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[2022] EWCA Crim 1779

IN THE COURT OF APPEAL

CRIMINAL DIVISION



No. 202202996 A2

202202986 A2

Royal Courts of Justice

Friday, 16 December 2022

Before:

LADY JUSTICE CARR

MRS JUSTICE CUTTS

HIS HONOUR JUDGE JEREMY RICHARDSON KC

(RECORDER OF SHEFFIELD)

**REFERENCE BY THE HIS MAJESTY'S ATTORNEY GENERAL UNDER
Section 36 Criminal Justice Act 1988**

REX

V

FG

**REPORTING RESTRICTIONS APPLY:
Section 45 of The Youth Justice and Criminal Evidence Act 1999**

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MR B LLOYD appeared on behalf of the Solicitor General.

MR A WESLEY appeared on behalf of the Offender.

J U D G M E N T

LADY JUSTICE CARR:

1. The provisions of section 45 of the Youth Justice and Criminal Evidence Act 1999 are engaged. No matter relating to the child victim in this case shall in his lifetime be included in any publication if it is likely to lead members of the public to identify him as being concerned in these proceedings.

Introduction

2. We have before us two applications in respect of a sentence imposed on the offender, FG, on 12 September 2022 by Her Honour Judge Julie Warburton (“the Judge”) sitting in Nottingham Crown Court.
3. The Solicitor General seeks leave to refer the sentence under section 36 of the Criminal Justice Act 1988 on the basis that it is unduly lenient. By contrast, the offender seeks leave to appeal the sentence on the basis that it is manifestly excessive, this latter application having been referred to the full court by the Registrar.
4. The offender, who is now 26 years old, pleaded guilty to causing his five-month-old son (“A”) grievous bodily harm with intent, contrary to section 18 of the Offences Against the Person Act 1861. The offence was committed on 7 November 2019, when the offender was looking after his two young children, A and C (then aged 18 months).
5. During the course of the evening FG picked A up by his legs and shook him, because A would not stop crying. A suffered several injuries as a result of the shaking, including fingerprint bruising to the head, legs and body; linear marks to the face; subdural and subarachnoid haemorrhaging (that is to say, bilateral brain haemorrhages), a spinal haemorrhage and retinal haemorrhaging.
6. The Solicitor General submits that the Judge fell into error by concluding that an adjusted term of five years’ imprisonment sufficiently reflected the level of culpability, the presence of several aggravating factors and the overall seriousness of the offending, and by attaching too much weight to the mitigating factors.
7. For the offender, it is said that the sentence was manifestly excessive. In particular, the Judge gave insufficient weight to the short duration of the incident, and so intent, within the context of the offender’s mental health difficulties. It is said that the sentence cannot be said to be unduly lenient, in particular, given the offender’s background and personal circumstances.

The facts

8. The offender had previously been in a relationship with B. Together they had two children, A and C. By September 2019 the offender and B had separated. In the days leading up to 7 November 2019, A and C were staying with the offender at his home address and he was essentially caring for them alone.
9. In the early evening of 7 November the offender telephoned B, asking her to come and collect the children. B could hear A in the background crying. She asked the offender to video call her, so that she could see how A was. He did so, and B thought immediately that A looked unwell and floppy. She collected the children and noted that A had a number of minor marks across his face and appeared tired. The following day she saw marks on his back and bruising, and took him to hospital. There it was identified that A had been shaken. Scans and examinations revealed the injuries to which we referred.

10. Expert evidence was to the effect that the brain and spine imaging showed that A had most likely been subjected to an inflicted injury of a violent shaking type with an additional impact against the soft surface, all outside the realms of normal handling form a child of this age. In an accidental setting, the infant's injuries would be akin to the sorts of injuries sustained in a high speed motor vehicle accident.
11. The bilateral extensive retinal haemorrhaging was due to abusive head trauma occasioned by:

"[...] a short-lived episode of shaking an infant with or without associated impact head injury [...] More than one episode of shaking cannot be excluded [...] The injuries documented have the potential to cause a degree of permanent damage to the retina [...]"

