IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2023] EWCA Crim 487

No. 202101562 B5

Royal Courts of Justice

Wednesday, 19 April 2023

Before:

LORD JUSTICE EDIS
MR JUSTICE JAY
HER HONOUR JUDGE ANDREW LEES

REX
V
GEORDAN ANTHONY REES

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MR D LEATHLEY appeared on behalf of the Applicant.

MR T J SCAPENS appeared on behalf of the Crown.

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J U D G M E N T

LORD JUSTICE EDIS:

1 On 6 April 2021 in the Crown Court at Swansea the appellant changed his plea of guilty to three counts (Counts 3, 5 and 6), on an indictment which as a result of amendment that morning contained six counts. Counts 1, 2, 3, 5 and 6 alleged offences of violence against the appellant. Count 4 alleged a joint offence of assault against the appellant and his father, who was co-accused, and like the appellant, had pleaded not guilty when first arraigned. The case was listed for trial of both defendants on all counts on 6 April. After he entered his new pleas, the prosecution offered no evidence against the appellant on the remaining three counts and also against his father on the sole count he had faced. The appellant was then sentenced to a suspended sentence totalling 12 months, suspended for 12 months and subject to an unpaid work requirement of 180 hours.

2 All the offences arose out of a violent incident at a street party held to celebrate VE day on 8 May 2020. The defence of the appellant to the charges which had been set out in a defence statement was self-defence, and he claimed that he had been the victim of serious violence. He had certainly been seriously injured in the incident.

3 This appeal against conviction is brought with leave of the full court and involves a single ground, namely that the convictions are unsafe because they were the result of inappropriate pressure exerted by the judge and defence counsel. The law in relation to situations such as this was extensively examined in two decisions of this court in another case dealt with by the same judge who dealt with the present case in Swansea. Those decisions are reported as *R v AB, CD, EF and GH* [2021] EWCA Crim 1959 and [2021] EWCA Crim 2003. In that case also the judge had given an indication of sentence. In that case the indication was given in September 2021 and the decisions of this court were handed down on dates in December 2021. The present case, therefore, predated those events and the judge did not have the benefit of the guidance given by this court in those decisions. It is not necessary for the purposes of dealing with this appeal to rehearse or to attempt to rephrase the legal position set out in those earlier decisions in this judgment.

4 During the morning of 6 April 2021 the judge caused counsel for the parties to be called into court in order that a discussion could take place between him and them in court. It is clear from the transcript that the defendants were not present during that discussion. The judge began this hearing by apologising for interrupting conferences which he understood were taking place between the two defendants and their counsel. They were separately represented. Some observations by Mr Dyfed Thomas who represented the appellant on that occasion suggested that he was considering the possibility prior to this hearing that there may be a compromise which would avoid a trial and that discussions in relation to that were on-going at the time when the judge had called the case on. Mr Tom Scapens, on behalf of the prosecution, informed the judge what pleas would be acceptable. The defendants were not, as we have said, present during this hearing. They clearly should have been. Prosecuting counsel said in terms that if the appellant pleaded guilty to Counts 3, 5 and 6 of the proposed new indictment the prosecution would offer no evidence against him in relation to Counts 1, 2, and 4, and would also offer no evidence against his father. The proposal relating to the appellant was followed by the exchange which we set out below, and after conclusion of that exchange, the prosecution made its position clear in relation to how those pleas, if entered by the appellant, would impact upon the case against his father.

5 The exchange which occurred between those two statements on behalf of the prosecution concerned sentence. It was the judge who initiated the discussion about sentence. Mr Thomas on behalf of the appellant had not asked him to give any indication

as to sentence. It was done spontaneously.

