

CO/8405/2005

Neutral Citation Number: [2006] EWHC 94 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand
London WC2

Tuesday, 17 January 2006

B E F O R E:

SIR IGOR JUDGE
(President of the Queen's Bench Division)

MR JUSTICE CRESSWELL

THE DIRECTOR OF PUBLIC PROSECUTIONS

(CLAIMANT)

-v-

MICHAEL ROSS SMITH

(DEFENDANT)

Computer-Aided Transcript of the Stenograph Notes of
Smith Bernal Wordwave Limited
190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

MR TIMOTHY GREEN (instructed by CPS Dudley) appeared on behalf of the
CLAIMANT

MR GEORGE FAIRBURN (instructed by Timothy Gascoyne Solicitors) appeared on
behalf of the DEFENDANT

J U D G M E N T
(As Approved by the Court)

Crown copyright©

1. THE PRESIDENT: This is a appeal by the Crown Prosecution Service by way of a case stated by the Justices for Dudley acting in and for the Local Justice Area of Dudley, in respect of an adjudication at a Magistrates' Court on 6 June 2005.
2. On 18 April 2005 an information was preferred against Michael Ross Smith, the respondent, that on 11 April 2005 he assaulted Michelle Tether, thereby occasioning her actual bodily harm, contrary to section 47 of the Offences Against the Person Act 1961. The information was heard on 6 June. The Justices found the following facts.
3. Michelle Tether was the ex-partner of Michael Smith. They had started a relationship about five years earlier. During the course of the relationship it had broken up on two occasions. Mr Smith lives in the next street to Miss Tether. On 11 April she went to his home. She went to his bedroom where he was asleep and she woke him up. He pushed her down on the bed and produced some kitchen scissors. He sat on top of her and cut off the pony tail at the back of her head, without her consent. In addition, he cut some hair off the top of her head without her consent.
4. According to Michelle Tether, she subsequently picked up some of her hair and the pony tail and took it with her. She was noticed in a distressed state by a passing friend in a car and was taken to another friend's house. She did not go home until the following morning, nor say anything to her mother at the time; rather, she covered her head with a baseball cap. But it was not long before her mother noticed that her pony tail was missing.
5. At the close of the case for the prosecution, it was contended on behalf of the respondent that there was no case to answer. Cutting someone's hair without her consent did not necessarily amount to the offence of assault occasioning actual bodily harm. It might well be an ordinary common assault, but the respondent was not charged with that offence. It was accepted that the loss of the hair changed one's appearance, but it still did not constitute actual bodily harm and no evidence to that effect had been given. The victim had said that she was upset. This was a matter of emotion and ordinary distress, and could not amount to actual bodily harm as there was nothing to support any suggestion that she suffered psychiatric or psychological harm. The complainant had been asked specifically whether there were any cuts to her scalp or other breaks of the skin caused while her hair was being cut. She replied that there were none. Accordingly, there was, so it was submitted, no actual bodily harm and the critical ingredient of the offence had not been established.
6. So far as the prosecution was concerned, the contention before the Justices was that cutting someone's hair without her consent was obviously an assault and naturally caused actual bodily harm. Bodily harm had its ordinary meaning. It included any hurt or injury calculated to interfere with the health or comfort of the victim. Emphasis was made on the potential interference with the comfort of Miss Tether.
7. It was further suggested that it was unnecessary for the purposes of the section 47 offence for the hurt to be permanent. The cutting of hair will eventually produce more hair -- the hair will grow back. Cutting it nevertheless can be regarded as more than

merely transient or trifling; at any rate in the context of this kind of case where the pony tail was removed rather than a single hair cut.

8. The Justices were referred to a number of authorities. They are well-known. They include: R v Donovan [1934] 2 KB 498; R v Brown [1994] AC 212; R v Chan-Fook [1999] Cr App R 147; R v Morris (Clarence Barrington) [1998] Cr App R 386. The Justices received advice from their legal adviser that there was no case law which indicated that the cutting off of a victim's hair amounted to actual bodily harm. The appellant and the respondent were given an opportunity to add anything they wished, but they were unable to produce any case law directly in point.
9. When considering whether or not there was a case to answer, the Justices were of the opinion that if Mr Smith had cut Miss Tether's hair, as she alleged, that would constitute an assault, but that it had not been established that she had been caused actual bodily harm because there was no bruising, bleeding or cutting of the skin. Cutting of the hair merely changed her appearance. There was no expert evidence regarding psychological or psychiatric harm, therefore although Miss Tether did suffer distress, taken on its own that too could not amount to actual bodily harm. The Justices concluded that an essential element of the offence was missing and found that there was no case to answer.
10. The question for the opinion of this court is:

"Were the Justices wrong in law to decide that the cutting of the complainant's hair did not constitute actual bodily harm?"

It is not in dispute that, on the facts, the Justices would have been entitled to find the respondent guilty of common assault. The single issue raised by the question in the case stated is whether his actions in cutting off the victim's hair against her wishes in the course of a common assault, without leaving any mark or breaking her skin, is capable of amounting to assault occasioning actual bodily harm. None of the previous reported decisions is directly in point. We have considered the authorities drawn to the attention of the Justices in the course of the hearing below.