[A] should have periodic hospital eye service assessments of his visual development."
12. A's injuries had been sustained shortly before the video call to B, and an observer witness such trauma would be aware that the infant was likely to suffer significant harm. It was said that the head, eye and spinal injury, with extensive bleeding, and the encephalopathy were generally accepted as being due to a shaking injury with or without impact.
13. Following review in February and July of 2020, it was said that A was making satisfactory developmental progress with no detectable neurological defects. Further, the MRI scan had not shown any definite brain injury. To date A had not shown any obvious developmental problems as a result of his injuries, but it was not possible to speculate accurately as to whether or not A would suffer difficulties in the future.
14. When arrested and interviewed in November 2019, the offender blamed C for causing the injuries. He said there had been three separate incidents when C had pulled A from his bouncer, causing his head to hit the doorframe, pulled A from his chair and jumped on his stomach, and straddled A when he was in his chair. These suggestions were rejected readily by the medical experts.
15. The offender was then re-arrested on 9 June 2020. In interview he continued to deny responsibility for causing A's injuries, maintaining still that C must have caused them. He maintained a not guilty plea upon charge and at the PTPH in March 2022, although on that occasion he did plead guilty to the lesser offence of inflicting grievous bodily harm, contrary to section 20 of the Offences Against the Person Act 1861, albeit on a basis.
16. That plea was not acceptable to the prosecution and the matter proceeded to trial. In April 2022 a defence statement was served in which the offender accepted causing A's injuries, but not the necessary intent. However, on 26 July 2022 the offender was re-arraigned and pleaded guilty to the index offence. His position was that during the early evening of 7 November he had placed his hand forcefully across A's face to stop him crying, and when that had failed, he had picked A up by his legs and shaken him. The incident had lasted some 30 seconds.
17. The offender was of previous good character, having only one reprimand for theft when a teenager.

The sentence

18. The material before the Judge for sentencing purposes included a Pre-sentence Report dated 1 September 2022. This summarised the offender's background including his schooling, home life, employment, personal relationships and traumatic experiences. In particular, there was

a description of childhood trauma from being bullied as a child at school and by his father in the form of physical and emotional abuse. The report summarised the offender's emotional state and his loss of emotional control at a time when he was not coping as a young father caring for a baby and a toddler. There were additional stresses in the form of the loss of his employment and also financial troubles.

19. There was also a Liaison and Diversion Court Report prepared by John Stocks, an experienced NHS mental health specialist. In his opinion, it was:

"...very likely that [the offender's] emotional dysregulation, impaired distress tolerance and damaged sense of identity, demonstrated by his name change, are very likely to be symptomatic of personality disorder with dependent emotionally unstable and avoidant traits [...] I also note from [the offender's] father that [the offender] struggles to take responsibility for his own actions, and this is also illustrated in his various explanations for the injury to [A] before admitting his guilt. This is also common in those with personality disorders."

20. Further, in Mr Stocks' opinion, the offence against A occurred in the context of the offender being under the stress of unemployment and ongoing mental health issues:

"His lack of coping, dysfunctional personality traits and emotional dysregulation seem to have contributed the commission of this offence." Mr Stocks recorded that the offender expressed what appeared to be genuine remorse for his actions.

21. There were character references from the offender's work supervisor, his mother and partner, summarising the offender's positive qualities, his good work record, his mental health difficulties and poor relationship with his father.

22. A lengthy Victim Personal Statement was also available from the offender's former partner. She set out the significant impact of the offence on her, her family and on her subsequent pregnancy. Suspicion had fallen on her as a result of the offender not taking responsibility for his conduct. As a result, A and C had been placed with foster carers. There was a very long period of time before they were returned to her, and as a result, she had lost a significant part of her life with them. She described the trauma of her children being placed away from her and not being able to care for them or cuddle or kiss them at night or to reassure them if they were upset or scared. In particular, this trauma related to the fact that she would never get back the 19 months when she with did not have the children in her care. This had had a "massive impact" on how she now is as a parent. The statement also described how the offender had breached her trust in the worst way possible. She now struggles to trust others, including professionals, and is paranoid when it comes to the safety of her children.

