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No: 201804497/A2

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Wednesday 8 May 2019

B e f o r e:

LADY JUSTICE THIRLWALL DBE

MR JUSTICE KERR

THE RECORDER OF LONDON

HIS HONOUR JUDGE HILLIARD QC

(Sitting as a Judge of the CACD)

R E G I N A

v

ISMAIL KHAN

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Mr Hector Maclean Watt appeared on behalf of the **Appellant**

J U D G M E N T

(Approved)

1. MR JUSTICE KERR: The appellant is now aged 27 with previous convictions for violence, including possession of knives and other offensive weapons. He appeals against his most recent sentence with leave of the single judge.

2. On 5 September 2018 in the Crown Court at Reading, before Her Honour Judge Morris, the appellant was convicted after a trial of unlawful wounding, contrary to section 20 of the Offences Against the Person Act 1861, but acquitted of wounding with intent under section 18. He was also convicted of having a bladed article, a flick knife, in a public place, contrary to section 139(1) of the Criminal Justice Act 1988.

3. On 4 October 2018 at the same court he was sentenced by the same judge to an extended sentence of five years in respect of count 2, unlawful wounding under section 20, comprising a custodial term of four-and-a-half years' imprisonment and an extension period of six months. On count 3, the bladed article count, he was sentenced to 18 months' imprisonment concurrent, making the total sentence an extended sentence of five years with a custodial term of four-and-a-half years and a six month extension period. An order for forfeiture of the knife and a restraining order were also made and there was a victim surcharge order in the sum of £170.

4. The facts were briefly as follows. The complainant was a resident of the block of flats where the incident occurred. In the weeks preceding that incident, he and other residents had been intimidated by a gang of youths who had been hanging around the block drinking and taking drugs.

5. On 20 March 2018 the appellant was present at the flats. The complainant heard a disturbance and went out onto his balcony. He saw the appellant and thought he recognised him as one of the gang who had been at the flats on previous occasions, although the appellant denies this and it was an area of dispute at the trial and at the sentencing stage. There was on that day a verbal altercation between

the two men and the complainant went down to remonstrate with the appellant in an effort to make him leave.

6. A physical altercation ensued during which the complainant was stabbed four times by the appellant. The most serious wound was to his abdomen which caused his lung to collapse. He also received two stab wounds under his left armpit, one to his face and a fractured rib. The appellant had brought the knife to the scene and deliberately stabbed the complainant, as the judge decided at the stage of sentencing. His defence of self-defence had been rejected by the jury.

7. The victim, Mr Niedzinski made a statement to police the next day giving his account of the assault and describing the injuries he had suffered. He also added that he was very frightened for himself and his family for fear of reprisals and wished to move out of his accommodation with his family as a direct result of the incident. The family has since done so. The victim, Mr Niedzinski still has scars, remains fearful and has also lost a considerable income as a result of the injuries.

8. In a pre-sentence report, the author recorded that the appellant accepted that he had caused injury to the complainant and that stabbing him four times was excessive even though he believed himself to be under attack. It was indicated in the report that according to the probation officer the appellant posed a medium risk of re-offending. She considered him to pose a high risk unless he addressed his tendency to respond violently to conflict. The appellant was assessed as posing a high risk of serious harm to the public, that risk was of verbal, psychological and physical harm caused by harassing behaviour towards partners, physical assault of members of the public and emotional harm that these behaviours in turn caused.

9. In a written sentencing note, prosecuting counsel Mr Sank, emphasised that the appellant had brought the knife to the scene and had deliberately stabbed the victim with intent to cause him some injury, albeit not really serious injury. He suggested in a note that this was a very serious Category 1 case of wounding under section 20 and that the numerous aggravating features combined were such that it was appropriate to sentence above the top of the category range. The range for Category 1 is two-and-a-half to four years' imprisonment, with a starting point of three years.

10. The appellant was sentenced on the basis that he deliberately stabbed the complainant intending to cause some injury. In her sentencing remarks, the judge stated the following.

11. Four of the appellant's 10 previous convictions related to the possession of knives or other offensive weapons and eight related to violence in one form or another including robbery and affray. At the time of these offences the appellant was on licence in respect of consecutive sentences imposed in 2013.

12. She considered the offending to have caused greater harm owing to the repeated assault and high culpability owing to use of a weapon; and accordingly this was a

Category 1 offence and other factors also increased the seriousness, namely that the offending took place in a residential block of flats, at night, in the presence of others (including the complainant's family). The offending was also aggravated by the appellant's antecedent history, it occurred while he was on licence for a robbery offence and while subject to a community order for possession of an offensive weapon, and the offending was also aggravated by the impact upon the complainant who, with his family, had had to move home.

13. She considered the bladed article offence, count 3, also to be a Category 1 offence.

14. The appellant having been convicted of a specified offence, the judge considered the issue of the dangerousness. She considered that a determinate sentence would not fully address the risk posed by him. The starting point for such a sentence would have been four-and-a-half years' imprisonment.

