Neutral Citation No: [2019] EWCA Crim 1740
Case No: 201903088 A2

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday, 9 October 2019

B e f o r e:
LORD JUSTICE HOLROYDE

MR JUSTICE JULIAN KNOWLES

HIS HONOUR JUDGE DEAN QC
(Sitting as a Judge of the CACD)

REFERENCE BY THE ATTORNEY GENERAL UNDER S.36 OF THE CRIMINAL JUSTICE ACT 1988

R E G I N A
v
MATHURAM MUTHURAJA

Mr P Ratliff appeared on behalf of the **Attorney General**
Mr R McCann appeared on behalf of the **Offender**

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J U D G M E N T
(Approved)

1. LORD JUSTICE HOLROYDE: On the night of 28 October 2018, at Barons Court Underground Station, Mathuram Muthuraja (to whom we shall refer as "the offender"), deliberately pushed Harsha Jayasekera from the platform to the track. Mr Jayasekera was rendered unconscious but, by great good fortune, he missed the live running rail and escaped serious injury. On 24 July 2019, at the Central Criminal Court, the offender was convicted by a jury of attempting to cause grievous bodily harm with intent and was sentenced to 3 years' imprisonment. Her Majesty's Attorney General believes that sentence to be unduly lenient. Application is accordingly made, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer the case to this court so that the sentence may be reviewed.

2. Mr Jayasekera and his wife had attended a birthday party. Amongst the other guests was the offender. The two men had never met before and appear to have done no more than exchange greetings at the party. Later in the evening a group from the party went to central London by underground rail. The offender, who showed all the signs of being intoxicated, behaved inappropriately during the journey towards two other members of the group and, changing their plans, the group collectively left the train at Barons Court. They stood on an island platform which has railway tracks on each side.

3. The court has been provided with a copy of CCTV footage which clearly shows the offender behaving in an aggressive manner. He was involved in a physical altercation with another man. Two young women from the group, later joined by a young man, made repeated attempts to keep the offender away from others. Mr Jayasekera and his wife were meanwhile standing further along the platform. Over the course of a few minutes, trains arrived on both sides of the platform. When one had departed, the offender ran past those who were trying to restrain him and pushed Mr Jayasekera forcefully from behind. Mr Jayasekera was pushed off the platform and onto the track below. As we have said, he fortuitously missed the live running rail, contact with which might have been fatal and would at the least have caused very serious injuries. An incoming train was expected within 2 minutes, but station staff acted promptly to stop it. Other persons on the platform managed to pull Mr Jayasekera back up from the track. The offender remained angry and aggressive. He was physically restrained. He boarded the train that was standing at the other platform, but it did not depart and he was arrested.

4. Mr Jayasekera lost consciousness when he was pushed onto the track. He had a flash of memory of seeing paramedics but after that remembered nothing until he woke up in hospital. He was bruised and in pain. He was however able to be discharged from hospital the following day and suffered no long-term physical consequences.

5. When interviewed under caution the offender said that he had been attacked by others in the group both on the train and on the platform. He made no comment when asked if he

had pushed Mr Jayasekera but said that he had no intention to hurt anyone.

6. The offender pleaded guilty to a lesser alternative charge of assault occasioning actual bodily harm. That plea was not accepted by the prosecution and he was tried and convicted by the jury of the more serious offence.

7. The offender was aged 22 at the time of the offence. He had no previous convictions and references provided to the court showed him to be a hard-working young man, occupying his time with both studying and employment. The references provided by persons who know him well speak highly of him and make clear that the offence was very much out of character.

8. The Sentencing Council has published a Definitive Guideline for sentencing offences of causing grievous bodily harm with intent to do grievous bodily harm. Counsel then appearing for the prosecution submitted to the trial judge that this offence fell within category 3 of that guideline, involving lesser harm and lower culpability. As such, the starting point for sentence was 4 years' custody with a range from 3 to 5 years. The advocate representing the offender agreed with that submission and the judge accepted it. In her sentencing remarks she said that the CCTV footage clearly showed the offender to have been spoiling for a fight. His drunkenness at the time did not provide any mitigation. It was sheer good fortune that Mr Jayasekera had not been far more seriously injured. The judge took into account the positive aspects of the offender's character. She accepted that he was genuinely remorseful. She said:

    i. "It is accepted by both the prosecution and the defence, and I agree with them, that this case falls into the lowest category. The injuries, as I have already stated, mercifully were less serious. There was no premeditation and although this was an attempt to cause serious injury it was an attempt because no serious injury in fact resulted.

    ii. The location and circumstances, however, are a seriously aggravating factor. Nobody in that situation could have perceived anything other than that there was a serious risk of really serious injury if not death by pushing somebody in those circumstances."