23. The Judge sentenced the offender on the basis of culpability B offending for the purpose of the Sentencing Council Guideline on Assault ("the Guideline"). He did so on the basis, accepting the prosecution's position, that there were factors in both high and lesser culpability categories which balanced each other out, namely a Category A factor in terms of the obvious vulnerability due to victim's age, and on the other hand, a Category C factor in terms of a mental disorder where linked to the commission of the Offence.

24. In terms of harm, the Judge placed harm at the lower end of Category 2 or the top end of Category 3. In terms of aggravation, the Judge pointed to the fact that the offender was in a position of trust, failed to seek any immediate medical assistance, failed to tell the mother what had happened and attempted to blame C.

25. In terms of mitigation, reference was made to the offender's age, his previous good character, the fact that there was no previous concern over his ability to provide proper care for the children, remorse and the fact that the injuries were inflicted as a result of a short temporary loss of self-control and without premeditation. There was reference to the character references and the personal mitigation and childhood issues affecting the offender, including the question of bullying and self-harm. In the latter regard the Judge stated in terms:

"These are all factors which may have a bearing on your ability to cope emotionally, though do not have any direct causal link to the actions you took on this occasion."

26. Thus, the Judge took a term of five years' custody before applying 20% credit for guilty plea, stating:

"Having regard to the aggravating and mitigating features, including in particular, your fragile mental state and your general inability to cope with mentally stressful situations, though not directly relevant to causation, I accept this does reduce to some extent your culpability. Within the context of the Guideline, in my judgment, the sentence after trial, taking account of the aggravating and mitigating features, would be one of five years' imprisonment."

Submissions for the Solicitor General

27. The central criticism made by Mr Lloyd for the Solicitor Generalist is of the starting point and category range adopted by the Judge namely, 2B or very top end 3B, and of the adjustments made to reflect the several aggravating factors, the limited mitigating factors and the overall seriousness of the offending. In short, the Judge should have treated this offending as Category 2A offending with a starting point of seven years' custody and a range of six to ten years.
28. In terms of culpability, there was no causal link between any personality disorder trait and the offending. Those were features which had to play a part somewhere, most appropriately in terms of mitigation, but were not relevant to the assessment of culpability at the outset.
29. In terms of harm, the injuries suffered were grave and merited a starting point in Category 2. A term of six years' custody, or thereabouts, which appears to have been what the Judge took before adjustment for aggravating and mitigating factors, was far too low.
30. There were multiple aggravating factors increasing the seriousness of the offence: the level of force; the position of trust; the presence of another child; the failure to seek immediate medical assistance; the failure to tell the mother what had happened immediately; the attempt to blame C, and the impact on the mother. It is submitted that the Judge gave insufficient weight to those factors and undue weight to the mitigating factors, which Mr Lloyd accepts exist, in particular, in relation to the question of mental health difficulties.
31. In summary, Mr Lloyd submits that a sentence of four years' imprisonment was substantially too short, did not sufficiently reflect the level of culpability, the several aggravating factors or the overall seriousness of the offending.

Submissions for the offender

32. Mr Wesley for the offender submits that the evidence of Mr Stocks and the overall background material relating to the offender's personal circumstances is of far greater importance than the Solicitor General suggests. In terms of culpability, there was, on the basis

of Mr Stocks' evidence, which everybody at the time of sentence was prepared to accept as adequate, a causal link between the offender's mental health difficulties and the offending in question. Mr Wesley emphasises the difficult background and personal circumstances of the offender, including a suicide threat in June and September 2019 and the fact that he presented a suicide risk, and indeed, had taken an overdose very shortly before sentence. These are matters, says Mr Wesley, which contextualise what was a momentary loss of control and intent to cause harm. The offender was not able to withstand the stresses of looking after two young children. This is also said to be relevant to the aggravating factor of breach of trust, and contextualises the offender's behaviour in failing to accept responsibility at an early stage. Such traits are common in those with personality disorders.