15. In respect of count 2 she imposed an extended sentence of five years, comprising a custodial period of four-and-a-half years and an extended licence period of six months, with 18 months' imprisonment to run concurrently on count 3.

16. Before we deal with the grounds of appeal advanced in writing and orally before us today by Mr Maclean Watt, we start with the point that the sentence in respect of count 2 (wounding) is unlawful and must be revisited, aside from the arguments raised on appeal to support the contention that the sentence was manifestly excessive. In respect of count 2, the extension period was six months. By section 226A(7A) of the Criminal Justice Act 2003, the extension period must be at least one year.

17. We therefore bear in mind that the sentence imposed by the judge cannot stand and the unlawful element needs to be corrected. With that in mind we turn next to the grounds of appeal, which are in summary that the sentence was manifestly excessive because the judge failed to give proper weight to factual findings and mitigation, made unreasonable factual findings contrary to the verdict of the jury, incorrectly applied and interpreted the sentencing guidelines and erred in failing to consider specific facts relating to the appellant's previous offending, as that issue related to dangerousness.

18. In our judgment, despite the eloquence with which those points were made in writing and orally, there is no merit in them. The jury's verdicts meant that they were sure the appellant had brought the knife to the scene and had used it on the victim, either intending to cause him some injury, or being reckless as to whether injury would be caused to him. Self-defence was rejected.

19. The judge had presided at the trial and had seen and heard the witnesses. It was a matter for her to decide the facts for the purposes of sentencing provided she did so in a manner consistent with the jury's verdicts.

20. The first point is that in sentencing the judge did not expressly find that the

appellant had been one of the youths who had previously hung around the area drinking and taking drugs. We reject the suggestion made in the written grounds that she unfairly treated the appellant as having been one of those persons.

21. We reject also the submission that she "side-stepped" (Mr Maclean Watt's word) the jury's verdict. She was entitled to find that the appellant had deliberately inflicted the wounds that amounted to grievous bodily harm, albeit that he did not, according to the jury's verdict, intend grievous bodily harm to result.

22. We do not accept that the judge was bound to find that because the victim first approached the appellant, and not the other way around, to find that the wounding offence was heavily mitigated or should be treated as a case of excessive self-defence.

23. Mr Maclean Watt also says in his written grounds that the legal directions to the jury did not justify the judge's finding that the wounds to the victim were, in the judge's words, "deliberately perpetrated".

24. We reject that argument also. The judge was right to observe that the victim was unarmed while the appellant had a knife. The jury's acceptance that the appellant had no intent to cause really serious harm, which led the jury to acquit the appellant of the section 18 offence, did not mean that the judge had to find that the wounds were inflicted otherwise than deliberately. Where a person strikes at another person with a knife in the course of a scuffle it is unlikely that the first will not intend to cause injury to the second.

25. Subject to the unlawful element of this sentence, we also reject the suggestion that the judge did not properly apply the sentencing guidelines or sufficiently analyse the appellant's previous offending. The conclusion that the appellant was a dangerous offender within the statutory provisions was obviously justified, both by the appellant's record of committing offences of violence and carrying offensive weapons and by the conclusion of the probation officer in the pre-sentence report that the appellant posed a high risk of serious harm to the public.

26. We come next to the unlawful element of the sentence. In correcting it, the court, taking the case as a whole, must not deal with the appellant more severely than he was dealt with by the court below (see section 11(3) of the Criminal Appeal Act 1968). Where a sentence is considered to be unlawful, having failed to comply with mandatory sentencing provisions, the court should consider the implications of an entitlement to automatic release, parole eligibility and licence of any substituted sentence (see *R v Thompson [2018] EWCA Crim 639 at paragraph 23*).

27. Further, if the court were to impose an extended sentence the custodial part of the sentence should be at least four years (see section 226(A3) Criminal Justice Act 2003 as the appellant does not have a previous conviction for a schedule 15B offence within that Act (see section 226A(2)).

28. In our judgment, the sentence for the unlawful wounding offence should be one of four years with an extension period of one year, making a total of five years. The custodial element of that sentence is at the top of the range for a Category 1 offence which we regard as appropriate. The extension period of one year is the minimum that can be imposed in a case where the offender is found to be dangerous.

29. We are satisfied for the purposes of section 11(3) of the Criminal Appeal Act 1968 that this sentence does not deal with the appellant more severely than he was dealt with by the court below. While the period spent on licence may be longer than that period would have been if the judge's sentence were to stand, the appellant will be eligible for release from custody two-thirds into the custodial part of the sentence, several months earlier than he would have been if the judge's sentence had stood.

30. We will therefore quash the unlawful extended sentence on count 2 of four-and-a-half years with a six month extension period, and substitute for it an extended sentence of four years with a one year extension period. The concurrent sentence of 18 months' imprisonment on count 3 will remain undisturbed.