11. Mr Green, for the appellant, in effect repeated the submissions made to the Justices, emphasising before us that pain is not a necessary ingredient of this offence, and that actual bodily harm may be occasioned to someone even if the victim has no sensation of it at the time because, for example, the part of the body which sustained the bruise or the cut lacks sensation as a result of an earlier injury.
12. Mr Fairburn, for the respondent, again effectively adopted the submissions made before the Justices. Before us, however, he particularly focused on the fact that, according to the medical and scientific material which he was able to discover, the shaft of the hair as opposed to the root is no more than dead tissue. What the respondent had done in this case was therefore to cut through dead tissue. Counsel drew attention to the decision of this court in Stephen Cooke (unreported) 22 July 1994, where Glidewell LJ, giving the judgment of the court, made these observations:

"Each human hair has a root -- with hair on the head this root is under the scalp. Only the root, and a section of the hair below the scalp leading from it, is alive and growing. The remainder of each hair, including all the part above the scalp, consists of dead tissue. The root is bedded or implanted in a sheath, consisting of a number of layers of living tissue. The sheath nourishes and supports the hair through its root. If a complete hair is pulled out of the scalp, it emerges with the inner part of the sheath adhering to the root. From the cells in this part of the sheath, which Mr Dawber would describe as cells on the surface of the hair, a DNA profile can be prepared. If, however, a sample of hair is cut or combed from above the scalp, the dead tissue forming that hair does not yield DNA for a profile."

13. Mr Fairburn also drew attention to the latest entry in the Encyclopedia Britannica for 2005, which includes the following passage:

"Except for a few growing cells at the base of the root, the hair is dead tissue, composed of keratin and related proteins. The hair follicle is a tubelike pocket of the epidermis that encloses a small section of the dermis at its base. The human hair is formed by divisions of cells at the base of the follicle. As the cells are pushed upward from the follicle's base, they become keratinized (hardened) and undergo pigmentation.

Hair is continually shed and renewed by the operation of alternating cycles of growth, rest, fallout and renewed growth. The average life of different varieties of hair varies from about 4 months for downy hairs to 3 to 5 years for long scalp hairs. Each human follicle follows this cycle independently of others... "

14. On the basis of the entry in the Encyclopedia Britannica and the decision of this court in Cooke, Mr Fairburn submitted that the shaft of the hair could not be harmed. That applied, as I understood his submission, to each individual hair or to a bunch of hair. As everyone knows, when hair is cut, it is not harmed. Everyone has his or her hair cut from time to time, and the hair grows after it has been cut. Accordingly, it followed that it could not be said that what happened here could amount to actual bodily harm.
15. As there are no decisions directly in point, we must address the problem on first principles, noting that, according to Viscount Kilmuir LC in Director of Public Prosecutions v Smith [1961] AC 290, "bodily harm" needs no explanation, and that the phrase "actual bodily harm" consists of "three words of the English language which require no elaboration and in the ordinary course should not receive any [R v Chan-Fook]". So actual bodily harm means what it says.
16. It is necessary to look at definitions because there is nothing to assist us in the decided cases. In ordinary language, "harm" is not limited to "injury", and according to the Concise Oxford Dictionary extends to "hurt" or "damage". According to the same dictionary, "bodily", whether used as an adjective or an adverb, is "concerned with the

body". "Actual", as defined in the authorities, means that the bodily harm should not be so trivial or trifling as to be effectively without significance.

17. Recent authority shows that evidence of external bodily injury, or a break in or bruise to the surface of the skin, is not required. Chan-Fook established that actual bodily harm was not limited to "harm to the skin, flesh and bones of the victim". It applies to all parts of the body, "including the victim's organs, his nervous system and his brain". The significant words in that sentence are "all" and "includes". By identifying specific parts of the body, the observations in this judgment were not excluding any others. An assault occasioning actual bodily harm may be committed by words or gestures alone, without the need for any physical contact between the assailant and the body of the victim (R v Ireland and Burstow [1998] AC 147). It follows that physical pain consequent on an assault is not a necessary ingredient of this offence (see also R(T) v DPP [2003] Crim LR 622).
18. In my judgment, whether it is alive beneath the surface of the skin or dead tissue above the surface of the skin, the hair is an attribute and part of the human body. It is intrinsic to each individual and to the identity of each individual. Although it is not essential to my decision, I note that an individual's hair is relevant to his or her autonomy. Some regard it as their crowning glory. Admirers may so regard it in the object of their affections. Even if, medically and scientifically speaking, the hair above the surface of the scalp is no more than dead tissue, it remains part of the body and is attached to it. While it is so attached, in my judgment it falls within the meaning of "bodily" in the phrase "actual bodily harm". It is concerned with the body of the individual victim.
19. In my judgment, the respondent's actions in cutting of a substantial part of the victim's hair in the course of an assault on her -- like putting paint on it or some unpleasant substance which marked or damaged it without causing injury elsewhere -- is capable of amounting to an assault which occasions actual bodily harm. The justices were wrong in law.
20. MR JUSTICE CRESSWELL: I agree fully with the analysis and reasoning of my Lord. The question for the opinion of this court is: were the Justices wrong in law to decide on a submission of no case to answer that the cutting of the complainant's hair did not constitute actual bodily harm?
21. The body, for the purposes of the word "bodily" in section 47 of the 1861 Act, includes all parts of the body, including the hairs upon the scalp. On the evidence called by the prosecution, there was a case to answer of actual bodily harm. As the President has said, to a woman her hair is a vitally important part of her body. Where a significant portion of a woman's hair is cut off without her consent, this is a serious matter amounting to actual (not trivial or insignificant) bodily harm.
22. THE PRESIDENT: Our inclination is to return the case to the Justices at Dudley and order that the hearing shall continue. Do you want to say anything about that?
23. MR FAIRBURN: Nothing at all, my Lord.

24. THE PRESIDENT: Very well. There will be an order accordingly.