[2019] EWCA Crim 1206

No: 201900923/A3

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

12 June 2019

Before:

Lord Justice Holroyde
Mr Justice Martin Spencer
HIS HONOUR JUDGE Picton
(Sitting as a Judge of the CACD)

Regina
and
Alan Barnard

Mr R Davies appeared on behalf of the **Appellant**

'Picton'

JUDGE On 16 January 2019 in the Crown Court at Sheffield the appellant pleaded guilty to inflicting grievous bodily harm, contrary to section 20 of the Offences Against the Person Act 1861 and witness intimidation, contrary to s.51(1) of the Criminal Justice and Public Order Act 1994. The appellant pleaded not guilty to a charge of attempting to pervert the course of public justice which, by reason of the plea to witness intimidation that was said to have been entered on a full facts basis, the prosecution elected not to pursue.

On 11 February 2019 the appellant was sentenced to 18 months' imprisonment in respect of the offence contrary to section 20 and 12 months consecutive in respect of the offence of witness intimidation. This appeal against sentence is brought with leave of the single judge. The focus of the appeal is in respect of the sentence of 12 months imposed for witness intimidation, it being accepted by the appellant that the sentence imposed in respect of the offence contrary to section 20 was fully justified. In the circumstances the facts can be set out quite shortly.

At around 7 p.m. on 25 November 2018 the complainant, Nicholas Ellis, was in the George Hotel Public House. He went outside to have a cigarette and was talking to the landlady who was or had been in a relationship with the appellant. Mr Ellis became aware of the appellant approaching him. The appellant then struck him one blow to the left side of his face. Mr Ellis fell to the floor. The landlady pushed the appellant inside the pub. The incident was captured on CCTV.

At first Mr Ellis did not want to make a complaint about the appellant's actions but about four days later his jaw was still sore and swollen and he was struggling to eat. He went to hospital and an x-ray established that his jaw was broken. He was referred to another hospital where he had an operation and was kept in overnight.

Mr Ellis informed the landlady that he was going to report the incident to the police. Shortly after he spoke to her he received a phone call from the appellant who said he was sorry and asking if the charges could be dropped. He also asked whether there was anything they could do to sort it out. Mr Ellis informed the appellant that as the hospital had logged it as an assault and the police were already involved his hands were tied. The appellant contacted him again later and said that he would put £500 in Mr Ellis's bank account if the charges were

dropped. Mr Ellis repeated that he could not do that.

In a Victim Personal Statement, Mr Ellis commented that the appellant's telephone contact had caused him to be worried because he was not sure if the appellant might seek revenge in some way and also that he felt that the appellant was capable of causing serious harm if not stopped.

In passing sentence, the judge stated that the appellant was now aged 39 and should know better. He related how the appellant had carried out an unprovoked attack on a vulnerable victim, in the sense that Mr Ellis had no inkling that he was about to be struck and thus did not have time to take any protective action. The judge commented that the consequences could easily have been even more severe than they were, and that Mr Ellis could have been killed given that he struck his head on the ground when he fell. The judge also noted that the injuries sustained required surgery and a period in hospital and caused great pain and discomfort. He said that immediate custody was required.

The judge further commented that the appellant had attempted to buy the complainant off with a sum of £500. The judge described this as an offence against the criminal justice system that was to be regarded as a serious matter and which would attract a consecutive sentence.

The judge noted the aggravating factor represented by the appellant's previous convictions for violence. The judge took into account his guilty plea for which he would be given 25 per cent credit. By reference to the assault guideline the judge identified a starting point of 18 months. The judge assessed that the aggravating features which he identified merited an upward adjustment to two years. After 25 per cent credit the sentence for the section 20 offence was set at 18 months' imprisonment. The judge stated that the offence of witness intimidation merited a consecutive sentence of 12 months. Accordingly, the total sentence was one of two-and-a-half years' imprisonment.

The appellant has appeared before the courts on eight previous occasions for 11 offences between 1995 and 2017. He received a non-custodial sentence for a section 47 actual bodily harm in 1995. In 1998 he was sentenced to four months in a young offender institute for a section 47 assault occasioning actual bodily harm and in 2002 he received a non-custodial sentence for another section 47 offence, criminal damage and common assault. In 2014 he was sentenced to 16 months' imprisonment suspended for 24 months for a section 20 wounding. His other offences were for driving with excess alcohol and breaches of court orders.

