Regina v Zackery Podmore

[2018] EWCA Crim 2463

Before: Lady Justice Hallett DBE (Vice President of the CACD) Mr Justice Nicol Mr Justice Butcher

Wednesday, 24 October 2018

Representation

Mr A Turnock (Solicitor-Advocate) appeared on behalf of the Applicant.
Mr P Beardwell appeared on behalf of the Crown.

Judgment

Mr Justice Nicol:

1 This is an application for permission to appeal against sentence which has been referred to the full court by the Registrar.

2 On 8 June 2018, in the Crown Court at Stoke-on-Trent, the applicant pleaded guilty to having an offensive weapon, contrary to section 1(1) of the Prevention of Crime Act 1953 . On 8 October 2018, he was sentenced by His Honour Judge Glenn to 2 months' imprisonment. No evidence was offered against the applicant on two other counts. Both concerned having an article with a blade or point. Accordingly, not guilty verdicts were entered in respect of them.

3 There were three other co-defendants. First, Jordan Burton pleaded guilty to having an article with a blade or point. He was sentenced to 9 months' detention. Second was Chandler Gallimore. He pleaded guilty to a like offence of having an article with a blade or point. He too was sentenced to 9 months' detention. The fourth co-defendant was a man against whom the prosecution offered no evidence on all of the counts on the indictment.

4 The facts of the offence were as follows. In September 2017, the applicant, Gallimore and Burton lived in a YMCA hostel in Handley. On 5 September 2017, Ms Mercer, another resident of the hostel, reported that four of the young men were going to Stoke-on-Trent with a plan to cause harm to a young man about whom rumours had been circulating around the YMCA for some time. Those rumours apparently concerned allegations that that young man had committed a sexual offence.

5 Burton showed Ms Mercer a joker face mask. Gallimore showed her a black

skull face mask. Burton also showed her a knife which he concealed in his rucksack. The group walked into the reception area and met up with the applicant. The applicant insisted that they were going, saying it was based on the rumour that they had heard. Another male joined them.

6 Ms Mercer left the YMCA by the back door and the men followed her out. Burton again showed her the knife and the applicant continued to utter threats of harm towards their intended victim. She parted company with the group. Believing their threats to be real, she alerted the police.

7 The police caught up with the group in Handley. Burton admitted to an officer that he had a knife in his rucksack and the joker mask was also found there. When he was searched the applicant was found to be in possession of a hammer, the sort used to smash through train windows. He was wearing a bandanna. He gave a number of excuses for possession of the item. Gallimore was found to be in possession of the skull face mask and an arts and craft scalpel. The fourth male was in possession of a face mask as well but no weapons.

8 In interview, Burton claimed that he had had the mask in his bag for some time. He claimed he was returning the knife to a friend. He later said that the plan was to go and harm the young man and the knife was taken to scare him. He said he did not know the other two were armed. Gallimore said he just had the mask in his pocket and had no idea of the presence of the scalpel. He had no idea the others were armed.

9 The applicant said the others persuaded him to go along to cause harm to the young man. He claimed that his plan was to go and warn him about the others and claimed the hammer, which had been in Burton's room at the YMCA, must have fallen off the shelf into his jacket pocket.

10 The applicant is now aged 26. He had no previous convictions. He had one caution in 2012 for shoplifting.

11 The court had before it a pre-sentence report which said the applicant presented as a man emotionally younger than his years. He was frank in interview and accepted that he had had a weapon in his pocket. He was aware of the group's intentions but blamed one of his co-defendants. The author of the report said the applicant did not know what he would have done had he met the potential victim. It was not suggested that he would have instigated the violence but the author of the report considered he probably would not have had the strength of character to prevent it.

12 The co-accused were aged 17 and 18. The applicant was 26. He said he was bullied into agreeing by the others. He had attended a special needs school for 9 years. There were no drug or alcohol issues. In 2016 to 2017 he was engaged in counselling for mental health problems and had been prescribed antidepressants for 4 years. He was assessed as posing a low risk of general reoffending and a low risk of serious recidivism. He was assessed as posing a medium risk of

serious harm.

13 The probation officer said that his court appearances to date seemed to have been a salutary experience. He would struggle in a custodial environment at the hand of less scrupulous others and potentially find himself negatively influenced. He had no previous convictions and there was no indication that he had engaged in similar behaviour before or since.

14 The proposal was for a community order with a rehabilitation activity requirement and unpaid work requirement as an appropriate sentence.

15 The judge also had a report dated 26 July 2018 by a forensic psychologist. She concluded that the applicant had a mild intellectual disability. He had significant cognitive functioning difficulties with verbal comprehension and reasoning, non-verbal reasoning and working memory. His difficulties were likely to present challenges for those working with him therapeutically while serving any prison sentence. He may present at socially vulnerable due to his intellectual disability and he would need extra support to understand the expectations and requirements in custody. The psychologist considered that the applicant would be socially vulnerable to peers, who might take advantage of his intellectual disability.

16 In passing sentence, the judge commented on the lack of previous convictions and the unrelated caution. The judge said that the applicant and his co-defendants would all be given full credit of one third for their pleas. The court also had to have regard to delay in their favour. The applicant and the co-defendants were going to the address of a former resident in respect of whom there had been rumours of alleged criminal activity. They said they were going to get him, kill him, teach him a lesson and cut off his balls. They went out mob-handed with weapons and disguises. There was no evidence of any of them seeking to disassociate themselves from the venture and the court inferred that had they not been stopped far more serious behaviour would have followed. The court had a duty to prevent vigilante-style behaviour, particularly when it involved weapons being carried. This was serious offending.

