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No: 201900385

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 2 May 2019

B e f o r e:

LORD JUSTICE HADDON-CAVE

MR JUSTICE POPPLEWELL

MRS JUSTICE O'FARRELL DBE

R E G I N A

v

SOLOMONS

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Mr E Butler appeared on behalf of the appellant

J U D G M E N T
(Approved)

MRS JUSTICE O'FARRELL:

1. On 18 June 2018 in the Reading Crown Court Jonathan Solomons, the appellant, pleaded guilty on two counts of assisting an offender, contrary to section 4(1) of the Criminal Law Act 1967. On 16 January 2019 he was sentenced by Her Honour Judge Morris as follows:
 - (i) on count 1, assisting an offender by taping over number plates with intent to impede the apprehension or prosecution of Jason Gardner who had committed the arrestable offence of criminal damage, six months' imprisonment;
 - (ii) on count 2, assisting an offender by concealing relevant CCTV with intent to impede the apprehension or prosecution of Jason Gardner who had committed the arrestable offence of grievous bodily harm with intent, two years' imprisonment, consecutive;
 - (iii) thereby a total sentence of two years, six months' imprisonment.

2. The appellant appeals against his sentence by leave of the single judge. The relevant facts are as follows. On the evening of 9 May 2018 Charlie Ward and his wife, Martina Ward, entered Long Barn public house in Slough. They became argumentative and Emma Mead, the landlady of the pub, refused to serve them any more alcohol. Mr Ward took exception to this and threw his drink into Miss Mead's face. Mr Ward was evicted from the pub. Jason Gardner, Miss Mead's partner, remonstrated with Mr Ward outside the pub and Mr Ward threatened Mr Gardner with a knife, but the two men shook hands before Mr Ward left.

3. Later that evening the appellant telephoned Mr Gardner and informed him that Mr Ward was in the Earl of Cornwall pub, about one mile away. Mr Gardner drove to the Earl of Cornwall pub and slashed the tyres of Mr Ward's van which was parked outside. The appellant met Mr Gardner outside the pub and they returned to the Long Barn pub together in Mr Gardner's transit van. Mr Gardner and the appellant put masking tape over the number plates on Mr Gardner's transit van. The appellant accepted that this was done to assist Mr Gardner to impede apprehension and prosecution for the criminal damage committed. This formed the subject of count 1.
4. Mr Gardner armed himself with a balaclava, a pair of surgical gloves and a long metal baton and returned to the Earl of Cornwall pub with the appellant. When they arrived, Mr Gardner entered the pub. The appellant remained outside. Mr Gardner hit Mr Ward on the head with the baton, causing a laceration. Mr Ward overpowered Mr Gardner and inflicted a substantial number of injuries with a knife. Mr Gardner was taken to hospital, but sadly, died of his injuries the following day. Mr Ward was convicted of his murder.
5. When he heard screaming from inside the Earl of Cornwall pub, the appellant ran back to the Long Barn pub, disconnected the CCTV unit and hid it in the loft. The appellant accepted that this was done to assist Mr Gardner to impede apprehension or prosecution for the violence he assumed had been committed. This formed the subject of count 2.
6. The CCTV unit was retrieved by Miss Mead from the loft and handed to police. Several days later the appellant was arrested. When interviewed, he admitted taping over the number plates on the van and concealing the CCTV unit.

7. Initially, the appellant was charged with perverting the course of justice and encouraging or assisting the commission of an offence. However, the indictment was limited to the offence of assisting an offender. On 11 June 2018, the day of the PTPH, a new indictment was proffered containing two separate counts of assisting an offender. The PTPH was adjourned until 18 June 2018 at which hearing the appellant pleaded guilty to both counts.
8. The appellant submitted a basis of plea, namely that he did not know in advance that Mr Gardner intended to attack Mr Ward in the way that he did and the appellant did not know at the time that he hid the CCTV unit that Mr Gardner had committed an offence of grievous bodily harm with intent. The basis of plea was not accepted by the prosecution, although there was no Newton hearing to determine the dispute.
9. At the date of sentencing the appellant was 40 years old. He had relevant previous convictions. In 2009 he received a suspended sentence of imprisonment for acts intending to pervert the course of justice and section 20 unlawful wounding. However, by way of personal mitigation he completed that sentence without any breaches, he rehabilitated himself, obtained employment and carried out a significant amount of charity work. He has two children with whom he has a close and positive relationship.
10. The judge refused the appellant's application for an adjournment to obtain a pre-sentence report based on her assessment that it would not assist the court.
11. In passing sentence the judge determined as follows. Firstly, the nature and criminality of

