could hear Hatwell saying "Don't hit me" but could not see much due to the swelling of his left eye. At that point Hallett thinks he either passed out or fell asleep. After a while Hallett woke and De Garis apologised to him but Hallett then fell asleep again. The next thing he was aware of was that Hatwell was in a chair next to him and both applicants were calling Hatwell a paedophile and making further threats of assault against him. They then did assault him by striking him on the face. Both victims were told "You say anything and we'll get you" and were then further punched. Eventually the applicants left but De Garis struck a further blow to the left side of Hallett's face as he did so.

5. Hatwell has angina and has previously suffered a heart attack. Due to his heart and chest conditions he has to take a number of tablets and gets short of breath. He recalls commenting on the age of Kaines' girlfriend. Sometime later, he said, Kaines walked up to Hallett, head-butted him and then punched him at least twice with a clenched fist. De Garis told Kaines to "leave it out" to which Kaines replied "Do you want some as well?". De Garis then called Hatwell a paedophile and grabbed him by the throat. Hatwell was able to grab De Garis' throat in return but this caused De Garis to squeeze even harder so that Hatwell started to feel weak and was forced to the floor. He was then punched five or six times by De Garis who, according to Hatwell, had completely lost control. While being punched by De Garis he could feel a further blow to his head which he believes was a kick from Kaines. A short time later both applicants tried to pick Hatwell up and shouted at him "Get up you fucking paedophile". Kaines then punched Hatwell in the face with a clenched fist. Both applicants then started punching him again to the face about five or six times. He fell to the floor where he was further attacked by both men and received numerous blows to the head and body. Blood was coming from his nose and ears. Hatwell gave Kaines some money and a mobile phone and Kaines told him "Tell the police and I'll kill you and your family. I might get four years for you but when I get out I'll be looking for you". Hatwell asked for some water as he could taste blood in his mouth. Kaines got some water but then poured it over Hatwell's head saying "You wanted water, you have it". De Garis subsequently passed Hatwell some water. Hatwell received further blows to the head from Kaines but not long after that both applicants and Kaines' girlfriend left the room.

6. Both victims were seen in hospital the next morning. We have seen the photographs which show the very considerable extent of the swelling and bruising to the faces of both men. Hallett had severe facial swelling and bruising and his left eye was closed as a result. He was also bleeding from the left ear. A CT scan was arranged in view of the extent of the facial injuries and the bleeding from the ear but no internal problems were shown. However the scan did show large blood clots under the skin. Hallett re-attended on 8th June at which time he was not able to see out of his left eye due to the swelling.

7. When examined, Hatwell had two black eyes, small cuts to the head and bridge of the nose and back of the left ear together with severe facial swelling. He could not open his left eye unaided and there was marked conjunctival oedema when the eye was opened. A CT scan was undertaken which came back normal. Fortunately there are no permanent injuries in either case.

8. Both applicants were arrested on 9th June but answered no comment to all questions put at interview. As Kaines was known to both victims, no identification procedures were carried out in respect of him. In respect of De Garis, the police carried out a Promat identification process during which Hatwell initially picked out De Garis but then qualified his identification by saying he was only 75% certain; Hallett picked out De Garis without qualification.

9. The second indictment involves a charge against Kaines of doing an act tending to pervert the course of justice. Both applicants had been remanded in custody following their being charged with the offences of assault on Hallett and Hatwell. Recordings of telephone calls showed that Kaines had made a number of telephone calls to his father Mr Honey asking him to make contact with Hatwell and Hallett and get them both to withdraw their statements of complaint. The first call was on 15th June when he said to his father that the complainants needed to sort things out and not turn up in court. The next day there was a further call in which Kaines repeated his request to his father to track down the witnesses saying that they needed to get up to the Police station by Friday and that they would be left alone if they dropped all charges. On the 17th June he said to his father in a further telephone call

"Basically they need to get their statements out … by the end of the day … otherwise we're fucked and, if this goes to court it's going to be all over the fucking front page that they are paedophiles … right at the end of the day, at the end of the day Dad I am not being funny but if you don't sort it out then I'm sending fucking mates round to go and fucking speak to the, … 'cos I know where they live … alright so do us a favour and do them a favour". Kaines was arrested in relation to these matters on 13th September and declined to make any comment at interview.