17 The judge referred to the pre-sentence report in respect of the applicant. He did not appear to accept awareness of the hammer, but that was ridiculous. He sought to blame other people. He suggested he would have alerted the intended victim or left the group. The court did not accept that. It was totally inconsistent with the account given by Ms Mercer. He had been the one speaking of cutting off the intended victim's balls and how he would be able to get him out of the house. The court had read the psychological report. He suffered from mild intellectual difficulty and there was some history of anxiety and depression. The court took account of that.

18 The judge referred to the guideline for bladed articles and offensive weapons from the Sentencing Council. The judge said this was a difficult case to categor-

ise. Culpability was not difficult. The applicant was category C. While the co-defendants were category A. That was because of the different nature of the weapons that each of them had carried. The court had to look at the level of harm caused or risked. It seemed the offence was committed in circumstances where there was a risk of serious disorder. They were only stopped because the police had received a tip-off. The court had regard to totality and the guideline in relation to the imposition of community and custodial sentences. These offences were so serious that only immediate custody was appropriate and that applied to all three of them. The judge passed the sentences to which we have referred.

19 On the applicant's behalf, Mr Turnock makes essentially two submissions. First he argues that the judge mischaracterised the offence for the purposes of the guideline on bladed articles and offensive weapons. As the judge noted, it was not disputed that the culpability was C. Since the defendant had been charged with possession of the hammer alone, that was not a bladed article and it had not been used to threaten or cause fear. However, Mr Turnock submits that the judge should have treated this as a category 2C case since no actual harm was caused and the defendants had been detained some distance from where their intended victim lived.

20 The problem with this submission is that it ignores the Council's heading to the categories of harm. What the judge had to assess was the level of harm that was caused *or risked* - our emphasis. In our view, the judge was plainly right to say that the level of harm risked to the intended victim was serious harm or distress. The judge, in other words, was plainly right to treat this as a case within category 1C. In fairness to Mr Turnock, he recognised that this was not his strongest point.

21 For category 1C the starting point is 3 months. Since the judge gave the applicant full credit, it is clear that he adopted this as his sentence before deducting further credit for the guilty plea.

22 Mr Turnock's second submission is that the judge ought to have suspended any custodial sentence.

23 In this regard, another of the Sentencing Council's guidelines is relevant, namely imposition of community and custodial sentences. That makes clear that a judge should consider first whether the custody threshold has been crossed and then whether it was unavoidable that a sentence of imprisonment should be imposed and, thirdly, what was the shortest term commensurate with the seriousness of the offence.

24 Judge Glenn's inferential response to these questions, that the custody threshold had been crossed, that a custody sentence was inevitable and that 2 months was the shortest term, were all well within the range of responses open to him.

25 The fourth question to be asked is: can a sentence be suspended. The

Sentencing Council lists three factors which indicate that suspension would *not* - our emphasis - be appropriate. Two of these were plainly inapplicable. Thus the applicant did not have a poor history of compliance with court orders. According to the PSR he had a low risk of general reoffending and a low risk of serious recidivism. In terms of harm he was assessed as posing a medium risk of causing serious harm, though that was because of the index offence. The probation officer added, "His court appearances to date seem to have been a salutary experience, though the risk is only likely to reduce further following intervention to address his thinking further", though the recommendation of a community order envisaged that the intervention in question could be achieved outside custody.

26 The remaining factor indicating that suspension would not be appropriate is that "appropriate punishment can only be achieved by immediate custody" and we assume that it was this factor which Judge Glenn must have had in mind.

27 However, two of the factors which the Sentencing Council list as indicating that suspension might be appropriate were important. The first of these is "realistic prospect of rehabilitation". As the PSR noted, the applicant had no previous convictions. We have already observed the assessment that the risk of reoffending was low. The PSR continued:

> " …and there is no indication that he has engaged in similar behaviour previously, or since, despite currently living with a male bearing a conviction similar to what they wrongly believed the intended victim to have carried out. In that respect the court may find that the risk he presents can be safely managed in the community where his thinking can be challenged and influenced in a more prosocial setting".

28 We were told that the conviction in question of the man with whom the applicant had been living was a person who had been convicted of a sex offence.

29 The next factor favouring suspension identified by the Sentencing Council is "strong personal mitigation". We have already referred to the report of the psychologist who identified deficiencies in the applicant's cognitive abilities which were likely to have been directly related to him succumbing to peer pressure to go along with his co-defendants.

30 A further factor which is relevant is the short length of term which the judge had in mind. Short prison sentences are sometimes salutary or unavoidable. But that will often be the case where a suspended sentence has previously been an ineffective deterrent or where community penalties have previously been unsuccessful. None of that applied in the present case, where, as we have said, the applicant had no previous convictions and only one unrelated caution.

31 In this case as well the judge took the starting point of 3 months. That is the

starting point recommended by the Sentencing Council. That did not take account of the mitigating factors, namely the applicant's good character and the psychological report. We add in parenthesis that that combination did not apply to the other two defendants. Those mitigating factors needed to be taken into account either by reducing the length of sentence or by suspending the applicant's sentence. The judge did neither.

32 This was not an easy sentencing exercise, particularly as there were co-defendants who had to be detained. Nonetheless, in our view, it is an unusual situation, where an immediate sentence of 2 months' imprisonment was outside the range of sentences properly open to Judge Glenn.

33 Accordingly, we will grant the applicant permission to appeal against his sentence. We will allow the appeal. The sentence will be quashed. There will be substituted a 2-month suspended sentence suspended for 1 year. As recommended by the pre-sentence report, the applicant will also be subject to a supervision period of 12 months. The 12 months of the suspension and the supervision period will run from today. The applicant will also be required to carry out 25 rehabilitation activity requirement days. Since the applicant has already been in custody for a little over 2 weeks it is not necessary to add an unpaid work requirement as well.

34 To this extent, the appeal is successful.

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