IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO: 202002046

Neutral Citation Number: [2021] EWCA Crim 181

Royal Courts of Justice

Strand

London

WC2A 2LL

Thursday 14 January 2021

LORD JUSTICE COULSON

MR JUSTICE WILLIAM DAVIS

MR JUSTICE HENSHAW

REGINA

V

JAMES HEALEY

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR M RADSTONE appeared on behalf of the Applicant.

J U D G M E N T

MR JUSTICE HENSHAW:

1. The Applicant pleaded guilty on 4 December 2019 in Snaresbrook Crown Court to assault occasioning actual bodily harm (contrary to section 47 of the Offences against the Person Act 1861) and to affray (contrary to section 3(1) of the Public Order Act 1986). Following a Newton hearing on 17 January 2020, Recorder A Studd QC on 24 July 2020 sentenced the Applicant to 32 months' imprisonment for the assault, with a concurrent sentence of 10 months' imprisonment for the affray.

2. The Applicant renews his application for permission to appeal against sentence, following refusal by the single judge. He is represented by Mr Matthew Radstone of counsel, to whom we are most grateful for his clear and cogent written and oral submissions.

3. The offences occurred in the early hours of 17 August 2019 outside a pub on Pentonville Road, London. The victim and his friends had been celebrating his birthday, ending at the pub in question. The victim is a well-known writer and broadcaster. Some other patrons of the pub recognised the victim and a light-hearted interaction took place. The Applicant was also there, having been socialising with his friends in London for most of the day.

4. On leaving the pub, the victim and his friends walked a short distance along the road to say goodbye to some of their number. A group including the Applicant followed them out. The Applicant approached the victim from behind and delivered a flying kick to his lower back, knocking him to the pavement. The Applicant also punched out at the victim at least twice. The victim's friends came to try to assist him, and were attacked by the Applicant's group, including the Applicant himself who swung a punch towards one of the victim's friends. Meanwhile, another of the Applicant's group kicked the victim while he was on the ground. The Applicant and his friends eventually ran off after one of the victim's friends shouted that she was calling the police.

5. The Applicant made no comment in interview, but then issued a prepared statement stating that someone had spilled drink on him in the pub and had walked off without apologising. He said he had gone outside to talk to them, but then believed he was going to be attacked by a member of the group and so hit out instinctively in self-defence.

6. Following the Newton hearing, in the course of which she heard oral evidence and reviewed the CCTV footage, the Recorder found the Applicant's version of events to be

untrue. She noted that in a search following the incident, the police had found in the Applicant's home various memorabilia, at least some of which convinced her that the Applicant held political beliefs broadly associated with the far-right wing. She noted that the victim had been in conversation in the pub with a person located very close to the Applicant. The Recorder concluded that the Applicant had committed a wholly unprovoked attack on the victim by reason of his widely publicised LGBTQ advocacy and left-wing beliefs.

7. As a result of the attack, the victim sustained a bump injury to the top of his head, a whiplash type injury to his neck, abrasions, a large graze, some bruises to his lower back and various aches. In his victim impact statement and in oral evidence, he said he now worried for the safety of himself and his partner, and that the incident had had a massive impact on his day-to-day routine. He no longer walked alone, took taxis even for short distances, and felt increasingly at risk.

8. The Applicant was 39 years old at the date of the offences. He had a significant record of offences relating to violence or disorder, mostly football-related, albeit none of them was recent. They include convictions for violent disorder committed in October 2011 (attempting to enter a pub in order to confront rival supporters), an offence under section 4A(1) of the Public Order Act 1986 in April 2011 (involving a violent confrontation with rival football supporters), other public order offences in 2009, 2006, 2003 and 2002, and possession of a prohibited weapon in July 2004.