6 The exchange about sentence was as follows, with Mr Scapens as prosecution counsel and Mr Thomas as counsel for the defendant:

> "His Honour Judge Rees: Geordan Anthony Rees, he's, what is he 38?
>
> Mr Scapens: 34, Your Honour.
>
> His Honour Judge Rees: Not violent in the past, 34?
>
> Mr Scapens: Yes.
>
> His Honour Judge Rees: Not violent in the past?
>
> Mr Scapens: No.
>
> His Honour Judge Rees: Is he in work, Mr Thomas?
>
> Mr Thomas: Not sure if he is at the moment. He has worked in the past but I'm not sure if he is at the moment. I, I've been concentrating on the, the potential for compromise rather than background----
>
> His Honour Judge Rees: Is he fit and well?
>
> Mr Thomas: Oh he seems to be, he seemed to be. He had, he, obviously serious injuries from this incident but he seems fit and well. He seems, sorry, he seems fit and well, Your Honour, yes.
>
> His Honour Judge Rees: It's not your fault. He seems fit and well?
>
> Mr Thomas: Yes, could, can I tell Your Honour this?
>
> His Honour Judge Rees: No, can I tell you something first?
>
> Mr Thomas: Very well.
>
> His Honour Judge Rees: He seems fit and well?
>
> Mr Thomas: Yes.
>
> His Honour Judge Rees: You get my meaning?
>
> Mr Thomas: Yes, well, the, the----
>
> His Honour Judge Rees: No, no you understand my meaning? He's----
>
> Mr Thomas: I understand your meaning.
>
> His Honour Judge Rees: Fit and well?
>
> Mr Thomas: He's fit and well.
>
> His Honour Judge Rees: Good, that's all I'm going to say about it----

Mr Thomas: I understand your meaning, but can I say this, Your Honour? We were in conference more than happy to come and see Your Honour, those conferences will continue, we are seeing whether there needs to be a trial in this case and there may be an application I will make to the Court if matters proceed in a certain way.

His Honour Judge Rees: What, a Goodyear application on the day of trial?

Mr Thomas: On the day of trial.

His Honour Judge Rees: Haven't I said enough?

Mr Thomas: I, I can, I'm happy with that myself, Your Honour, yes, and I will make sure there's----

His Honour Judge Rees: There's no need for a Goodyear application----

Mr Thomas: I, I understand.

His Honour Judge Rees: It'll be refused apparently, one isn't meant to entertain Goodyear, I don't understand that and I----

Mr Thomas: No.

His Honour Judge Rees: And I like to see where that's written.

Mr Thomas: I, well can I say I, I've not found it anywhere.

His Honour Judge Rees: He was injured himself, wasn't he?

Mr Thomas: Very seriously.

His Honour Judge Rees: Is that why Mr McAbe is required?

Mr Thomas: Yes indeed.

His Honour Judge Rees: If we have a trial.

Mr Thomas: If we have a trial.

His Honour Judge Rees: We'll see about that if we have a trial and whether he's required but I'm trying to be helpful.

Mr Thomas: I, I understand, Your Honour, and grateful.

His Honour Judge Rees: This is not the type of case then if he was injured as well that compensation would obviously flow."

7 The discussion then turned to the appellant's father, and the prosecution explained its position as set out above. This was a matter of interest to the appellant, both because his proposed pleas would remove the possibility of a criminal conviction of his father, and also because it appears his father was paying for his own defence. There seems to have been some discussion between lawyers about the expense in legal costs which would be saved if the case did not continue against the appellant's father. These costs are not recoverable in

the event of acquittal. If, therefore, the appellant pleaded guilty to Counts 3, 5 and 6, he would be helping his father.

8 There was then an adjournment when the judge allowed time for counsel for the defendants to speak further to their clients. This would, of course, involve counsel interpreting what the judge had said and explaining to their clients what it meant. So far as what Mr Thomas said to the appellant is concerned, the evidence is in some respects quite unclear. This is no criticism of anyone. The conversations occurred over two years ago and recollections are likely to differ. It is perhaps unfortunate in these circumstances that there was no record created by Mr Thomas for the appellant to confirm by signing it of the advice which had been given and of the decision which the appellant then took. In these circumstances, we have to take a view about what we think occurred when Mr Thomas spoke to the appellant after the judge's comments about sentence.