The pre-sentence report recorded the appellant as indicating that he punched the victim because he saw him kissing his on/off partner. He said he later telephoned to apologise and try to make amends. He denied offering money in order to persuade Mr Ellis to withdraw his complaint. He said he had genuinely felt bad about what he had done and that it was never his intention to intimidate the complainant. Excessive alcohol consumption, poor emotional control and poor anger management appeared to have contributed to the offence. The appellant told the report's author that he had not drunk alcohol since the incident. It was noted that a custodial sentence would result in the appellant losing his employment. The report proposed a community disposal.

The grounds of appeal assert that the sentence imposed for the witness intimidation did not appropriately take into account current case law or the principle of totality, thus making the overall sentence manifestly excessive.

On behalf of the appellant, Mr Davies has developed those submissions in an economical and helpful manner. In the absence of a guideline he has referred us to a number of cases. Chinery [2002] EWCA Crim 32 involved an appellant who remarked to the witness of an assault in which he had been involved that bad things happen to people who, as he put it, ‘grass’ and that she should ‘watch her back’. He made a similar comment to another witness shortly thereafter. The sentence of six months was upheld on appeal. Parry [2007] 1 Cr.App.R.(S) 62 involved the appellant telling the 13-year-old complainant in an assault case that something bad would happen if the charges were not dropped. He was sentenced to two months in respect of the assault, but six months consecutive for the offence of witness intimidation. The court made the two-month sentence concurrent, commenting that on its own it would not have merited immediate custody.

Neither case provide any kind of benchmark for this type of offence but merely represent sentences imposed at first instance that were not found to be manifestly excessive when subject to an appeal.

In Lawrence [2005] 1 Cr.App.R.(S) 83 the appellant pleaded guilty to threatening to take revenge upon his

father who had reported him to the police. The threats included that he would kill his father and also tell people that his father was a sex offender. The sentence imposed at first instance was 16 months, but on appeal that was reduced to eight months, on the basis that after a trial the right sentence would have been 12 months. The court noted that the appellant committed the offence when intoxicated and some of the threats were uttered when already in police custody.

Our own researches have led us to the case of Younger [2014] EWCA Crim 2376. The appellant in that case was, following a trial, made the subject of a suspended sentence for theft. Two days later he saw the security guard who had been involved in his arrest and prosecution and shouted a threat that he was going to 'do' him, along with some unpleasant insults. The appellant denied the offence but was convicted after a trial. In addition to activating the suspended sentence, the court imposed 18 months in respect of the offence of witness intimidation. In concluding that the sentence was manifestly excessive, the court referred to the case of Smith [2011] 2 Cr.App.R (S) 676 where a number of authorities in this general area were reviewed. The court identified the factors which might bear upon sentence as being:

(i) Whether the intimidation was isolated or part of a campaign;

(ii) The content of any threat;

(iii) Whether any intimidation was accompanied by violence;

(iv) The circumstances in which the threat was uttered;

(v) Whether any contact was premeditated or by chance;

(vi) The impact on the witness.

The court also commented that the key factor is the public policy of ensuring the integrity of the justice system by the imposition of sentences which have a general deterrent effect. In the particular circumstances of that case the court referred to the threat of violence but also noted that the meeting had been by chance and was of short duration. The sentence was reduced to one of 12 months.

The cases underline that each sentence will very much depend upon the individual factual matrix. Younger does, however, provide some guidance of general application. We note that the appellant's case did not involve the uttering of any specific threat of violence. We consider, however, that there are a number of other aggravating factors:

(i) The appellant made two efforts at contacting Mr Ellis — the conversations did not take place in the context of chance meetings;

(ii) He did so in the knowledge that he had been responsible for a serious assault that had caused significant injury;

(iii) The appellant would have well understood that he faced going to prison if the matter were pursued;

(iv) He chose in those circumstances to offer Mr Ellis what can only be described as a bribe in the hope that he could thereby be persuaded not to support a prosecution;

(v) By his plea the appellant accepted that his actions were intended to and did have an intimidatory effect;

(vi) The victim personal statement from Mr Ellis confirms that to be the case;

(vii) Behaving in such a manner clearly has the potential to seriously undermine the integrity of the justice system.

The judge did not identify the sentence he had in mind prior to the application of credit for plea, but it appears likely that it was 16 months. We have to consider whether, in the light of such assistance as the cases provide, bearing in mind totality and in the context of the mitigation available, that has resulted in a sentence that should be assessed as being manifestly excessive.

After carefully reflecting on the arguments advanced on behalf of the appellant, we have concluded that, whilst this sentence was undoubtedly severe, and at the very top of the range that one might expect sentences to be in the context of this kind of offending, we consider that in the particular circumstances of this case it is not one that should be assessed as being manifestly excessive and accordingly this appeal is dismissed.