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**IN THE COURT OF APPEAL**
**CRIMINAL DIVISION**

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday 6 June 2019

**B e f o r e**:

**MR JUSTICE SPENCER**
**HIS HONOUR JUDGE PICTON**
(Sitting as a Judge of the CACD)
**R E G I N A**
v
**JORDAN NEARY**

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**Mr T Starkey** appeared on behalf of the **Appellant**

**J U D G M E N T**
(Approved)

1. MR JUSTICE SPENCER: On 21 December 2018 in the Crown Court at Isleworth, the appellant, now 28 years of age, was sentenced by Mr Recorder Glyn QC to a total of four years five months' imprisonment for offences of domestic violence committed

against his partner, Kelly Bloxham. First, for an offence of assault occasioning actual bodily harm, having been convicted after a trial before the Recorder, the appellant was sentenced to eight months' imprisonment. Second, for an offence of doing an act which harmed a witness, contrary to section 51(2) of the Criminal Justice and Public Order Act 1994, he was sentenced to three years nine months' imprisonment consecutive. His partner Kelly Bloxham was the victim of that offence also. The offence was committed the day after the jury had convicted him of the earlier assault. He pleaded guilty to the offence of witness harming but only on the day of trial. Third, and arising from the witness harming offence, he also pleaded guilty to assault by beating, contrary to section 39 of the Criminal Justice Act 1988 for which no separate penalty was imposed, the criminality of that offence being reflected in the sentence for the witness harming.

2. The grounds of appeal in summary were that the sentence for the assault occasioning actual bodily harm was manifestly excessive, that the judge's starting point of four years for the witness harming offence was too high, that insufficient credit was given for his guilty plea to that offence and that in any event the totality of the sentence was excessive. Mr Starkey in his oral submissions this morning very realistically has concentrated on two points only: first, and uncontroversially, the arithmetical error in relation to credit for the guilty plea, and secondly the question of totality.

3. Having presided over the trial of the original assault offence, the judge was ideally placed to assess its seriousness. He helpfully provided for the probation service a note of the factual basis on which he proposed to sentence. That offence was committed on 22 December 2017. At that time the appellant and his partner were in an on-off relationship, as it was described, which had lasted for some five years. They had a daughter and at the time of this offence his partner was five months pregnant with their second child. They were living together at the time, it would seem, or at least were regularly together at the same address.

4. The complainant had been out for the evening and returned very late the worse for drink. The appellant was asleep on the sofa. She shouted at him and pushed him to wake him up. He lost his temper and the two of them then fought. The judge found that the attack was committed over a relatively short period of time. She was holding her arms across her face to protect herself. He was smacking her about the head but with open-handed blows and in doing so he caught her face and arm, causing cuts and bruises to the face and bruising to the arms. We have seen photographs. The judge was satisfied that there was no punching to her pregnant stomach and there was no attempt to prevent her from leaving.

5. The police were called. The appellant left the property and was arrested soon afterwards. As a result of this incident, Ms Bloxham was afraid to remain at the property and she left for some time. In his police interviews the appellant denied assaulting his partner and that denial was maintained at trial.

6. He was convicted by the jury on 12 July 2018. Sentence was adjourned by the Recorder and the appellant was remanded on bail with a condition not to contact his partner. The very next day, 13 July, the appellant went to Ms Bloxham's home. He

knocked on the door. He demanded entry. He accused her of having another man in the house. He threatened to kick the door down if she did not let him in and he shouted abuse at her. She put a piece of wood against the door to try and prevent him entering and called the police. In the phone call he could be heard in the background shouting. Before the police arrived he kicked the door open. Ms Bloxham took refuge and was holding her daughter (aged 3) on her lap. The appellant shouted in her face that she was a slag and that he knew she had someone else. She told him to leave. His response was to punch her to the side of the face, hitting her jaw. Her head cannoned into her young daughter's head, although happily that caused no separate injury. Ms Bloxham left the property and had to be rehoused temporarily because she was frightened.

7. The judge said in his sentencing remarks, on the basis of the material before him, that the appellant acted in pure revenge for her evidence against the appellant which had resulted in his conviction by the jury only the day before. The appellant was indicating not guilty pleas until the day of trial for the witness harming offence. It seems that the appellant's partner did not attend court on the first day, so to that extent she was not put in additional fear or put to inconvenience, but she must have been expecting to have to give evidence again, as she had done at the original trial. It was therefore a case for 10 per cent credit for plea on the day of trial.