9. The Recorder when sentencing the Applicant for the assault applied the Sentencing Council's Guideline for section 47 offences. Having earlier noted that the Applicant and his friends made a "frenzied and wholly unprovoked attack" on the victim, the Recorder in the context of the guideline said that this was a "sustained, targeted and unprovoked attack on the victim, causing injury to him". She therefore considered this to be a case involving "greater harm". The Recorder also considered there to be "greater culpability". The fact that the Applicant attacked the victim motivated in part by hostility based on his sexual orientation was a statutory aggravating factor. In addition, she referred to a degree of premeditation, the Applicant's use of a shod foot to kick the victim in the back, and the Applicant's leading role. On that basis, the case fell in to category 1 of the guideline, with a starting point of 1 year 6 months' custody and a category range from 1 to 3 years' custody.

10. The Recorder noted that there were also other very serious aggravating factors. These included the Applicant's previous convictions, and the facts that the offence was committed at night, on the street, under the influence of alcohol, and had an ongoing effect on the victim.

11. After taking account of what the Applicant's counsel had said on his behalf in mitigation, the Recorder concluded that the sentence after trial would have been at the top end of the category 1 range, 3 years.

12. The Applicant had not pleaded guilty before the Magistrates' Court, but had done so at the first opportunity in the Crown Court. The maximum credit for plea would ordinarily have been 25%. However, as the Recorder said, the Applicant pleaded guilty based on a very different version of events than that which she had found took place. Moreover, the Applicant required the victim to attend court to give evidence, and he put forward a version of events which the Recorder found to be untrue, as regards both the incident and the Applicant's political affiliations.

13. Paragraph F2 of the Sentencing Council's Definitive Guideline on Reduction in Sentence for a Guilty Plea states:

> "In circumstances where an offender's version of events is rejected at a Newton hearing or special reasons hearing, the reduction which would have been available at the stage of proceedings the plea was indicated should normally be halved. Where witnesses are called during such a hearing, it may be appropriate further to decrease the reduction"

14. The outcome of the Newton hearing thus would normally halve the credit for plea otherwise available, from 25% to 12.5% here, and the fact that the victim had to give evidence entitled the Recorder to reduce the credit further. In the event, she reduced it from 12.5% to approximately 5%, namely 2 months.

15. The Recorder also had regard to the effects of the current Covid-19 pandemic on prison conditions, reducing the sentence by a further 2 months to take that into account. The overall sentence for the assault was therefore 36 months minus 4 months, i.e. 32 months.

16. The Applicant renews his application for permission to appeal from sentence on five main grounds, which relate to the Recorder's approach to harm, culpability, credit for plea, the effect of the pandemic, and mitigation. We consider these in turn.

17. First, the Applicant submits that the Recorder was wrong to treat this as a case of greater harm. He submits that 'greater harm' normally requires there to be injury that is serious in the context of the offence, whereas the injuries here were more akin to those often found in a case of common assault. The Applicant also submits that the Recorder was wrong to conclude that this was a "sustained or repeated assault on the same victim", which could also take the case into the greater harm category. Accordingly the Applicant submits that this case should have been regarded as falling in category 2 in the

sentencing guideline, which has a starting point of 26 weeks' custody and a category range from a low level community order to 51 weeks' custody.

18. In considering these issues we have reminded ourselves of this Court's decision last year in ***R v Jordan Lee Smith*** [2020] EWCA Crim 1427 about the 'greater harm' category in the sentencing guideline relating to more serious offence of causing grievous bodily harm with intent contrary to section 18 of the 1861 Act. The court noted there that the concept of 'greater harm' in that context has been the subject of a number of appeals to this Court, including ***R v Xue*** [2020] EWCA Crim 587; [2020] 2 Cr App R (S) 49 where the court reviewed some of those authorities and gave further helpful guidance.

19. On the topic of severity of injury, those two cases reconfirm the statement in ***R v Grant Smith*** [2015] EWCA Crim 1482, [2016] 1 Cr App R(S) 8 that:

> "… The purpose behind the words 'which is serious in the context of the offence' in the guidelines is to distinguish between that level of violence which is inherent or par in a standard section 18 offence and that which will, by definition, go beyond what may be viewed as par for the course. In our view, given that there is such a marked disparity in the starting point between categories 1 and 2, the sorts of harm and violence which will justify placing a case within category 1 must be significantly above the serious level of harm which is normal for the purpose of section 18." (§ 14)

20. We note that for the section 18 offence, the category 1 starting point is 12 years compared to the category 2 starting point of 6 years. In a section 47 case like the present one, the category 1 starting point is 1 year 6 months compared to the category 2 starting point of 6 months.

