**In the St Helena Court of Appeal** **Case No:10/2016**

**On appeal from the St Helena Supreme Court**

**The Queen -v- Tony Malcolm Thomas**

**This is the judgment of the Court on the appeal of Tony Malcolm Thomas.**

1. On 19th December 2016, the Appellant pleaded guilty to six counts on an indictment containing seven counts. All the offences were committed on the evening of 4th to 5th July 2016. The offences to which the Appellant pleaded guilty were as follows:
   Count 1 was an offence of using violence to secure entry contrary to s. 6(1) of the Criminal Law Act 1977. Count 2 was an offence of criminal damage; count 3 an offence of assault occasioning actual bodily harm; count 5 an offence of escaping from lawful custody; count 6 an offence of wounding and count 7 the breach of a restraining order.
2. The total sentence imposed by the Chief Justice was one of 54 months imprisonment. This was made up as follows: on counts 1, 2 and 3, the Judge imposed sentences of 3 months imprisonment, one month imprisonment and 2 years imprisonment respectively, all concurrent with one another. On count 5 the sentence was 6 months imprisonment consecutive; count 6: 20 months, also consecutive and finally 4 months consecutive on count 7. In relation to each count, the Judge reduced his initial starting point by one third to reflect the fact that the Appellant pleaded guilty at the first opportunity.
3. The real point on this appeal is whether the Judge has made any or any sufficient reduction in the sentences to reflect totality. Had the Appellant not pleaded guilty, the sentence would have been one of 6 years 9 months. The question for us is whether that is outside the appropriate bracket for these offences.
4. The sentencing Judge applied the Sentencing Guidelines for England and Wales in arriving at his sentences. The single Judge, when granting leave, invited submissions as to whether that was appropriate and whether, in applying them, the sentencing Judge should have discounted the

guidelines to reflect the fact that prisoners sentenced to a determinate sentence in England and Wales are released at the half way point, whereas in St. Helena prisoners serve two thirds of the sentence before being released.

5. Having considered the submissions of counsel we are satisfied that it was appropriate for the Judge to apply those guidelines. Guidelines not only encourage a consistency of approach to sentencing but identify mitigating and aggravating factors which increase or decrease the sentence. Taking those factors into account, it is then for the sentencing Judge to decide which apply and which do not. Use of guidelines encourages an analytical approach to sentence which is likely to result in fairness between offenders sentenced for similar offences.
6. There may be certain offences where local conditions in St. Helena would justify departure from the Guidelines devised for England and Wales. A Judge who regularly sits in St. Helena, such as the Chief Justice, is best able to identify the offences where that applies. It would then be for the Judge to explain in his sentencing remarks what it is about local conditions which has led him or her to depart from the guidelines. No-one is suggesting that the Guidelines should be followed slavishly whatever the circumstances of the case. Both counsel dealt at the sentencing hearing with the case on the basis that the Guidelines applied and there is no reason for us to suggest that that was not a proper way of dealing with it.
7. Should the Judge have reduced the sentences to reflect the different early release provisions in England and Wales and St. Helena? The answer according to English law is clear. No court is permitted to take account of differing early release provisions. For example, under the new extended sentence provisions introduced in LASPO 2012, a prisoner is not eligible for release on licence until he has served two thirds of the period of imprisonment. If sentenced to an ordinary determinate sentence the prisoner would be automatically released at the half way stage. The Court of Appeal in the **Attorney General's Reference (no. 27 of 2013) (R-v- Burinskas) [2014] EWCA Crim 334** said that that was not a matter which the Judge could take into account in fixing the appropriate term. The Court affirmed the decision of the Court of Appeal in **R-v-Round and Dunn [2009] EWCA Crim 2667** where Hughes LJ said at para 44 *'the general principle that early release, licence and their various*

*ramifications should be left out of account upon sentencing is ……. a matter of principle of some importance'*. We see no reason that the same principle should not apply to St. Helena. The legislature has determined that prisoners in St. Helena should serve two thirds of their sentence before being released and it is not for the courts to go behind that.