9. The judge took as her starting point the guideline starting point of 4 years' imprisonment, which she reduced to 3 years because of the offender's good character, positive references and remorse.

10. On behalf of Her Majesty's Solicitor General, and having given the necessary clear notice in this regard, Mr Ratliff seeks to depart from what was put forward by prosecuting counsel below as to the appropriate categorisation of the offence. He submits that a clear error was made by both counsel and the judge in applying the guideline to the facts as they *were* rather than to the facts as they *would have been* if the offence had been

completed. He relies on the decision of this court in R v Laverick [2015] 2 Cr App R(S) 62. The appellant in that case had pleaded guilty to attempting to cause grievous bodily harm with intent, the circumstances being that he had thrown petrol over his former partner and attempted to ignite it. In passing sentence the judge assessed the appropriate sentence, had the offence been completed, and then applied a discount to reflect the fact that the offence was an attempt. That approach was approved by this court. It was consistent with section 143(1) of the Criminal Justice Act 2003, which requires a court, in considering the seriousness of the offence, to consider not only any harm which was in fact caused but also harm which the offender intended to cause or might foreseeably have caused.

11. Adopting that approach, Mr Ratliff submits that if the offender had achieved his intention to cause really serious injury the offence would, at the least, have fallen within category 2 of the guideline, which has a starting point of 6 years' custody and a range from 5 to 9 years. He further submits that the offence could indeed properly be regarded as falling within category 1, with a starting point of 12 years' custody and a range from 9 to 16 years. He acknowledges that the sentence appropriate for the completed offence should be discounted to reflect the fact that the offender was only convicted of an attempt. However, relying on the decision of this court in Attorney-General's Reference (R v Zaheer) [2019] 1 Cr App R(S) 14, he submits that the degree of reduction which should be made will depend on all the circumstances of the case, including the stage at which the attempt failed and the reason why it failed. Mr Ratliff submits that in the present case it was a matter of sheer good fortune that the offence was not completed.

12. Mr McCann, appearing today as he did below for the offender, submits that the sentence was not unduly lenient and was indeed appropriate in all the circumstances. He points to the fact that there was no evidence before the court of any long-term physical injury to Mr Jayasekera, who we understand did not provide a victim personal statement. Mr McCann also invites our attention to the offender's guilty plea to the alternative charge of assault occasioning actual bodily harm. This, he said, should properly be viewed as another indication of the remorse which the learned judge found to be genuine. There was never any suggestion at trial that Mr Jayasekera was in any way to blame for the incident. Moreover, submits Mr McCann, it was a guilty plea courageously entered in the expectation that immediate custody would follow.

13. As to the fact that the offender was intoxicated, Mr McCann acknowledges that that is always an aggravating feature but invites the court to set it in its proper context. As a young child the offender was taken into care for 2 years because of physical abuse perpetrated in the home by his father, who it seems had an alcohol problem. Since that time, Mr McCann submits, there was quite simply no alcohol in the household in which the offender grew up. He was inexperienced in the effects of alcohol and that, suggests Mr McCann, contributed to his downfall on this occasion. Finally Mr McCann understandably places emphasis on the letters of reference which were provided to the court below and which we have considered.

14. We are grateful to counsel for their submissions and we have reflected upon them. As R v Stewart [2017] 1 Cr App R(S) 48 shows, neither the Attorney General nor this court is bound by any concession made by the prosecution advocate in the court below if there is a sufficient and proper justification for departing from it. If this court is satisfied that an error was made below which significantly affected the sentencing, then its duty is to intervene. It is however clear from R v Susorovs [2017] 1 Cr App R(S) 15 and other cases that the fact that the Attorney General is departing from submissions made on behalf of the prosecution in the court below can give rise to an element of unfairness to the offender. If the court finds a sentence to have been unduly lenient, any such element of unfairness may be reflected by a reduction from the sentence which would otherwise have been appropriate.