8. The appellant had a previous conviction for common assault in 2015 arising from a fight with his brother. There was a much earlier offence of common assault when he was only 16 years old which the judge disregarded. The appellant also had previous convictions for criminal damage and for failing to surrender to custody. His most recent court appearance had been in January 2017 for an offence of being drunk and disorderly for which he was fined. He had never previously served a custodial sentence.

9. There was a pre-sentence report in which the appellant expressed remorse for his offending. It was apparent that his behaviour was linked to poor emotional management and to alcohol abuse. It was suggested that if immediate custody could be avoided, a community order might be appropriate with an accredited programme requirement, an unpaid work requirement and a rehabilitation requirement.

10. In passing sentence, the judge said he had regard to the relevant Sentencing Council guidelines for assault, for overarching principles of domestic abuse, and for totality. The judge was satisfied that the assault occasioning actual bodily harm was a Category 2 offence under the guideline, which was common ground between counsel in any event. The starting point under the guideline was therefore six months' custody with a range up to 51 weeks. The judge identified several aggravating factors: the offence violated the trust and security which should exist between people in intimate family relationships; there was abuse of power and strength; and as a result of the offence his partner moved out of the address for a period. His previous conviction for common assault was also an aggravating factor.

11. The judge took into account in the appellant's favour the progress he had made on remand in prison and the remorse that he had shown. In relation to the offence of

harming a witness, the judge noted that there was no Sentencing Council guideline. He derived some assistance however from the decision of this court in *R v Macdonald* [2008] 2 Cr.App.R (S) 100 (to which we shall return). He also referred to the decision of this court in *R v Bishop* [2010] 2 Cr.App.R (S) 17.

12. The judge identified several serious aggravating factors in the offence of harming a witness. First, the appellant sought out his victim in her own home and did so in breach of bail conditions imposed only the day before. Second, the offence was committed in front of young children. Third, he assaulted his partner when she was holding her three-year-old daughter. Fourth, his partner was vulnerable having come to court to give evidence against him. Fifth, his partner had to move again as a result of this second offence and to be taken to a place of safety. The judge said that it was the duty of the courts to punish violence and domestic abuse such as this on behalf of the wider public and to punish a revenge attack on a woman such as Ms Bloxham who had been brave enough to give evidence against the man who had assaulted her in the original incident.

13. The judge concluded that after trial the sentence for the witness harming offence would have been four years' imprisonment. He said in terms that he was affording 10 per cent credit for the late guilty plea. However, the sentence he actually imposed was 45 months, whereas 10 per cent should have resulted in a reduction to 43 months. We observe, and Mr Starkey acknowledges that it is regrettable that this error was not drawn to the judge's attention and corrected at the time, either immediately afterwards or as soon as it was appreciated, and within the time permitted for a variation of sentence under the slip rule.

14. In respect of the assault occasioning actual bodily harm, the sentence the judge imposed was eight months consecutive. By a slip of the tongue the judge suggested that the total sentence would be four years and one month, whereas in fact it was four years and five months. He also made a restraining order for a period of five years in appropriate terms, as to which there is no challenge.

15. In granting leave, the single judge indicated that there could be no complaint about the sentence of eight months for the original offence of assault occasioning actual bodily harm and Mr Starkey has not pursued his original ground of appeal in that regard. Plainly the judge was entitled to conclude that an uplift from the starting point of six months was appropriate. Two months was modest in the circumstances, in our view.

16. Turning to the offence of witness harming, there were, as we have indicated, originally two separate complaints. The first, which we have already mentioned, is that the judge failed to give the correct arithmetical deduction for the late guilty plea; it should have been 10 per cent as he himself indicated.

17. The nub of the appeal, however, in the grounds as pleaded was that the level of sentence appropriate for this particular offence of witness harming was less than the judge arrived at. Again, realistically we think, Mr Starkey in his attractive oral submissions this morning has drawn back from making such a bold assertion, choosing

to concentrate on the question of totality and the level of sentencing overall for these two offences.

18. The judge had drawn counsels' attention in advance to the two authorities he had mentioned in his sentencing remarks. He took the view that the present case was in effect equivalent in seriousness and similar on its facts to *Macdonald* in which this court decided that the appropriate sentence before credit for plea would have been four years. As the case has been mentioned, we should say a little about it.

