

Regina
v
Marcin Pawal Forys

[2019] EWCA Crim 943

Court

Court of Appeal (Criminal Division)

Court of Appeal Criminal Division

Before: Lord Justice Davis Mrs Justice Simler DBE and The Recorder of London (His Honour Judge Hilliard QC)
(Sitting as a Judge of the Court of Appeal Criminal Division)

Friday 17th May 2019

Representation

Mr Bernard Gateshill appeared on behalf of the Appellant.

Judgment

Friday 17th May 2019

Lord Justice Davis:

I shall ask Mrs Justice Simler to give the judgment of the Court.

Mrs Justice Simler:

1. This is an appeal against sentence brought with leave of the single judge.

2. On 3 August 2018, following a trial in the Crown Court at Kingston upon Hull before His Honour Judge Kelson QC and a jury, the appellant (now aged 32) was convicted of two offences: wounding with intent, contrary to section 18 of the Offences against the Person Act 1861 (count 1), and kidnap (count 2). He was sentenced to a 20 year extended sentence comprising a custodial term of 16 years and an extended licence of four years, pursuant to section 226 A of the Criminal Justice Act 2003 . The sentence was structured so that the totality of the offending was reflected in the extended sentence passed in respect of the wounding offence. A concurrent term of six years' imprisonment was passed in respect of the kidnap. The appellant was acquitted of attempted murder (count 3).

3. A co-accused, Alex Haigh (born on 9 January 1991), was convicted of the same offences at the same trial. He was also sentenced to a 20 year extended sentence, comprising a custodial term of 16 years and an extended licence of four years. His application for leave to appeal against sentence was refused by the single judge and has not been renewed.

4. The facts are as follows. At 8.30am on Monday 18 September 2017 the complainant, Mr Lee Atkinson, was at his home address with his partner, her daughter Ashleigh, and Ashleigh's boyfriend, Alex Haigh. There was another man also present. Two further men arrived at the house, one of whom was the appellant. After about fifteen minutes, the appellant began to demand money from the complainant and punched him in the face when it was not forthcoming. The appellant then placed the complainant's hand inside a car jack and tightened the jack so that the complainant could not move. He held the complainant down on the floor and struck him to the head and back with some bicycle handlebars. The appellant then told Haigh that the complainant had "shagged Ashleigh". He passed Haigh a tyre iron and told him to hit the complainant. Haigh struck the complainant to the rib area and shouted threats. The appellant began to hit the complainant again, as did Haigh. The assault continued and included a stamp to the head by the appellant. The complainant's partner, who was present, was crying and screaming for the complainant to be left alone. Threats were then issued at her.

5. The appellant told the complainant that they would go for a drive so that he could extract the truth from him or "you will not come back". The complainant was in pain and was falling asleep. The appellant then held his arm while Haigh injected something into it. The appellant then said, "You will feel everything I do to you". The appellant told the complainant to put on his coat. The coat smelt strongly of petrol. The complainant was then forced into the rear of a motor car driven by the appellant, with Haigh as the front seat passenger. He was made to put his hands back into the car jack which had been removed before they left the house. During the drive, the appellant flicked a knife in the complainant's face and said, "If you try to jump from the car while we're driving I will kill you where you sit". During the journey the complainant was punched and threatened.

6. After about 20 or 30 minutes they drove down a small dirt track in a remote location and stopped. Haigh dragged the complainant from the vehicle and struck him with the tyre iron. The complainant tried to run away. He was unsuccessful and was dragged back. He was again hit with the tyre iron. The appellant told Haigh to stop and said "I'm going to burn the mother fucker". Haigh poured petrol over the complainant's head and the appellant lit the petrol. The complainant rolled in the wet grass to stop the flames. Petrol was again poured over him and lit again. The complainant again fell to the ground in order to extinguish the flames. A man walking his dog then appeared and the complainant screamed for help. At that point, the appellant and Haigh ran back to the car, but the appellant shouted "Now we go to the house and burn it down with Katie and the dogs in". The complainant was helped by the passer-by and the emergency services were contacted.

7. The complainant suffered a laceration to his left eyebrow, and bruising and grazing to his right cheek. There was a deep laceration to the dorsal aspect of his right wrist. Although no burns were evident, he smelt strongly of petrol. X-rays showed multiple right-sided rib fractures, with a small, right-sided pneumothorax, and there was also a fracture to the right little finger. His wrist lacerations and other lacerations were sutured.

8. Both the appellant and Haigh were arrested and interviewed. The appellant denied the offences in interview. In a second interview he declined to comment.

9. The appellant was aged 32 at the date of sentence, born on 19 September 1986. He had five convictions spanning the period 2015 to 2017. Of relevance were three offences of battery. He had not previously experienced a term of imprisonment.

10. There was no pre-sentence report available to the sentencing judge. There was, however, a Victim Personal Statement from the complainant who described the impact of the offending on him and his life.

11. In passing sentence the judge referred to the prolonged nature of the attack on the complainant, which he described as nothing short of torture. The attack lasted between one and two hours. During the course of it, the complainant was repeatedly threatened with death. His partner was also threatened with death. The judge referred to the way in which the complainant was incapacitated and physically attacked repeatedly with weapons, bars and items from the house, which caused the wounds to which we have referred. There was gratuitous degradation in the threats uttered.

