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No: 201106492/A2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 3 April 2012

B e f o r e:

LORD JUSTICE RIX

MR JUSTICE COULSON

MR JUSTICE HADDON-CAVE

R E G I N A

v

RUSSELL CRIPPS

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Mr M Ruffell appeared on behalf of the **Applicant**

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

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1. LORD JUSTICE RIX: This appeal against sentence arises in the context, we fear, of yet another pub fight and raises a question of categorisation for the purposes of the relatively new Sentencing Council Definitive Guidelines on Assault, in this case the section 18 offence of grievous bodily harm with intent.

2. On 10 October 2011 in the Crown Court at Leicester before His Honour Judge Head and a jury, the appellant, Russell Cripps, was convicted of causing grievous bodily harm with intent. On 28 October 2011 in the Crown Court at Nottingham, before the same judge, he was sentenced to nine years' imprisonment. 18 days spent in custody on remand were ordered to count towards sentence pursuant to section 240 of the Criminal Justice Act 2003.

3. The appellant now renews his application for leave to appeal against sentence and for an extension of time of ten days following refusal by the single judge. We will grant leave to appeal and extend time as necessary.

4. The facts are these. On the evening of 29 October 2010 the complainant, David Fowle, was at a bar at the Meadow Farm Marina drinking with a friend. The appellant arrived at the bar at around 11.00 pm and appeared drunk. He was involved in altercations at the bar and then outside. The complainant intervened in the last of those incidents. The appellant struck him to the face, causing him to fall unconscious to the floor. He then continued to punch Mr Fowle to the face and kicked him to the head. The police were called at around 2.40 am.

5. The complainant was taken to hospital and found to have sustained extensive fractures to the upper jaw, cheek bones, eye sockets and nose. 11 metal plates were used to reconstruct his face. His left eye socket was reconstructed with the use of mesh. His jaw was wired shut for six weeks. We have seen photographs of the complainant on the day of the incident which are a terrible sight.

6. The appellant was arrested not long after from his home address nearby where he was found hiding under some towels. He made no comment in interview. He was found to have damage to his hand and a lump to the back of his head. On 15 February 2011 he was reinterviewed. He then commented that he had been acting in self-defence. He also denied any kicking or stamping and then refused to answer further questions.

7. In a victim personal impact statement the complainant stated that he was using pain killers for months after the incident. Although he was now feeling much better, it had taken a year for him to reach that position. He had permanent scaring which was virtually the length of his scalp. He had had trouble sleeping since the incident. He suffered from a degree of double vision and loss of confidence had forced him to give up his job as a heavy goods vehicle driver. He had not worked since the attack. His finances were in a dire state and he could no longer afford to live in a house.

8. In passing sentence the judge observed that the injuries that the appellant had inflicted with his fists and shod feet were truly horrific. The proper factual basis of sentence was that the appellant had consumed an amount of alcohol which had made him aggressive

and offensive. The landlord had intervened inside the bar when the appellant had become involved in an altercation. The appellant had calmed down but continued drinking. He had then gone outside and begun a further altercation and then another one too. His victim, the complainant, had intervened to try and pacify him. Although the complainant initially went off, he returned and mounted his attack. He punched his victim twice which felled him and knocked him out. He then continued the attack as his victim lay unconscious on the ground, punching and kicking his head, not many times but more than once. Any suggestion, as there had been at trial, that this was an incident where violence was begun by the victim and that the appellant was defending himself but exercised excessive self-defence was rejected. The appellant's conduct in hiding from the police demonstrated that he knew he had done something seriously wrong.

9. The extent of the injuries placed the case broadly within the greater harm category of the Sentencing Guidelines. The appellant's use of shod feet to kick an unconscious man's head on the ground made it a greater culpability matter. It was therefore a category 1 offence, albeit at the lower end, bearing in mind that a foot was used rather than a separate weapon.

10. However, there were further aggravations. The appellant was drunk, he had already acted aggressively towards others, he had failed to respond to previous intervention and warning about his conduct. The location and timing were further aggravating features. The assault had happened outside licenced premises in the early hours and in the presence of significant numbers of people.

11. The starting point was therefore 12 years with a range of nine to 16 years. The appellant had previous convictions for section 20 and for actual bodily harm, but each was 22 to 30 years ago.

12. In mitigation, reference letters had been taken into account, many people thought highly of the appellant, and more recently he had what the judge described as a positive good character.

13. This was not a premeditated attack in the sense of being long planned but it was a culmination of the previous incidents in which the appellant had involved himself. It was not accepted that it warranted a category 2 sentence.

14. Reference had been made to an element of remorse. However, the appellant had pleaded not guilty and had been convicted. The consequences of his action would impact on someone very important to the appellant, who was dependent on him to some extent, but it was noted that he had been living away from that person when these offences were committed. The judge found the appellant not to be dangerous but taking into account both aggravating features and such mitigation as there was the sentence was nine years' imprisonment. In fixing that sentence the judge expressly said that he was imposing a sentence:

> "... at the bottom of the range for category 1 offences."

15. The appellant, who is now aged 49, was born on 12 December 1962, had appeared before the courts on seven previous occasions for ten offences between 1976 and 2008. Those offences included the section 20 wounding, to which the judge made reference, for which he was sentenced to three months in a detention centre as long ago as 1980 and to the section 47 assault, to which the judge also made reference, for which he was fined in 1988.

16. A pre-sentence report stated that the appellant offered some remorse for his actions, recognising in part the harm that had been caused, although he was preoccupied with the impact on himself and his own family. It was considered that further offending was unlikely. However, he was not willing to take full responsibility for his actions and maintained that he was not the initial aggressor. He was not assessed as someone who generally represented a high risk of harm to the public. Further incidents could not be ruled out but were not likely to be imminent. It was recognised that custody was inevitable.