9 The appellant, his father and sister have made statements which we have read. They are critical of the conduct of Mr Thomas in some reasons. They suggest that he, in effect, bullied the appellant into pleading guilty. They say that the appellant was advised that if he was convicted after a trial he would be sent to prison but that the judge had offered a deal whereby he would plead guilty to only one offence and would receive a Community Service Order (as they call it). The statements also suggest that during this discussion the interests of the appellant's father were also mentioned. They say that counsel was not interested in fighting the case for him and that when the appellant protested his innocence during these discussions, counsel said that it was his job to keep him out of prison and this is what would happen if he entered the plea as proposed.

10 As we shall explain, there are some difficulties in accepting all of the evidence contained in those three witness statements. When contrasted with the undisputable events which occurred on re-arraignment recorded in the transcript, they are not convincing. We do not need for our purposes in dealing with this appeal to make findings of fact in relation to all that they say about what Mr Thomas did. We certainly make no findings against him in the terms which they have included in those statements. We are concerned only with the central matter of fact on which, in our judgment, this appeal depends, namely what was the understanding of the appellant as to the judge's indication at the time when he decided to enter his pleas.

11 Mr Thomas was asked by the registrar for his response to these allegations, and has responded in three documents. He denies that he was not willing to contest the case and tells us that he had no other work that week which would have prevented him from doing so. As we have indicated, we make no findings against him in relation to that part of what is said about him by the appellant and his two witnesses.

12 In relation to a specific request from the court for assistance as to what advice he gave the appellant after the exchange with the judge, which we have set out above, he said this, with some key words emphasised by us:

> "4. I understand that the Court wishes assistance with what advice was given following the learned trial judge's observations and any effect that had on the defendant. **As I have previously outlined the appellant would have been advised that if he were convicted after a trial that he would face a custodial sentence and that the sentence could be an immediate custodial sentence. I could not have given the appellant any guarantee that the sentence following a plea would not be an immediate custodial sentence as the learned judge had refused to hear a Goodyear indication. However, based on the learned judge's observations**

> **I would have advised the applicant that despite there being no guarantee my opinion was that in the event of acceptable pleas the learned judge would pass a sentence that did not involve an immediate custodial, sentence.** The applicant was advised that any decision in relation to any pleas was his own decision. I cannot recall any comment by the appellant that suggested he felt that following the learned judge's observations he was now in a position that he had to offer guilty pleas or that he felt pressurised to do so. If the appellant had suggested he did feel that way or I thought he did have those feelings I would have advised the appellant that he could decide whether to plead guilty or maintain his not guilty pleas. This would be the same advice that is given following a formal Goodyear indication where the defendant is free to choose whether to act upon any indication given by the court. I do remember that I left the appellant with some of those who accompanied him to court so he could consider what he wanted to do."

13 We invited Mr Thomas to make himself available for cross-examination on the Video Link at this hearing and we are grateful to him for doing so. When questioned by Mr Leathley and by the court, he said again that he had told the appellant that he could not guarantee a non-custodial sentence in the event of a plea. However, he said in his experience he understood the judge's observations to mean that a non-custodial sentence would be imposed if guilty pleas were entered, as a result of what the judge had said in court.

14 He said that he believed that he could not guarantee anything because there was no formal indication in *Goodyear* form. It was his opinion that a custodial sentence would be likely after a trial, but he did not understand the judge to have said this. He did not think that he repeated his earlier advice to that effect after the indication. At that stage, to the best of his recollection, he did not then repeat the advice that a custodial sentence was likely in the event of a conviction after a trial. However, Mr Thomas did not say in his evidence that he had said anything to change the advice that he had previously given on that subject, which is as we have set out above.

15 He said that he would have advised the appellant that he should not plead guilty unless he was guilty, because this is part of the advice which has to be given. As we have said, there is no written record of the advice or of Mr Rees's understanding of it, and Mr Thomas was trying to assist the court to the best of his ability with the detail of a conversation which happened two years ago.

