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No: 201901192 A1/201901280 A1

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Tuesday, 21 May 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE PICKEN

SIR DAVID FOSKETT

R E G I N A

v

JAKE CAGNA

JAMES STEPHEN FOWLES

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Mr M B Wilson appeared on behalf of the **Appellant CAGNA**

Mr M Connor appeared on behalf of the **Appellant FOWLES**

J U D G M E N T

(Approved)

1. SIR DAVID FOSKETT: On 14 February 2019, at Chester Crown Court, the appellant Cagna pleaded guilty to assault occasioning actual bodily harm, contrary to 47 Offences Against the Person Act 1861 and the appellant Fowles to an affray, contrary to section 3(1) of the Public Order Act 1986, each offence arising out of the same incident.

2. On 26 March, they were sentenced by His Honour Judge Berkson to immediate terms of imprisonment: Cagna to 16 months and Fowles to 8 months.

3. Each appeals against those sentences with the leave of the single judge, the basis of that leave being that it was said to be open to them to argue that the sentences should have been suspended.

4. Cagna was aged 23 and had no relevant previous convictions. Fowles was aged 28 and had appeared before the courts on 12 previous occasions for 17 offences between 2007 and 2017, including an offence of affray in 2009, when he was sentenced to 6 months in a Young Offender Institution, and a racially aggravated assault in 2011, when he was sentenced to 3 years in a Young Offender Institution. There had been a more recent

conviction for battery but that did not involve a custodial sentence.

5. In the early hours of 20 May 2018, at around 2.00 am, the complainant, Ashley Hickey, and his girlfriend, a Ms Cooke, were on their way home to an address in Middlewich. As they reached the gate for the entrance to the property they were intercepted by Fowles. He prevented them from entering through the gate and said words to effect of "Where the fuck do you think you're going?" Within moments another co-defendant, Shane Smalley, and another male arrived. Smalley confronted Mr Hickey and then produced a chain, which he used to lash out. The chain struck Mr Hickey in the face.

6. At the same time, a car driven by Cagna arrived. Cagna and four passengers got out of the car. Two of the female passengers went to confront Ms Cooke. Cagna went towards where Mr Hickey was and started to attack him. At one stage, Mr Hickey was being attacked by a group of four or five people. He was forced to the ground and Cagna stamped on him once around the head. Smalley kicked at Mr Hickey's legs. Mr Hickey's companions came to try to help him and indeed Fowles assisted him, helping Mr Hickey to his feet and carrying him to the gated area of the property.

7. At that stage, however, Fowles then remonstrated with Ms Cooke, who had previously been in a relationship with his brother. He said to her: "This is because of what you've done to Dean". Fowles was then pulled away by another male.

8. Mr Hickey was a haemophiliac and he was assisted by the police when they arrived in obtaining some emergency treatment from his home and then he was taken to hospital. His main injury was a blow to the right side of his face but it was not known if this was caused by the assault or by the chain. He was kept in hospital overnight.

9. As we have indicated, both appellants pleaded guilty at the earliest opportunity and were given full credit by the sentencing judge. The judge said that the incident reflected an ugly scene of group violence which left a man battered and bruised after a repeated attack. The aggravating features were the location and timing of the offence (in the early hours of the morning) in the town centre and in front of the victim's partner and other bystanders. The judge treated the case as a category 1 case within the guideline and said in respect of Cagna that the sentence after trial would have been 30 months but his personal mitigation, no relevant convictions, a job and a stable home life reduced that to 2 years. The full one-third reduction led to the sentence to which we have referred.

10. The judge considered the question of suspension, as indeed he was invited to do, but he said that the offence was too serious to justify suspending the sentence. He observed that there was no need for Cagna to stop his car, but he did and he involved himself in violence after it had started. He had joined in a group attack on Mr Hickey, caused him to fall to the ground and as part of the group attack stamped on him in the head area when he lay defenceless on the ground.

11. In respect of Fowles, the judge said he was involved in the start and at the end of the incident. He involved himself in group violence but his own involvement was to issue threats. The judge accepted that he did not strike any clear blows but was part and parcel of an affray in a public place. The judge acknowledged that at one point Fowles tried to help the victim of the assault committed by the others and the judge said that after a trial the sentence would have been 12 months.

12. It is said on behalf of both of them, by Mr Connor for Mr Fowles and Mr Wilson for Mr Cagna, that their sentences should have been suspended.

13. The guidelines indicate that factors that may make it appropriate to suspend a custodial sentence are strong personal mitigation and/or the significant harmful impact of a sentence on others, but that a factor operating against suspension is that the appropriate punishment can only be achieved by an immediate sentence. The judge plainly considered that the latter factor operated in this case.

14. In the case of someone who actively engages in or encourages significant and unprovoked violence, particularly in a public place at night and in front of others, it will require some fairly exceptional circumstances to justify suspending any sentence of imprisonment because appropriate punishment could only be achieved by immediate custody.

15. In this case, the appellant Cagna not merely got involved when there was absolutely no reason to do so, as the judge observed, but brought the victim to the ground and stamped on him, as we have indicated. It was fortunate that no greater harm was done to the victim than was in fact occasioned. But it is this sort of attack and the sort of violence that merits an immediate sentence of imprisonment.

16. It is very surprising that Cagna should have got himself involved in this incident. He had no previous convictions. He had good job and a stable home life. We accept that he is sincerely remorseful for what was plainly something out of character from his perspective. We also accept that the assessment is made of him that he is a low risk of further reoffending. We also accept that prison would undoubtedly be a significant punishment for him. However, we agree with the judge that there was no alternative to immediate custody given the circumstances. So far as the length of the sentence is concerned, the sentence was entirely within the guidelines and cannot, in our judgment, be criticised.

17. So far as Fowles is concerned, he was present at the start of this incident and played a part in causing it to start. He used no violence himself and at one point, as we have indicated, went to the assistance of the victim. But he was instrumental in starting the episode. He has previous convictions for violence, as we have indicated, and should have known the consequences of getting anywhere near such an incident given his history.

18. There is, we would say though, a credible suggestion that he is beginning to realise that he must not get involved in incidents of this nature and it is a positive factor to his credit that he has taken some personal responsibility recently, particularly in relation to his aging grandmother who is terminally ill. We accept in this case that he is genuinely remorseful for having got involved.

19. All those factors operate in his favour but they does not, in our judgment, obviate the need for an immediate custodial sentence for the same reasons as in Cagna's case. This was, as we have indicated, ugly street violence.

20. So notwithstanding the able and helpful submissions from Mr Connor and Mr Wilson, both these appeals are dismissed.

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