10. The third indictment involves an assault by De Garis on a fellow prisoner on 17th September 2010 whilst on remand. In the court below the prisoner was referred to as X and we shall do the same. It appears that De Garis thought that X had taken something from De Garis' cell and, before lunch, said to X "You'd better not tell any of the screws, I'll fucking cut you" and warned X "You'd better hope I've calmed down by two o'clock". After lunch De Garis and another prisoner Barrisson called X to Barrisson's cell. De Garis challenged him to fight but X refused. De Garis then punched X to the face with a clenched fist which caused him to fall to the bed. De Garis then grabbed X and threw him to the floor, kicked him once in the chest and punched him to the face. De Garis punched him a number of times until he was eventually pushed out of the cell. He was spitting blood out of his mouth and his nose was bleeding as well as his right cheek. On examination he was found to have sustained a fracture of the cheekbone and of the floor of the orbit together with extensive bruising around the upper and lower eyelid, a haemorrhage to the right eye and double vision. He required surgery for the injury to his cheekbone but again fortunately there are unlikely to be any permanent ill effects. When interviewed De Garis denied assaulting X.

11. Kaines pleaded guilty to all the offences at the committal hearing on 24th November and De Garis entered guilty pleas at the first plea and directions hearing on the 2nd December. Both applicants have bad records including previous offences of assault, affray and other public order offences.

12. In mitigation before the Royal Court, Advocate Eeles, on behalf of De Garis emphasised his very troubled background. She explained that at some stage during the evening De Garis had recognised Hatwell as a male who had been involved in sexually abusing De Garis when he was a youngster and that was why he had assaulted Hatwell. She emphasised that there was no premeditation and there was an element of provocation by reason of Hatwell's previous conduct in respect of De Garis. She argued that De Garis was entitled to a full one third discount for his early guilty plea given the various inconsistencies between the two victims and the lack of independent evidence. As to the assault on X, she said that it was provoked by X's stealing from De Garis and that it was a short, albeit violent incident. She urged that the sentences for the two assaults on the first indictment were part and parcel of the same course of conduct and the sentences should be concurrent.

13. On behalf of Kaines, Advocate Green also emphasised the value of the guilty plea in relation to the assaults on the first indictment and the fact that, in relation to the charge of doing an act tending to pervert the course of justice, the victims were never actually threatened because Mr Honey had never passed on the threats made by Kaines. Thus the victims were not put in fear or worry. He also argued for concurrent sentences in relation to the assaults on the first indictment.

14. In passing sentence the Royal Court indicated that it regarded the injuries sustained by the victims on the first indictment as just falling short of grievous bodily harm and the offence on the third indictment as being towards the top end of grievous bodily harm. The Court considered all the various reports which had been prepared but they were troubled at the risk

of re-offending of both applicants. The Court concluded that it would give a discount of 25% for the guilty pleas and imposed sentences as follows: on the first indictment 2 years' imprisonment for each assault consecutive i.e. 4 years for each defendant. On the second indictment Kaines was sentenced to 18 months' imprisonment consecutive and on the third indictment De Garis was sentenced to 4 years' imprisonment consecutive. The suspended sentence in respect of De Garis was activated but in view of the totality principle, the Court ordered that it should run concurrently. Thus there was a total sentence of 8 years for De Garis and 5½ years for Kaines.

15. Advocate Eeles accepts that these were serious offences. But she argues that the sentences on the first indictment should have been made concurrent, that insufficient discount had been given for the guilty pleas and that in all the circumstances the sentences were manifestly excessive having regard to the totality principle.