16 Mr David Leathley, on behalf of the appellant, has made it very clear that he is not suggesting that Mr Thomas was doing anything other than trying to do the best he could for his client during the events of the morning of 6 April 2021, but he invites us to conclude that the appellant, at the time when he decided to enter guilty pleas, was under the impression that if he did so he would not receive a custodial sentence, whereas if he continued to fight the case and lost, he might. His submission is that given that was the state of mind of the appellant at the material time, that was the result of impermissible pressure which had originated from the judge and which should, in accordance with established principles, lead this court to say that the convictions were unsafe.

17 The reason why we have said that some of the evidence contained in the witness statements of the appellant and his father and sister is inconsistent with the transcript is that they all say that they understood that the offer which had originated from the judge involved the appellant pleading guilty to one offence only. They are insistent on that point. However, this is impossible to reconcile with what happened when the court reconvened.

18 The transcript records what happened at the re-arraignment as follows:

> "His Honour Judge Rees: Thank you very much. Well I give leave to prefer this indictment at B3 and I stay the indictments at B1 and 2. Now the Defendant's been arraigned on Counts 1 to 5 in a different form, they don't need to be rearraigned, but Mr Geordan Anthony Rees needs to be now arraigned on Count 6.
>
> Mr Thomas: Yes, and can he be rearraigned on Counts 3 and 5 as well please?
>
> His Honour Judge Rees: Yes, rearraigned on Counts 3 and 5 and arraigned on Count 6. So 3, 5 and 6 please to be put to the Defendant.
>
> Court Clerk: Geordan Rees can you please stand? Geordan Anthony Rees you stand charged on this indictment as follows. On Count 3, Geordan Rees, you stand charged with assault occasioning actual bodily harm, that on the 8th day of May 2020 assaulted Marion Rees, Marion Thomas, thereby occasioning her actual bodily harm. Do you plead guilty or not guilty?
>
> Mr G Rees: Guilty.
>
> Court Clerk: On Count 5 you stand charged with unlawful wounding. That on the 8th day of May 2020 unlawfully wounded Douglas James Watkins. Do you plead guilty or not guilty?
>
> Mr G Rees: Guilty.
>
> Court Clerk: On Count 6 you stand charged with affray. That on the 8th day of May 2020 used or threatened unlawful violence towards another and his conduct was such as would cause a person of reasonable firmness present at the scene to fear for his personal safety. Do you plead guilty or not guilty?
>
> Mr G Rees: Guilty.
>
> Court Clerk: Thank you, please sit down."

19 That passage makes it clear that the appellant was asked to plead guilty to three separate offences in different terms and that he did so without expressing any concern or asking for any clarification or further help. There is a suggestion in his evidence that he may not really have been taking in what was happening because Mr Thomas had told him that he did not need to listen to what was being said in court because he would not understand it anyway, but the language of the arraignment was very clear and the appellant was invited to plead three times and did so, saying on each occasion "Guilty". He was, therefore, clearly aware that he was pleading guilty to three offences, and did so without objection. He simply entered his pleas.

20 It is further to be noted that he was at that point in the hearing sitting next to his father, who did not protest either. It is impossible to avoid the conclusion based on the transcript that the proposed course had in fact been explained to the appellant and that he did understand that he needed to plead guilty to these three offences and that if he did, the judge had made an offer of a non-custodial offer and the prosecution had agreed to discontinue the case against his father. This is the factual basis on which we will deal with the appeal.

21 So far as his state of mind is concerned, we are satisfied that whether because of advice given on the morning of 6 April or previously, the appellant was clear in his mind that if he

was convicted by the jury an immediate sentence of imprisonment was likely.

22 We are also satisfied that as a result of what the judge had said as reported to him by Mr Thomas, the appellant understood that if he were to plead guilty to those three offences to which he did plead guilty, the sentence would be a non-custodial sentence.