15. We are satisfied that both the judge and the advocates did fall into error in their application of the sentencing guidelines to the circumstances of this case. It was an error to treat this as an attempt to commit a category 3 offence. That incorrect categorisation stemmed not from a mistake as to the evaluation of relevant factors but from the taking of an approach which was wrong in law. The correct approach, and the approach which we adopt, is that set out in Laverick.

16. The jury were satisfied that the offender intended to cause really serious injury. He attempted to achieve that intent by pushing Mr Jayasekera onto the tracks of a busy underground station. As the judge rightly noted, there was an obvious and high risk that Mr Jayasekera would either come into contact with the live rail or be struck by a train. In either of those circumstances, there was a high risk that he would be very seriously injured if not killed.

17. In those circumstances, it is in our judgment clear that the completed offence would involve greater harm because it would cause, in the words of the guideline, "injury which is serious in the context of the offence".

18. We do not find that any of the factors indicating higher culpability would have been present if the full offence had been completed. Mr Ratliff accepts that there was not "a significant degree" of premeditation. He submits however that one or both of two other factors were present: "Intention to commit more serious harm than actually resulted from the offence" and/or "deliberately causes more harm than is necessary for commission of offence." We are unable to accept those submissions. The first would, in our view, be inconsistent with the approach set out in Laverick in relation to offences of attempt. It is a factor which in our view applies to a case where an offender does cause really serious injury but intended to inflict even greater harm. The second submission relates to a factor which in our view applies primarily to the gratuitous inflicting of additional injury beyond that which already constitutes really serious injury. In those circumstances, we conclude that the completed offence would fall within category 2 of the guideline.

19. If completed, the offence would have had a number of serious aggravating features. First, it was completed in the presence of others, including Mr Jayasekera's wife, in a comparatively confined area. Secondly, and contrary to the judge's assessment that there was no premeditation, it is apparent from the CCTV footage that there was at least some premeditation: the footage shows that over a period of about 3 minutes the offender was clearly trying to get past those who were seeking to restrain him and to get at someone else. The judge's description of the offender as "spoiling for a fight" is, in our view, entirely apt. Thirdly, and on a related point, the offender ignored the attempts which were made by others to calm him down and to restrain him and eventually pushed past those persons in order to reach Mr Jayasekera. Fourthly, whilst his intention was to cause really serious injury, his actions gave rise to a real risk of death. Fifthly, his actions also put at risk those brave persons who went to the assistance of Mr Jayasekera. Lastly, the offender was intoxicated.

20. To set against those features there are undoubtedly a number of mitigating factors: the offender is a young man of otherwise good character, he has led an industrious life, has done his best to assist his family financially and has attracted the favourable references to which we have referred. Serious though it was, his aggressive conduct lasted only a matter of minutes and culminated in a single violent push. By good fortune no lasting physical injury was caused. The judge accepted that he had shown genuine remorse for his crime.

21. In our view, a fair balancing of the aggravating and mitigating features would result, if the offence had been completed, in a sentence somewhat in excess of the guideline starting point. That notional sentence must be reduced to reflect the fact that this was an attempt rather than a full offence. It was however very close to the full offence. The offender had done all he could to achieve his intention and it was a matter of pure good fortune that Mr Jayasekera did not in fact sustain very serious injury. The reduction to be made in this regard cannot therefore be a substantial one.

22. Finally, we think it right in the circumstances of this case to make some modest further reduction to reflect the element of unfairness from the offender's perspective in his being brought before this court on the basis of submissions which contradict those advanced by the prosecution in the court below.

23. We recognise that this offender acted very much out of character and that there is a much better side to him. Nonetheless, we conclude that a significant error was made in the court below and that as a result the sentence passed was unduly lenient. Taking the most favourable view of the circumstances we can, the least sentence appropriate in all the circumstances was one of 5 years' imprisonment. We therefore grant leave to refer, we quash the sentence imposed below as being unduly lenient and we substitute for it a sentence of 5 years' imprisonment.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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