33. Mr Wesley's position is that culpability could properly be placed at B, and harm could properly be placed at Category 3, given A's good recovery.
34. In terms of aggravation, the degree of force he used had to be balanced against the short duration of the incident, and although another child was present, there was no suggestion that that child was affected by the incident.
35. In terms of the submission that the sentence was manifestly excessive, it is argued, in particular, that the Judge gave insufficient weight to the short duration of the incident and so intent within the context of the offender's mental health difficulties and personal background.

Discussion

36. References under section 36 of the Criminal Justice Act 1988 are made for the purpose of the avoidance of gross error, the allaying of widespread public concern at what may appear to be an unduly lenient sentence and the preservation of public confidence in cases where a judge appears to have departed to a substantial extent from the norms of sentencing generally applied by the courts in cases of a particular type (see *Attorney General's Reference No. 132 of 2001*; *R v Johnston* [2002] EWCA Crim 1418; [2003] 1 Cr App R (S) 41 at [25]). We remind ourselves that the hurdle is a high one for appellate interference to be justified. The sentence in question must be, not only lenient, but unduly so. On the other side of the coin, if appellate interference is to be justified on appeal by a defendant, the sentence must be manifestly excessive or wrong in principle.
37. We consider, first, the question of culpability, noting at the outset that it was the prosecution's submission that this was Category B culpability. As confirmed, for example, in *Attorney General's Reference (R v Stewart)* [2016] EWCA Crim 2238 at [34] and [35], any concession below by prosecuting counsel as to appropriate categorisation is not to be taken as binding on this court or the Solicitor General. However, the fact that a concession has been made and acted upon may well be a powerful indication that it is indeed an assessment properly made.
38. We do not consider that this was culpability B offending. It was culpability A offending. The infant was obviously vulnerable due to his age. The fact that this was a serious assault on a five-month-old baby was the dominant feature. There was only very limited evidence to support a suggestion that the offending seemed to be linked to the commission of the offence.
39. In terms of harm, this was again, in our judgment, Category 2 harm, being grave injury. The fact that there may have been a good subsequent recovery in no way affects that assessment. There were then the following aggravating features: the degree of force; the undoubted abuse of trust; the presence of another child; the failure to seek medical assistance and to reveal what had happened, and the blaming of others which resulted, amongst other things, in the removal of two children for a very long period of time from their mother.

40. In terms of mitigation, account had to be taken of the offender's age and character, the shortness of the incident, the lack of previous concerns over care, the remorse, and of course, significantly at this stage, the mental health difficulties and personal background of the offender.
41. With Category 2A offending the starting point is seven years' custody. Category 2B offending has a starting point of five years.
42. Having carefully reflected on the submissions made before us and the material available, we have no doubt that the overall term arrived at by the Judge of five years before credit for guilty plea by reference to the Guideline and aggravating and mitigating features, was low. A term of at least six years' custody could readily have been justified. As set out above, we disagree with some aspects of the Judge's approach to categorisation, particularly so far as culpability is concerned.
43. However, what matters for present purposes is whether the ultimate sentence is so outside the norms of sentencing that it can be said to be unduly lenient. We are not persuaded that it was. The Judge carried out a careful sentencing exercise in what was a difficult case, and whilst undoubtedly lenient, the sentence of four years' custody did not, in our judgment, fall outside the bounds of acceptability. It certainly was not a sentence that was arguably manifestly excessive. The Judge gave due weight to all the circumstances, including that the offending involved a short and temporary loss of self-control.

Conclusion

44. For these reasons, whilst we consider the sentence arrived at by the Judge to be lenient, we do not consider that it was unduly lenient. We grant leave on the Reference, but we dismiss it on the full merits. We refuse leave to appeal against sentence.
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