23 In our judgment, that is the only sensible reading of what the judge said. It is true that the judge did not say that his indication of a non-custodial sentence depended upon guilty pleas. He said nothing about what would happen if the appellant were to be convicted after a trial. That part of what we have found that the appellant understood came from the advice that he had received from his counsel in the way we have explained.

24 The question then is whether the prosecution by indicating what was acceptable, the judge by indicating what the sentence would be and defence counsel by indicating what the sentence might be if there were a conviction following a trial, created a situation where the appellant was placed under such pressure to enter these pleas that his conviction should be held to be unsafe.

25 Defendants in criminal proceedings are, of course, always under a degree of pressure when deciding what pleas to enter. The system whereby credit is allowed for a guilty plea which is reflected in statute is itself a source of some pressure because a benefit will accrue to a defendant who enters a guilty plea, as against that defendant being convicted by the jury.

26 Pressures arising from situations where members of the same family may find themselves indicted in respect of the same offences also arise commonly. Not all pressure, therefore, is capable of rendering a conviction based on a guilty plea unsafe. The sources of the pressure on this appellant in this case were:

(1) The offer of the prosecution in relation to his father's case. This was not improper but it did mean that everyone involved needed to be aware that it was something that the appellant needed to consider, having his own interests at the forefront of his mind when it came to deciding what pleas to enter.

(2) The offer from the judge of a sentence which was not immediate imprisonment. We will deal with this further below.

(3) The fact that his own counsel may not have advised him in clear and unambiguous terms that he should not plead guilty if he was not guilty and that he should take his own decision and let his father take his chances.

(4) The fact that neither counsel told the judge that the only indication as to sentence which he could properly give was an indication that there should be no immediate custodial sentence on conviction, whether that was following a plea of guilty or after a trial (see *R v Turner* [1970] 54 Cr App R 72).

27 The *Goodyear* procedure was not followed. The judge expressly declined to entertain any request by counsel for a Goodyear indication, and it has not been suggested that in any event counsel had instructions to seek such an indication. Outside that procedure, the only appropriate indication which a judge can give as to sentence is that in *R v Turner*.

28 <u>The judge's intervention on sentence</u>
The judge expressly declined to give an indication on sentence, in accordance with Criminal

Procedure Rules 3.31 and Criminal Practice Direction 7 Part C, entitled "Indications of Sentence — *Goodyear*."

29 In the absence of a request from or on behalf of the defendant for such an indication, it would have been wrong for him to do so. It is, however, quite clear from the passage we have set out in full above that the judge was intending to give an indication as to sentence. He did not do so in clear and unambiguous terms to a layperson, but he was clearly communicating in terms which he expected Mr Thomas as defence counsel to understand and on which he intended Mr Thomas to rely.

30 That indication clearly involved an indication that the sentence would not be an immediate custodial sentence because it would involve unpaid work. This was the purpose of the judge's repeated concern to establish whether the appellant was "fit and well", and therefore capable of undertaking unpaid work.

31 The judge did not say that this clear indication would only apply if there was a guilty plea. The legal effect, therefore, of this indication could only have been that explained in *R v Turner*, namely that with effect from the time when that indication was given, the defendant could be assured that whatever the plea in the event of conviction, the sentence would be non-custodial. Whether that is in fact the message that the judge intended to convey, we cannot of course say, because of the choice he made to use language which was in some respects rather opaque. Nevertheless, the upshot on legal analysis of what he said was as we have just indicated.

32 That is not how Mr Thomas understood the position and not how he communicated it in conference to his client. It would have been highly desirable for counsel to invite the judge to be clearer on this point before giving any advice to Mr Rees, but that is not what happened.

33 What happened, as we have said, was that the appellant continued to believe that he was at risk of an immediate custodial sentence if convicted by the jury, and was told that that risk no longer applied if guilty pleas were entered. We accept that Mr Thomas said that he could not guarantee that, but we are sure that the overall impact of the advice that was given was that the appellant could act on the basis that those guilty pleas would result in a non-custodial sentence.