Mr Gardner's actions was serious and substantial; he orchestrated a deliberate planned attack on Mr Ward and ensured his victim could not escape by slashing the tyres of his van; he acquired weapons, gloves and a disguise before seeking to perpetrate the attack. Secondly, it was not appropriate to isolate different elements of Mr Gardner's offending and set the appellant's offending against each separate element. Thirdly, at the time of the appellant's first offence, he knew it was precursor to the attack on Mr Ward with a weapon to cause really serious bodily harm. Fourthly, at the time of the appellant's second offence, he knew that Mr Gardner had entered the Earl of Cornwall public house armed with a weapon, wearing surgical gloves and a disguise to attack Mr Ward with intent to cause him grievous bodily harm. Fifthly, the offences did not have the effect of damaging the interests of justice, although that was not assisted by the appellant. Sixthly, the nature and seriousness of the offences crossed the custody threshold and a suspended sentence was not appropriate. Finally, the appellant had rehabilitated himself since 2009 and there was significant personal mitigation, including the loss of his friend Mr Gardner.

12. On count 1 the judge imposed a term of 9 months' imprisonment, reduced to 6 months to reflect the appellant's guilty plea. On count 2 the judge imposed a term of 3 years' imprisonment, reduced to 2 years to reflect the guilty plea. The judge determined that the sentences should run consecutively, a total of 30 months' imprisonment, but that 110 days of qualifying curfew and 28 days spent on remand would count towards the sentence.
13. The grounds of appeal against sentence advanced by Mr Butler for the appellant today are that the sentence is manifestly excessive and wrong in principle in that the judge:

- (i) firstly, adopted a factual basis for sentence that went well beyond the counts to which the appellant pleaded guilty, contrary to well-established authority **R v Canavan** [1998] 1 Cr App R (S) 243, **R v Courtie** [1984] AC 463;
- (ii) secondly, imposed a sentence on count 1 that was greater than the sentence that could possibly have been imposed for the index offence committed by Mr Gardner, contrary to sentencing practice;
- (iii) thirdly, imposed a sentence on count 2 that was excessive and did not adequately reflect the sentencing principles established in the **Attorney General's Reference No.16 of 2009 (Yates)** [2010] 2 Cr App R (S) 11;
- (iv) fourthly, failed to give any or adequate consideration to reported authorities placed before her so as to achieve consistency in approach, and
- (v) fifthly, wrongly imposed consecutive sentences.

14. Although not relied on now as a separate ground of appeal, Mr Butler also submits that the judge wrongly refused to order a pre-sentence report, and consequently, did not give adequate consideration as to whether the sentence could or should be suspended.

15. We are grateful to Mr Butler for his very clear skeleton and careful submissions.

Ground 1 - The factual basis for sentence

16. The well-established principle is set out by Lord Diplock in **Courtie** at page 467:

“...an accused person cannot be convicted of any offence with which he was charged unless it has been established by the prosecution that each one of the factual ingredients, which are included in the legal definition of that specific offence, was

present in the case that had been brought against him by the prosecution... In the absence of... an informed and unequivocal plea of guilty by the accused, the prosecution, if it is to obtain the accused's conviction for the specific offence charged, must prove to the satisfaction (beyond reasonable doubt) of the person or persons in whom is vested the function of trying the facts, that each and every factual ingredient of that offence existed in the case of the accused.”

17. Lord Bingham CJ stated in **Canavan**:

“A defendant is not to be convicted of any offence with which he is charged unless and until his guilt is proved. Such guilt may be proved by his own admission or (on indictment) by the verdict of a jury. He may be sentenced only for an offence proved against him (by admission or verdict) or which he has admitted and asked the court to take into consideration when passing sentence: see R v Anderson [1978] AC 964. If, as we think, these are basic principles underlying the administration of the criminal law, it is not easy to see how a defendant can lawfully be punished for offences for which he has not been indicted and which he has denied or declined to admit.

It is said that the trial judge, in the light of the jury's verdict, can form his own judgment of the evidence he has heard on the extent of the offending conduct beyond the instances specified in individual counts. But this, as it was put in R v Huchison (1972) 56 Cr App R 307 at 309, [1972] 1 WLR 398 at 400 is to 'deprive the appellant of his right to trial by jury in respect of the other alleged offences.' Unless such other offences are admitted, such deprivation cannot in our view be consistent with principle.”

18. In this case we consider that the judge strayed from that principle. Both counts on the indictment to which the appellant pleaded guilty were defined as ex post facto offences, that is each alleged conduct by the appellant after an index offence committed by the offender. The offence identified in each case was limited to that of assisting Mr Gardner in order to impede apprehension and prosecution of a specified offence. Although the judge was entitled to conclude that the appellant must have known that Mr Gardner had committed criminal damage, in the case of count 1, and committed grievous bodily harm with intent or another arrestable offence, in the case of count 2, she was not entitled to find that they formed part of Mr Gardner's planned attack on Mr Ward. She inappropriately

described count 1 as “a precursor to the main event”, thereby wrongly linking the two matters in her mind and attributing responsibility to the appellant for the attack.