19. *Macdonald* was a case which bore some similarities to the present case in that it was an offence of taking revenge on a witness who had given evidence against the defendant. In that case the defendant had been convicted of affray at a trial in which the witness in question had given evidence. It does not appear, however, that the witness had been the victim of the original offence in contradistinction to the present case. Some 10 months later the defendant came across the witness by chance in a supermarket. The witness was with his teenage sons. The defendant approached the witness in the store and threatened that he was going to "have him" outside and was going to "kill him". He then desisted but repeated the threat shortly afterwards when he came across the same witness in another aisle of the supermarket. This time he swung a punch at the witness which landed on the witness's right ear, causing some minor injury. There was an impact statement from the witness indicating that the incident had made a profound impression upon him with long lasting effects and the defendant in that case had a bad record for violence. But like this appellant he had addressed his problems in custody on remand and (in that case) subsequently prior to the appeal. This court considered that the appropriate starting point after trial would have been four years.

20. In his sentencing remarks, the judge in the present case acknowledged that there were differences between this case and *Macdonald*, in particular the difference in their respective records. However, the judge identified the aggravating factors we have already listed which he considered justified the same starting point of four years.

21. Mr Starkey in his written argument and his original grounds of appeal submitted that the present case was less serious than *Macdonald* in that there was no threat to kill, the appellant did not have the same bad record for violence, and there was no victim impact statement equivalent to that in *Macdonald*. Mr Starkey pointed out and reminds us today that there was no evidence that the victim in this case described herself as being significantly distressed by the second episode, nor her three-year-old daughter. For example she did not describe in her witness statement or anywhere else that the appellant in the course of the incident had referred to the fact that she had been a witness against him, although obviously that was implicit in the attack in the first place.

22. Mr Starkey also referred us helpfully in his written argument to the decision of this court in *R v Smith* [2011] 2 Cr.App.R (S) 118, another case of witness intimidation but different in nature because it was not a revenge offence but an attempt to persuade a witness to retract her statement in advance of the trial. In that case the court reviewed the authorities for witness intimidation generally and identified a number of factors which would normally bear on sentence. They include: whether the intimidation was

isolated or part of a campaign; the content of any threat; whether the intimidation was accompanied by violence; the circumstances in which any threat was uttered; whether any encounter with the witness was premeditated or by chance; the impact on the victim, remembering that psychological harm may be as serious as physical harm. The court stressed, however, that a key factor is the public policy in ensuring the integrity of the criminal justice system by imposing a sentence which had a general deterrent effect on this type of offending.

23. Mr Starkey concentrated in his oral submissions on the question of totality. He acknowledges that because of the close proximity in time and the gross breach of bail in committing the offence the following day, the reduction for totality can perhaps not be as great as it might otherwise be. He points out that nowhere in the judge's sentencing remarks did he advert expressly to the need to reflect totality in the overall sentence when he was analysing and costructing the individual sentences.

24. We have considered Mr Starkey's submissions carefully, both oral and written. It is important to emphasise that none of the cases cited is in any sense a guideline case, nor has Mr Starkey sought to rely upon them as such. They are merely examples. We think the judge was right to regard this as a particularly serious case of its kind in view of the brazen breach of the bail conditions the very day after he had been convicted, and the clear intention of the appellant to have revenge upon the woman who had given evidence against him leading to his conviction. Mr Starkey suggested that the motive for the offence of witness harming was not necessarily predominantly revenge. We observe that section 51(5) of the 1994 Act provides that the motive required for the offence, that is doing the harm in question because of the knowledge or belief that the victim had given evidence, need not be the only or the predominating motive with which the act is done. It seems to us that the public interest and the need for deterrence is just as great whether the motive was wholly or only partly revenge.

25. We consider that the judge was entitled to take four years as the starting point. However applying the full 10 per cent credit for plea there should have been a reduction of five months in round figures. That would bring the sentence down to 43 months. That leaves the question of totality. The judge did refer at the outset of his sentencing remarks to the fact that he had considered the totality guideline but as Mr Starkey correctly points out he made no subsequent reference to totality. Consecutive sentences were plainly justified and essential in the circumstances; there could not be a clearer case. However, we bear in mind this was the first custodial sentence the appellant had ever received and we think that some further modest reduction should have been made in the overall sentence on the grounds of totality.

26. We consider that the sentence for the offence of witness harming, count 2, should have been 40 months' imprisonment with the result that the total sentence should have been 48 months rather than 53 months. We recognise that this is only a modest reduction at a level where this court might not normally interfere. Nevertheless the appellant is entitled to have the arithmetical error in relation to the reduction for plea corrected as a matter of principle and a further reduction for totality is appropriate.

27. Accordingly, we allow the appeal, we quash the sentence of 45 months' imprisonment on count 2 and substitute a sentence of 40 months' imprisonment. The other sentences remain intact. The total sentence becomes 4 years.