21. As to the nature of the attack, the court in ***Xue*** and ***Jordan Lee Smith*** again cited ***Grant Smith***, where this Court said:

> "… An assault may be repeated because it involves multiple blows over a short period of time... We have doubts whether a difference between one blow and two blows could justify moving the starting point from a category 2 (6-year) level to a category 1 (12-year) level. If this were so, there would be very few attacks that were not category 1. The concept of sustained or repeated, in our view, imports some degree of persistent repetition. These concepts must be read in the light of the major difference in starting point between the two categories. In order for a sentence to be compliant with the test of proportionality, the facts warranting the higher sentence should reflect the difference in the guidelines. In our judgment, two blows, one of which is not said to amount to a section 18 offence, would not at least normally amount to a sustained or repeated assault. We

> do not wish to be more specific or precise than this because we acknowledge that each case will entail a very fact-specific assessment.'"' (§ 18)

22. In *Xue*, an attack in which the defendant stabbed and slashed at the victim's face at least four times with a knife or razor, in an assault lasting a couple of minutes, was held not to be so prolonged or persistent as to take it out of the norm for section 18 offences and therefore to constitute greater harm. In *Jordan Lee Smith*, a short but brutal attack involving a punch and four kicks, lasting 10 seconds in total, was also held not to be a sustained or repeated assault falling in the 'greater harm' category.

23. Turning to the present case, the Recorder described the victim's injuries, but did not (at least explicitly) categorise them as amounting to "serious injury". In the context of the section 47 offence, "serious injury" will inevitably be of a considerably lower order than in cases of grievous bodily harm. Nonetheless, we do not think it would be correct to categorise the injuries sustained by the victim in the present case, unpleasant as they were, as "serious injury" in the context of the section 47 offence.

24. In one sense the attack here did involve a level of persistence, in that the initial kick was followed by punches from the Applicant, and then at least one kick from one of his accomplices. On the other hand, it was relatively short in duration – counsel for the Applicant suggests about 30 seconds. The Recorder found that it would have gone on longer but for the intervention of the victim's friends, and was persistent in that sense, but that in our view is a factor going to culpability rather than harm.

25. In the light of the case law, we therefore feel bound to conclude that the attack could not properly be categorised as involving 'greater harm' within the guideline. It follows that the offence should have been sentenced by reference to category 2 in the guideline. Nevertheless, we consider that this came close to being what could properly be characterised as a sustained attack. It was in the Recorder's words a "frenzied attack", and continued (in the sense we have described) even after the victim had been knocked to the ground. That remains a relevant consideration when assessing the length of the sentence passed in the light also of the culpability and seriousness factors to which we now turn.

26. The Applicant's second submission relates to culpability. He submits that the Recorder double counted the Applicant's motivation for the attack, treating it both as a statutory aggravating factor indicating higher culpability and also as a factor moving the offence up within the category range thereby arrived at. Moreover, the Applicant says, many of the factors set out in the guideline as indicating higher culpability were not present, such as significant premeditation, use of weapon or targeting of a vulnerable victim. Nor, it is suggested, were most of the factors listed in the guideline as increasing seriousness present. For example, it is said the offence was not in a domestic setting or residential

street, no children were present, and the ongoing effect on the victim, the Applicant submits, has not prevented him from continuing to express his views in public.

27. We do not accept those submissions. On the contrary, we consider that there were multiple aggravating factors going both to culpability and to seriousness.

28. Starting with the culpability factors, the guideline notes that "*A case of particular gravity, reflected by multiple features of culpability in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features…*". Here, the statutory aggravating factor of the Applicant having attacked the victim because of his sexual orientation was sufficient to place the offence in the higher culpability range. However, there were also further culpability factors here. The Applicant kicked the victim in the back using his shod foot. He took the leading role in the group, instigating as well as continuing the attack. He deliberately caused more harm than necessary for commission of the offence: the initial kick to the victim's back was followed by punches from the Applicant, and then one or more kicks from one of his accomplices while the victim lay on the ground and the Applicant attacked one of the victim's friends who were trying to help him.