8. Having dealt with those matters of principles we go on to deal with the facts of this individual case. The Appellant has a long history of committing violent offences; including offences of violence against Shelley Furniss who had been his partner. His last sentence in March 2016 had been for 7 months for offences of common assault and harassment and obstructing a police officer. The victim of the first two offences had been Shelley Furniss.
9. The Appellant was still on licence on 4th July, having been released from prison in June from that sentence. He had also been made the subject of a restraining order. The restraining order prevented the Appellant from approaching or contacting Shelley Furniss except in certain limited circumstances.
10. At about 10 pm on 4th July the Appellant went to Shelley Furniss' house. He was drunk. She refused him entry and he kicked the door down, which is the subject of count 1. She was in the house with her children who were asleep and, fortunately, were not disturbed by what went on. Once inside the house, the Appellant attacked Shelley Furniss. She was dragged by the hair and thrown to the ground more than once. While on the ground the Appellant grabbed her by the hair again and banged her head on the ground. He scratched her torso and attempted to bite her. He punched her in the chest area. The Appellant picked up a bike which he threw at Shelley Furniss but which fortunately did not make contact with her. All the time the Appellant was shouting abuse at Shelley Furniss. As the Chief Justice said it must have been a terrifying attack. Shelley Furniss suffered carpet burns, scratches and other marks to the body. Fortunately the physical injuries were relatively minor. The noise of the assault was heard by people in the area and the police were called. By the time they arrived the Appellant had left the house.
11. Two police officers found the Appellant in the vicinity of the house and attempted to arrest him. The Appellant struggled with the officers and during the struggle he bit a female officer on the hand breaking the skin.

She subsequently had to have treatment for the injury which fortunately healed without further consequences except the loss of a nail. It was nevertheless for the officer a worrying injury. The Appellant managed to escape from the officers and was not arrested until the following morning before he could give himself up, which is apparently what he intended to do.

12. By the time of sentence, a pre sentence report had been prepared on the Appellant which assessed him as being a high risk of causing serious physical and emotional harm to Miss Furniss. There was also a victim impact statement which was read to the court in which Miss Furniss talked of the fear she has of what the Appellant will do to her when he is released from prison.

13. The Chief Justice considered that the offence of assault occasioning actual bodily harm was a category 2 offence in the relevant guideline as the injuries were relatively minor. However, he identified a number of aggravating factors which led him to treat the assault as a category 1 offence and place it towards the top of the bracket. From a starting point of 3 years the Judge reduced it to 2 to reflect the plea of guilty. The aggravating factors were the fact that the attack took place in Miss Furniss' house and children were present. It took place at night. The Appellant had a previous record for assaults including assaults on Miss Furniss. The assault was sustained and it was domestic violence of a serious nature. Far from amounting to a mitigating factor, the advanced state of inebriation of the Appellant was properly regarded as an aggravating feature. Further he was on licence from his previous sentence when he committed these offences. In our judgment the Judge cannot be criticised for the starting point he took.

14. The Judge passed concurrent sentences on counts 1 and 2 as he treated them as being part of the same facts and were included in the sentence for count 3. There can be no justified criticism of those sentences either.

15. For breach of the restraining order the Judge passed a sentence of 4 months imprisonment (count 7). He took a starting point of 6 months which is the top of the appropriate range and reduced it to reflect the plea of guilty. The Judge regarded the breach as flagrant and serious and was aggravated by the Appellant's record of violence and threats. Again there can be no proper criticism of that sentence standing on its own. The only issue is whether in the light of the sentence passed on

count 3, it needed to be consecutive or could have been served concurrently.

16. For the offence of unlawful wounding (count 6) the Judge concluded that the offence fell within category 2 and took a starting point of 30 months. The Judge treated as a serious aggravating factor the fact that the offence was committed on a police officer who was carrying out her duty by arresting the Appellant. Again the Judge took into account the Appellant's previous record. In our judgment that sentence taken on its own cannot be properly criticised although this was the second sentence which was aggravated by the Appellant's previous convictions
17. The Appellant has a number of convictions for escaping from lawful custody and the Judge passed a sentence of 6 months imprisonment for this offence. (count 5). The sentences on both counts 5 and 6 were also made consecutive to the other sentences giving a total of 54 months.
18. It is clear that the Chief Justice placed reliance on the contents of the pre sentence report. He was bound to do so. It is now submitted to us that there were a number of matters set out in that report which were not accepted by the Appellant. It is accepted that none of these matters was drawn to the attention of the sentencing Judge at the hearing and it is suggested that that is because the Appellant only received the report shortly before the hearing and he had no proper opportunity to give instructions to his solicitor on the passages he disputes.
19. In our judgment it is too late to raise these matters at the appeal hearing. We do not accept that it was not possible for the Appellant to give instructions to his lawyer, who could then have asked for a short adjournment to discuss the matter.
20. The only possible submission open to the Appellant as to the length of his sentence is that some of the sentences could have been passed concurrently rather than consecutively. While, as we have said, we consider each of the sentences individually to be entirely justified, it is necessary to stand back at the end of any sentencing exercise and ask whether the totality of the individual sentences added together results in an excessive sentence. In this case we have to consider whether total sentences of 6 years 9 months would have been appropriate for this series of offences , serious though they were, after a trial.
21. We are persuaded that, when totality is properly taken into account, it is appropriate and proportionate to make some small reduction in the

overall sentence. We do that by directing that the sentences on counts 5 and 7 are served concurrently with the other sentences rather than consecutively. This effectively reduces the overall sentence from one of 54 months to one of 44 months.

22. To that extent the appeal is allowed.