Grounds 2 & 5 – Count 1

19. The principles applicable when assessing the appropriate sentence for assisting an offender who has committed an offence are set out by Lord Judge, then Chief Justice, in **Yates** at paragraph 33. The court must consider:

- (1) the nature and extent of the criminality of the offender for whom assistance was provided;
- (2) the nature and extent of the assistance actually provided, and
- (3) the extent to which the efforts of assisting the offender damaged the interests of justice.

20. The index offence in respect of count 1 was Mr Gardner's criminal damage, namely slashing the van tyres. We accept that the value of the tyres must have been less than £5,000. Therefore, the maximum sentence for the index offence would be three months' imprisonment. Against that maximum, the sentence of nine months' imprisonment prior to credit for the guilty plea was manifestly excessive.

21. We agree the judge wrongly sentenced the appellant based on her assessment that he participated in, or shared responsibility for, the attack on Mr Ward. A reasonable and proportionate approach would have been to determine the sentence on count 2, taking into account the additional criminality involved in count 1, and then fix a minimum concurrent sentence on count 1.

22. We consider that an appropriate sentence on count 1 would be one and a half months' imprisonment, reduced to one month for the appellant's guilty plea, to run concurrently with the sentence on count 2.

Grounds 3 & 4 – Count 2

23. Our attention has been drawn to the authorities of **R v Khatab** [2008] 2 Cr App R (S) 94; **R v Roberts** [2008] 2 Cr App R 59; **R v Worthington-Hale** [2011] 1 Cr App R 64; **R v Sula** [2017] EWCA Crim 206. These authorities were placed before the judge when sentencing. As noted by McCombe LJ in **Sula**, these cases are very fact specific, but in the absence of specific Sentencing Guidelines the court always seeks to achieve a degree of consistency in its approach to sentencing on similar cases.

24. We have considered each of the factors identified in the case of **Yates**. Firstly, in this case the judge was entitled to find as she did that the index offence in respect of count 2 was serious and substantial; the parties agreed that the section 18 GBH offence with intent was a category 2 offence under the relevant Sentencing Guidelines, giving a starting point of six years' imprisonment and a range of five to nine years. There were two factors indicating higher culpability: premeditation and the use of a weapon. The appellant accepts that there were statutory aggravating factors, including the time and location of the offence in a public place in front of others. Therefore, there must have been a realistic prospect that the index offence would have attracted a sentence above the starting point.

25. Secondly, we accept that the nature and extent of the assistance provided by the appellant to Mr Gardner, as set out in the indictment, was not likely to be particularly effective, but the intention was to conceal evidence of the events leading up to the attack on Mr Ward. The concealment was not of significant duration, but as the judge correctly observed, that was because Miss Mead found the CCTV unit. The appellant did not hand it in.
26. In respect of factor three, we accept that the interests of justice were not significantly affected by the appellant's offending.
27. Taking into account all of those factors, in our judgment the sentence of three years' imprisonment prior to reduction of the appellant's guilty plea was out of line with the other cases and was manifestly excessive. We consider that a sentence of two years would be appropriate, reduced to sixteen months following credit for the guilty plea.
28. Turning to what would have been ground 6, the suspended sentence, although this is not advanced as a separate ground, we have considered it. The judge expressly considered and rejected the necessity for a pre-sentence report. We are of the view that generally, where it is arguable that sentences might fall within the range of custodial sentence that could be suspended, it is advisable to obtain a pre-sentence report. However, the failure to obtain a pre-sentence report does not invalidate the sentence. In our judgment, the judge was entitled to conclude that the seriousness of the offending demanded an immediate custodial sentence, particularly given the appellant's relevant previous conviction for conduct intended to pervert the course of justice for which he had received a suspended sentence.

29. In conclusion, on count 1 we set aside the term of six months and substitute a sentence of one month, to run concurrently with the sentence on count 2; on count 2 we set aside the term of two years and substitute a sentence of sixteen months. Thus, a total sentence of sixteen months' imprisonment. Subject to checking the arithmetic, allowing for the 110 days of qualifying curfew and 28 days on remand, we are of the view the appellant has now served eight months in custody.

30. Accordingly, to that extent this appeal is allowed.

MR BUTLER: I am extremely grateful to my Lady and my Lords.

May I just ask this: because the appellant is not here, I wonder if the court might consider ordering an expedited copy of the judgment so that he knows what has taken place and understands the rationale behind the decision that has been made, albeit I am sure he will be delighted with it?

LORD JUSTICE HADDON-CAVE: Indeed. We so direct. No doubt, Mr Butler, you will be in touch with your client directly too?

MR BUTLER: Yes.

LORD JUSTICE HADDON-CAVE: Can we thank you for your very able submissions.

MR BUTLER: I am extremely grateful, my Lord. Thank you, my Lady.

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