16. In relation to the first indictment she points out that the two assaults occurred at the same time and were part and parcel of the same incident. She referred to R v Noble [2002] EWCA Crim 1713 where, in the context of a road accident involving the killing of a number of people leading to multiple charges of causing death by dangerous driving, Keene LJ said this at para 15:-

> *"It seems to this court that the element of chance in the number of people killed by a single piece of dangerous driving underlies the appropriateness of the general principle which applies throughout sentencing for criminal offences, namely that consecutive sentences should not normally be imposed for offences arising out of the same single incident … that is not an absolute principle. It may admit of exceptions in exceptional circumstances, as the trial judge in the present case rightly stated. He referred to the decision in Dillon (1983) 8 Cr App R (s) 166 which was such an exception.*
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> *But where such exceptional cases occur, they tend to be ones where different offences are committed. It seems to this court to be wrong in principle to impose consecutive sentences in respect of each death arising from a single piece of dangerous driving. We emphasise in saying that that it is right that the total sentence imposed in such cases should take account of the number of deaths involved. …"*

17. She referred also to R v Sunak [2005] EWCA 1184 where the defendant assaulted two victims in the course of the same incident involving a group attack where the group had focussed on one victim and then another. In the court below he was sentenced to consecutive terms of imprisonment but the Court of Appeal allowed the appeal and made the sentences concurrent.

18. Advocate Eeles argued there was nothing exceptional about the present case and that the sentences on the two counts on the first indictment should have been concurrent.

19. As to the discount for the guilty pleas, she argued that the pleas were entered appropriately early, namely at the first plea and directions hearing. She pointed out that the evidence of

Hatwell and Hallett was conflicting in certain respects and that Hatwell was only 75% sure that De Garis had been one of the attackers. Both witnesses were alcoholics who were intoxicated at the time. There was no forensic evidence linking the applicants to the assaults and the pleas of guilty were therefore of real value and should have attracted the usual one third discount. She did not challenge the reduction of 25% for the assault in the third indictment.

20. In summary she argued that the sentence imposed on De Garis was manifestly excessive. Although these were nasty assaults, they did not involve the use of a weapon and there was no premeditation. Making all the sentences consecutive had resulted in the totality principle being breached and an aggregate sentence which was manifestly excessive.

21. On behalf of Kaines, Advocate Green made similar submissions in relation to the two counts of assault on the first indictment. He submitted that the sentences should have been concurrent for the same reasons as put forward by Advocate Eeles and that a discount of 25% for the guilty pleas to the first indictment was insufficient, although he did not challenge the reduction of 25% on the second indictment.

22. His second point was that a sentence of 18 months for the offence of doing an act tending to pervert the course of justice was too high given that this was an offence where there had been no direct threats to the prosecution witnesses, who had in fact never been troubled in any way because Mr Honey never did make contact with them and where the attempt had been unsuccessful and unsophisticated. He referred to R v Tunney [2007] 1Cr App R(S)91 where the English Court of Appeal said that the particular factors which a court should have regard to in relation to such offences are first, the seriousness of the substantive offence to which the perverting of the course of justice relates; secondly, the degree of persistence in the conduct question shown by the offender; and thirdly, whether the attempt to pervert the course of justice had been successful.

23. We have to say that we do not think that too much weight should be placed on whether the attempt was successful. The gravamen of the offence will usually be in the conduct attempting to pervert the course of justice. What is of more significance is the nature of the attempt to pervert the course of justice.

24. He also referred to two other English cases. The first was R v Philpott (1990) 12 Cr App R (S) 406 where the offender received a prison sentence of 15 months for directly approaching a young female witness in a park and telling her that the male defendant in the primary assault proceedings was going to be visiting all witnesses in the trial, one of whom had already been attacked. The second was R v Riley (1990) 12 Cr App R (S) 410 where an offender received 15 months for directly approaching the complainant and suggesting she should not testify against his nephew whilst using an implied threat of violence. Advocate Green submitted that those were both more serious offences, which suggested that the sentence of 18 months imposed by the Royal Court was too high.

25. We take first the argument by both applicants in relation to the discount for the guilty pleas on the first indictment. In Pirito v Law Officers of the Crown 2007-08 GLR N21, the Royal Court gave no reduction for a guilty plea. That decision was upheld by this court which made it clear that, while a plea of guilty would normally lead to a substantial reduction in sentence, that did not necessarily apply where the accused had no real alternative but to plead guilty. In Ryder v Law Officers of the Crown 2009-10 GLR 288, this court followed Pirito and described as 'merciful' a reduction of 25% applied by the Royal Court where the appellant had had no real alternative but to plead guilty. The clear inference was that a smaller reduction could properly have been applied.