17. There were letters of reference, including a doctor's letter regarding the appellant's mother.

18. The grounds of appeal were essentially two. First of all, that the judge had determined the factual basis for sentencing the appellant inaccurately and unreasonably by preferring the evidence of one witness in particular, the barman Jamie Snow, to that of other conflicting evidence, including that from the licensee himself.

19. The second ground of appeal was that the judge had been wrong to place the case into category 1 of the definitive guidelines and that the matter should have been properly placed within category 2.

20. In his written submissions Mr Ruffell necessarily had to devote some space to his first ground of appeal, but in his oral submissions he frankly said that he was not going to spend time on that first ground, which he placed second in these submissions before this court. He did so essentially on the basis that the judge had presided over the trial and heard the witnesses for himself and that, in effect, the gravamen of his submissions in any event had to depend upon the success or otherwise of his other ground of appeal which he placed first before us. We believe that Mr Ruffell was realistic in this approach. We cannot go behind the trial judge's appreciation of the evidence which satisfied him. We say nothing more about this ground.

21. We turn therefore to the other ground. For this purpose it is necessary to say something about the modern definitive guidelines for this offence.

22. Those guidelines divide the offence into three categories. Category 1, the highest category, requires both greater harm, that is greater harm in the context of an offence which already involves by its nature grievous bodily harm, and higher culpability. Category 2 involves greater harm in that same sense and lower culpability, or lesser harm and higher culpability. It might be expressed as either being greater harm or higher culpability.

23. Category 1 starting point is 12 years with a category range of nine to 16 years. Category 2 starting point is six years with a category range of five to nine years. There is no dispute in this case that we are dealing with an offence of greater harm.

24. However, Mr Ruffell submits that despite the use of shod feet, which is a factor, albeit not a statutory factor, which indicates higher culpability as being tantamount to the use of a weapon, nevertheless this offence should, on the whole, be regarded as falling into category 2. For that purpose he relies upon the factor of lack of premeditation.

25. The definitive guidelines then go on to state that having started with the correct starting point, which depends upon an exercise of categorisation, the sentencing judge should then in an essentially familiar way consider aggravating features and mitigating features and should thereby arrive at the intermediate resting place before taking account of such matters as pleas of guilty, which do not arise in this case.

26. Mr Ruffell accepts the aggravating features which the judge mentioned in his sentencing remarks, such as drunkenness, persistence in aggression, failure to respond to previous interventions and warnings, the location in and just outside a bar or public house, licensed premises, and the presence of significant numbers of people. All of those are matters which are properly taken into account and many, if not all, of them are specifically listed in the list of other aggravating factors included within the guidelines.

27. Mr Ruffell submits with some force that even after account is taken of the mitigation in this case, which is that there are no recent relevant previous convictions and that the judge was able to speak of the applicant as a man who more recently had what could be described as a positive good character, as well as having a close relative who relied upon him for care, nevertheless, if one starts at a starting point for category 1 of 12 years, it would not be possible to arrive at a final resting point right at the bottom of the category range of nine to 16 years as the judge did. In effect therefore this was miscategorisation on the part of the judge. One should instead start at the six year starting point of category 2. In those circumstances one would conclude that the judge's overall sentence of nine years' imprisonment at the very top end of that category was too high because it would make no allowance at all for mitigation.

28. There is some theoretical force in those submissions until one realises, as in our judgment one needs to do, that categorisation of this kind is not a zero sum gain. With matters such as higher harm and in particular higher culpability to take into account, and with a six year difference between the starting points of a category 1 and category 2 offence, there must be many cases, and in our judgment this is one such case, which do not fall easily within either category, but might be said to lie between the two categories or at the cusp of each of them. Although the judge was clear in saying that he regarded this as a category 1 offence, nevertheless he also made it clear at the end of his sentencing remarks that he was dealing with the matter as a case at the bottom of that category. Applying Mr Ruffell's submissions, it is not easy to see how he arrived at the bottom of that category.

29. But if one more properly, as we think should be done, regards this case as lying uneasily on the cusp of category 1 and category 2, then it is much easier to see how, taking into account those very features of aggravation and mitigation to which we have referred, one ends up either at the very bottom of the category 1 range at nine years or at the very top of the category 2 range at nine years.

30. In our judgment this is such a case. It is plainly a case of greater harm, even if not, as Mr Ruffell pointed out, a case of life threatening injuries. It is, we nevertheless remind ourselves, a case where really awful as the harm was it has, at any rate after a year's time, settled down and can be spoken of at any rate in its physical consequences to have been overcome. So far as culpability is concerned, there was, indeed, the use of a shod foot, but that was not the only manner in which it may be that some of that really serious harm was caused.

31. There was serious aggravation and some mitigation. All in all, we regard the sentence of nine years as being one that is in no way manifestly excessive. Reading between the lines, we regard the judge as saying, in effect, that he was treating the offence as lying between the two categories, although we accept in express terms he put it in the top category. We regard it as properly lying on the cusp of the two categories. As a sentencing exercise on that basis there is nothing wrong with the nine years. Although we have given leave to appeal out of recognition for Mr Ruffell's helpful and attractive submissions, we consider that when all is said and done this is a sentence with which we would not interfere.

32. MR RUFFELL: My Lord, I have one other application. Legal aid was granted in the Crown Court. May I apply for legal aid for today's purposes?

33. LORD JUSTICE RIX: You want a representation for today?

34. MR RUFFELL: Yes, please.

35. LORD JUSTICE RIX: Yes, we grant you that.

36. MR RUFFELL: Thank you, my Lord.