12. The judge described the fact that the complainant was forced to ingest amphetamines orally and then when those did not work sufficiently amphetamines were injected into his body so that he would feel the full extent of the pain, as indicative of the psychopathic nature of the attack. The judge accepted the jury's conclusion that the offenders did not intend to kill the complainant, but found that the petrol was set alight, which he treated as part of the torturous episode.

13. The judge recognised that the appellant had relevant previous convictions and ultimately concluded that he was dangerous because in the course of the enterprise he had played a leading role. It was he, for example, who brought out the car jack; it was he who went and obtained the fuel-soaked garment; and it was he who drove the car that was used to facilitate the kidnapping. The judge recognised that the appellant had a more limited record than Haigh, but regarded that as fading into insignificance, given the grotesqueness of this extended episode of extreme violence.

14. The judge concluded that it was a category 1 offence. He did not accept that the injuries did not amount to serious injuries for the purposes of the Definitive Guideline, as was argued on the appellant's behalf. He concluded that a standard determinate sentence would not fully address the risk presented by the appellant and concluded that the extended sentence to which we have already referred was necessary in the circumstances.

15. In clear and focused submissions, Mr Gateshill of counsel, who appears on the appellant's behalf, realistically accepts that a very lengthy sentence for this particularly grave category 1 offence was inevitable. He is plainly correct to do so. In the single ground of appeal he now pursues, however, he contends that it was wrong for the judge to conclude that the appellant was dangerous. Not only was there no pre-sentence report available - and no warning to counsel that was a sentence in the judge's mind - he contends that an extended sentence was inappropriate, having regard to a number of features present. First, he refers to the fact that the appellant had limited previous convictions, and nothing that could justify a finding of dangerousness. Secondly, although he recognises the multiplicity of injuries, none of the injuries were as serious as they might have been. Thirdly, he refers to the fact that the appellant was acquitted of the charge of attempted murder, so that there was no specific intent to kill. Finally, he compares the behaviour of Haigh, described during the course of the trial as "psychopathic" in nature, with that of the appellant, who was subdued and whose behaviour overall was not indicative of dangerousness.

16. Mr Gateshill also points to the progress that the appellant has made according to the author of the pre-appeal report obtained for this court, and to the fact that he has received praise for his attitude towards staff and his helpfulness whilst in prison. He submits that such behaviour is not indicative of a man properly categorised as dangerous.

17. Clearly and cogently as those submissions were advanced by Mr Gateshill, we do not accept them. The judge presided over the trial and heard all the evidence relating to the attack on the complainant. He was, accordingly, best placed to assess the nature and extent of the attack, the extent of the role played by the

appellant, and the harm caused by it. It was a planned, premeditated attack by two on one. Weapons were used. In addition to the prolonged physical aspect of the attack, the complainant was repeatedly threatened with death. He was incapacitated and restrained by use of the jack. He was injected with drugs and driven to a remote location where he was left in no doubt that he would be killed. He was blindfolded and fuel was poured over him. The appellant and his co-accused only ceased their attack when disturbed - and even then they continued to make threats. Although no doubt the complainant's physical injuries will heal, it seems to us that the judge was entitled to conclude that the inevitable psychological impact on the complainant was serious and potentially life-changing.

18. There were aggravating features: the location of the offending; the ongoing effect on the complainant, as we have already indicated; and the gratuitous degradation to which he was subjected. There was, in fact, no real mitigation. It was a particularly grave attack with multiple features of culpability that caused serious injury and involved greater harm.

19. In addition, although the appellant's antecedent record includes only limited violence which is of a significantly lower scale to that involved in the index offence, there were two offences of battery, both of which appear to have involved entirely unprovoked attacks on other man. Those offences indicate that the appellant is a man prepared to use violence as retribution for perceived wrongdoing in a deliberate and planned way. That propensity to use violence together with the unexplained, unprovoked sadistic violence amounting to torture involved in the index offence, amply entitled the judge to conclude that a lengthy determinate sentence would not adequately address the risk presented by the appellant.

20. In our judgment, the conclusion that he posed a significant risk of causing serious harm through offences of violence in the future and was therefore dangerous was open to the judge. We are fortified in reaching that conclusion by the contents of the pre-appeal report prepared by Mark Sambrook, dated 18 March 2019. The probation officer interviewed the appellant on two occasions at Her Majesty's Prison Full Sutton. He records that at that stage the appellant did not accept responsibility for his offending and articulated no victim empathy. We note Mr Gateshill's submission this morning that the appellant does now accept the facts of the assault, although even now he does not accept the entirety of the account given. Mr Sambrook says that although there is no established pattern of offending reflected within the appellant's antecedents, there is an emerging pattern involving the use of instrumental violence. He outlines the circumstances of the offences of battery. In relation to the assessment of risk, although the probation officer identified the progress made by the appellant, as Mr Gateshill also identified, nevertheless he assessed the appellant as posing a high risk of serious harm to members of the public. There are, he says, identifiable indicators of such harm, including the propensity for the appellant to target individuals for retribution, or in order to enforce or carry out the wishes of others.

21. For all those reasons, and although we accept, as Mr Gateshill has argued, that it would have been better for counsel to have been warned that a finding of dangerousness was in contemplation so that the question of obtaining a pre-sentence report could at least have been considered, nonetheless, for all the reasons we have given, we consider that the finding of dangerousness was amply open to the judge in this case.

22. Accordingly, this appeal against sentence is dismissed.