26. Whilst this was not a case where the evidence in relation to the first indictment was overwhelming, it was fairly strong and we see no grounds for interfering with the discount of 25% applied by the Royal Court.

27. Turning to Advocate Eeles' submissions in relation to the consecutive sentences imposed on the first indictment, there is in our judgment considerable force in her contention that the sentences for the two assaults on the first indictment should have been made concurrent. Whilst there were assaults on two separate victims, the assaults were carried out at the same time and were part of a single incident. It was therefore, in our judgment, wrong in principle to impose consecutive sentences. However, this was a vicious and prolonged beating by two young men, with previous convictions for violence, on two much older victims who were in no position to defend themselves. Counsel referred to the sentencing guidelines published by the Sentencing Guidelines Council of England and Wales but, as this court said in Ryder, the courts of Guernsey have tended to impose heavier sentences for offences of violence than may be the case in England and Wales. In our judgment, given the serious nature of these particular assaults, it cannot be said that an aggregate sentence of 4 years was manifestly excessive. We propose therefore to substitute concurrent sentences of 4 years for the consecutive sentences of 2 years.

28. In our judgment, no criticism can be made of the sentence of 4 years for the offence on the third indictment when considered on its own. However, the issue for this court is whether the sentences as a whole were manifestly excessive having regard to the totality principle. We have considered carefully all the mitigation which is available on the papers. In view of the content of that mitigation, we have just been persuaded that an aggregate sentence of 8 years did not take sufficient account of the totality principle. We think that the correct overall sentence is one of 7 years. However, we cannot reduce the sentence on the first indictment because of the need for consistency with the sentence passed on Kaines. In the circumstances we grant leave to appeal and allow the appeal of De Garis to the limited extent of substituting concurrent sentences of 4 years' imprisonment on the two counts in the first indictment in place of the consecutive sentences of 2 years imposed by the Royal Court and substituting a sentence on the third indictment of 3 years imprisonment, to run consecutively, making the total sentence one of 7 years.

29. We would add one further observation. In our judgment, when a suspended sentence is activated, it should normally run consecutively as otherwise the offender suffers no real penalty for having breached the suspended sentence. However, in view of the special circumstances in this case and having regard to the totality principle, we agree that it was appropriate to order that the suspended sentence should run concurrently.

30. Turning to Kaines, we reach a similar conclusion in relation to the offences on the first indictment. As to the offence of doing an act tending to pervert the course of justice, we accept that the sentence imposed appears to be at a higher level than that found in the two English cases we have been referred to, namely Philpott and Riley although the offending in this case is by the person charged with the principal offence, rather than someone trying to help him, as in those two cases. However, Guernsey is a separate jurisdiction and is free to set its own sentencing levels having regard to the circumstances prevailing in the Island.

31. In our judgment, offences of doing an act tending to pervert the course of justice strike at the heart of public confidence in the administration of justice. This is particularly so in a small jurisdiction. If a complainant withdraws an allegation because of threats, this is likely to become known in the community and will encourage other defendants to behave in a similar manner. In our judgment, the Royal Court was entitled to send out a strong message that any attempt to pervert the course of justice will attract a substantial sentence which will be in addition to any sentence imposed for the principal offence. Notwithstanding that Mr Honey did not act on the telephone calls from Kaines, the fact remains that the calls display a

considerable determination on the part of Kaines that the two complainants should be warned off from giving evidence. In our judgment, a sentence of 18 months for such conduct was entirely reasonable.

32. Accordingly, in the case of Kaines, we grant leave to appeal and we allow the appeal to the extent of substituting concurrent sentences of 4 years' imprisonment, for the two offences on the first indictment. There is no change to the sentence on the second indictment with the result that the total sentence remains one of 5½ years' imprisonment.