34 Having regard to the content of the transcript which we have set out above, we are of the view that it would have been wholly wrong for the judge to impose an immediate sentence in the event that those pleas were entered, and we have no doubt that that is the impression with which the appellant was left immediately before he decided to enter his guilty pleas.

35 We think it right to observe that hearings of the kind which took place in this case ought not to happen. Discussions about sentence between counsel and the court should take place in the presence of the defendant whose sentence is being discussed. Indications should be given in clear terms so that their implications are unambiguously understood by all concerned. In our judgment, the principal responsibility for ensuring that this happens falls on the judge, particularly in circumstances where it is the judge who has initiated the whole process. We also consider that where a judge is seeking to give an indication of sentence in this unconventional and inappropriate way, it is the responsibility of counsel on both sides to ensure that the proceedings are conducted in accordance with the law as it has been clearly explained by this court on a number of occasions.

36 The concern of defence counsel is, of course, to ensure that they clearly understand what the

court is saying so that they can give accurate advice to their client whose proper interests are safeguarded. So far as the prosecution are concerned, the prosecution here acts as a minister of justice, and in our judgment, has, if nothing more, an obligation to submit to the court that conversations of this kind should only happen in the presence of the defendant.

37 Discussion and decision

Given the unsatisfactory nature of the proceedings before the judge, we have concluded that these convictions are unsafe. The judge allowed a situation to develop where counsel advised his client, because of what the judge had said, that he would not go to prison if he pleaded guilty, having previously advised him in clear terms that if he did not and were to be convicted by the jury, he would probably go to prison immediately. In fact, as we have explained, the only way in which what the judge said could be justified as a matter of law was if it were to be interpreted as meaning that the appellant was no longer at risk of imprisonment whatever he pleaded. That advice was certainly not given to him, and the position was left unclear.

38 On its own, the position of the appellant's father would not suffice to show that these convictions were unsafe. It very often happens that members of a family may be jointly accused and the prosecution may choose not to proceed against all of them if the principal offender accepts an appropriate share of the blame. We regard this as part of the background which makes the judge's indication as to sentence and the way in which it was given particularly unfortunate. However, it is the judge's indication on sentence which renders these convictions unsafe, and they will therefore be quashed.

39 Retrial

The alleged offences occurred in May 2020, very nearly three years ago. The appellant has served the 180 hours of unpaid work which was a requirement of the suspended sentence order. That order has long since expired. Although the incident was a serious one, the prosecution did not seek to refer the sentence to this court as unduly lenient at the time and that puts the seriousness of the episode into a proper context. The prosecution, nevertheless, seek a retrial after this long passage of time.

40 We think it right to say in this context that what went wrong here was principally the responsibility of the judge, but it was a responsibility which was to some extent shared by all parties. Something occurred which should not have occurred and nobody objected. It was, as we have said, at least the responsibility of the prosecution to ensure that any indication as to sentence or discussion on that subject should take place in the presence of the defendant concerned. In the modern practice it is the responsibility of the prosecution to ensure that the position of the Attorney General as to referring any sentence which may be unduly lenient is preserved. The prosecution has a formal role in the *Goodyear* process to achieve that object, and there is no reason why that should not also be required in less formal discussions of this kind in the unfortunate situation where they arise. Staying silent during this process which led to the convictions being quashed and then seeking a retrial when that has happened is not, in our judgment, an altogether attractive course to take.

41 Although we consider that this was a serious incident which actually did require an immediate custodial sentence in the event of conviction, we consider that in the light of all which has happened, the interests of justice do not require a retrial, and we decline to order one.

42 In those circumstances, we do not consider that we are bound by Mr Leathley's invitation to us to direct a retrial and we decline to accept that invitation, whether proffered by him or by the prosecution.

43 The order we make is, therefore, that these convictions are quashed, and we do not order a retrial.

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