29. Moreover, multiple guideline factors increasing seriousness were also present. The Applicant has a poor record of convictions for violence or disorder, even though none was recent at the time of this offence. He attacked the victim at night, in a public street, in the presence of others. The attack has had an enduring effect on the victim. It is true that the Recorder mentioned the Applicant's motivation for the attack again when considering further aggravating factors. However, we consider that the other matters to which she attached and we attach importance amply justify a significantly increased sentence.

30. Taking account of all the matters we have mentioned – the persistent nature of the attack, falling just short of a sustained attack, the multiple culpability factors and the multiple factors increasing seriousness – we consider that, in accordance with the note in the guideline to which we have referred, the upward adjustment required is very significant. On the particular facts of this case, it would lead to the adjusted starting point of 3 years originally taken by the Recorder, albeit for different reasons. On that basis the 3-year adjusted starting point was not manifestly excessive. We bear in mind also that the Recorder was well placed to assess the overall seriousness of the offence, having in effect conducted a quasi-trial at the Newton hearing including hearing oral evidence; and the fact that the Applicant was being sentenced for the offence of affray as well.

31. The Applicant's third submission is that the Recorder was wrong to reduce the credit for his guilty plea from 12.5% to 5% in the way we have described. He says the facts of the assault were fully admitted and the question in issue on the Newton hearing was a narrow one. We disagree. The CCTV footage and witness evidence made the basic facts very

hard to contest. The Applicant's motivation for the attack was the critical issue when it came to sentencing. As we have already noted, he contested that matter to the very end, putting forward a false version of events and causing the victim to have to give evidence. There are no good grounds for us to interfere with the Recorder's conclusion on this point.

32. Fourthly, the Applicant says a larger reduction, 6 months rather than 2, should have been given in light of the Covid pandemic. In ***R v Manning*** *[2020] EWCA Crim 592* the Lord Chief Justice said about the pandemic:

> "… The current conditions in prisons represent a factor which can properly be taken into account in deciding whether to suspend a sentence. In accordance with established principles, any court will take into account the likely impact of a custodial sentence upon an offender and, where appropriate, upon others as well. Judges and magistrates can, therefore, and in our judgment should, keep in mind that the impact of a custodial sentence is likely to be heavier during the current emergency than it would otherwise be. Those in custody are, for example, confined to their cells for much longer periods than would otherwise be the case – currently, 23 hours a day. They are unable to receive visits. Both they and their families are likely to be anxious about the risk of the transmission of Covid-19.
>
> Applying ordinary principles, where a court is satisfied that a custodial sentence must be imposed, the likely impact of that sentence continues to be relevant to the further decisions as to its necessary length and whether it can be suspended. …" (§§ 41 and 42)

33. The present case was a serious one in the context of the offence, and a long way from being on the cusp of a suspended sentence. It was nonetheless right for the Recorder to take account of current prison conditions when sentencing, and she did so when reducing by 2 months the sentence that she would otherwise have imposed. We see no grounds on which to interfere with that exercise of judgment.

34. Fifthly and finally, the Applicant submits that the Recorder gave too little weight to his personal mitigation, including among other matters his signing up as an NHS volunteer during the pandemic, his hard work during the pandemic, numerous character references, lack of recent relevant convictions, and certain personal family circumstances meaning that his partner was particularly reliant on him. We have given careful consideration to these matters. However, it is clear that the Recorder had them in mind when sentencing and we cannot say the Recorder was wrong in her consideration of them.

35. In conclusion, we consider that the Applicant should have been sentenced on the basis that this was not a sustained attack and therefore did not fall within category 1 of the guideline. However, in the particular circumstances of this case, and for reasons we

have explained, we consider that the sentence imposed by the Recorder was neither wrong nor manifestly excessive. We therefore allow the application for permission to appeal but dismiss the appeal.

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

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk