[2019] EWCA Crim 1209

No: 201802380/A4

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

6 June 2019

Before:

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

Regina
and
Jamal Poku

Miss L Bald appeared on behalf of the **Appellant**

Picton
JUDGE This is an appeal against sentence brought with leave of the single judge. On 6 November 2017 the appellant was convicted of inflicting grievous bodily harm with intent, contrary to section 18 of the Offences Against the Person Act. The court moved immediately to sentence, imposing a term of seven years' imprisonment.

The offence took place on 7 March 2016 when the appellant went to buy cigarettes from a local convenience store that he was in the habit of using. He took exception to the fact that the shop assistant, the victim in the section 18, declined to sell the appellant cigarettes unless he could produce some valid identification. The defence case was that the appellant had been there before and had been served without such a demand being made and so it was that he was caused to lose his temper.

The appellant's reaction to the shop assistant's challenge was to arm himself with a wine bottle from the shelf and strike the victim over the head, causing the bottle to smash and his victim to sustain cuts. A struggle ensued, during the course of which the appellant took hold of a second bottle with which he struck the shop assistant a further blow or blows, causing additional lacerations. Eventually the shop assistant was able to wrestle the appellant out through the door.

As a result of the blows, the appellant's victim sustained six significant lacerations to his head, ranging from 3 centimetres to 15 centimetres in length. A head scan revealed a left frontal laceration with adjacent locules of air. There was no acute inter-cranial haemorrhage or fractures. The wounds were cleaned and sutured and he was discharged at 02.45 hours the following morning. In a victim personal statement, taken just two weeks after the incident, the shop assistant described how he lost a great deal of blood, was treated with 35 stitches, had also injured his ankle and sustained a broken tooth. He referred to the fact that he was unable to move his left eye properly. He spoke about how his children were upset by his appearance and that he had not been able to go back to work. He said that people found the scars on his face alarming. Photographs of the scene graphically depict the amount of blood that the unfortunate shop assistant must have shed as a result of the appellant's actions.

The police attended and commenced an investigation but very soon after they had done so the appellant's

mother contacted the emergency services and reported that her son had come home covered in blood and told her that he had lost his temper and hurt a shop keeper. The appellant was arrested. He told the arresting officers that he had been in a fight with the victim and smashed two bottles over his head before punching him. The appellant stated: “I hit him with a bottle multiple times. I told him not to come for me but he kept coming at me.” Later in the subject of a formal interview process the appellant declined to answer questions.

At trial the appellant claimed to have been acting in self-defence. The defence statement referred to incidents in the appellant's past when his brother had been both shot and stabbed. These events were said to have caused the appellant “trauma and long-term mental anguish”. The defence statement also referred to the fact that the appellant had himself been a victim of crime, having had a car deliberately driven into him, causing injuries to his leg and body. The defence statement asserted that the appellant was “stressed” by these issues and that his condition had been aggravated by his mother's illness.

The appellant was 22 years of age as at the date of sentence and a person of previous good character. There was no pre-sentence report and the Recorder who presided over the trial refused a defence application that sentence should be adjourned in order to investigate whether the appellant was subject to autism. The court was aware that the defence had obtained a ‘psychiatric’ report (that is what the Recorder believed it to be) addressing the issue of fitness to plead, but the Recorder was told that the report had not investigated whether the appellant was on the autism spectrum. The Recorder queried the potential relevance of an assessment by a psychologist that the defence sought to have undertaken prior to sentence. In the event he proceeded to sentence without any reports.

The Recorder assessed that the offence fell within Category 1 of the section 18 assault guideline, on the basis that this was a sustained attack causing a large number of wounds to the victim's head, commenting that the victim was “lucky to have come out of it as well as he did”. The Recorder further commented that the appellant had used a series of weapons and thus there was both greater harm and higher culpability. The result was to place the offence within Category 1 of the guideline with an identified starting point of 12 years and a category range of nine to 16 years.

The Recorder then commented that he was positioning the appellant's offence at the bottom of the category range, commenting that he perceived there was a risk that such a conclusion might be criticised on the basis that it was too lenient. The Recorder said he was going to discount the sentence by a further year on the basis of the appellant's good character and because of the “possibility of a peripheral degree or very marginal degree of autism”. The Recorder repeated his conclusion that he did not need a report on the issue, commenting that if such condition had been apparent to the appellant's family then they would have had it investigated previously. The Recorder then stated he was going to discount the sentence further because the appellant's mother had reported what the appellant had done to the police. The Recorder put the matter thus:

> “So it's really because of her assistance that I am going to reduce it by another year.”

The consequence of the Recorder's deductions was to take the sentence down from the guideline starting point, as he assessed it, to a final sentence of seven years, two years below the category range into which he assessed the appellant's offending fell.

The grounds of appeal upon which leave was granted argued that the Recorder erred in his determination that this was a Category 1 rather than a Category 2 case. Today, Miss Bald has adjusted her position somewhat, submitting that the case falls in fact into Category 3.

In support of the appeal reliance is placed on the judgment in the case of R v Smith [2015] EWCA Crim. 1482. It is submitted that the greater harm criterion was not made out because, first, the injuries sustained were not serious in the context of a section 18 offence, and secondly, two distinct blows in the course of what took place was not sufficient so as to amount to a sustained and repeated assault. Additionally, counsel seeks permission to argue an additional ground of appeal on the basis of two reports obtained post-sentence that address potential diagnoses of autism, PTSD and learning disability. It is submitted that the absence of the material now available in relation to these conditions has led to an incorrect categorisation of the offence and thus the imposition of a manifestly excessive sentence.

Although it is accepted that there is higher culpability by reason of the use of a weapon, the defence argue that

the evidence of the psychiatrist and psychologist who had been instructed to report post-sentence support a lower culpability factor based on the existence of a “mental disorder or learning disability linked to the commission of the offence” as identified in the list of potentially relevant features to which account should be taken at Step 1 when assessing into which category the offence should be placed. Counsel for the appellant has attractively developed those arguments before us today in succinct submissions.

So far as categorisation is concerned, we have watched the CCTV footage of the attack. Whilst it is right to say that the two blows to the head that the appellant delivered to his unfortunate victim appeared to have been struck towards the beginning of what was an extended struggle, it is apparent that the two men spent some little time violently wrestling together as the shop assistant attempted to remove the appellant from the premises. In terms of the gravity of the injuries sustained there were a number of them and they were relatively severe. Given the force with which the appellant struck the complainant, causing each of the bottles he used as a weapon to smash on impact, it is indeed remarkable that the consequences were not a great deal worse than they turned out to be.

The defence submit that the two blows struck by the appellant in the course of the incident should not be assessed as amounting to a sustained attack for the purposes of applying the guideline. In relation to the case of Smith reference is made to the circumstances of that matter where an attack with a baseball bat, which involved only one blow that was said to have been delivered with intent to cause really serious harm, albeit with a preceding blow or blows which the prosecution appear to have accepted were not delivered with the requisite intent, was held not to amount to a sustained attack. The court on that occasion highlighted the substantial difference in starting point and range depending on whether an offence falls within Category 1 or 2, the starting point being 12 years for a Category 1 offence and six years if Category 2. At paragraph 18 of the judgment, the court stated:

> “The phrases ‘sustained’ and ‘repeated’ may imply different things. An assault may be sustained because it continued over the course of a significant period of time, even though it did not necessarily involve a substantial number of blows. An assault may be repeated because it involves multiple blows over a short period of time. In one sense, the present case involves a repeated offence in that there were two blows, though only one of them was charged under section 18. We have doubts whether a difference between one blow and two blows could justify moving the starting point from a category 2 (6-year) level to a category 1 (12-year) level. If this were so, there would be very few attacks that were not category 1. The concept of sustained or repeated, in our view, imports some degree of persistent repetition. These concepts must be read in the light of the major difference in starting point between the two categories. In order for a sentence to be compliant with the test of proportionality, the facts warranting the higher sentence should reflect the difference in the guidelines. In our judgment, two blows, one of which is not said to amount to a section 18 offence, would not at least normally amount to a sustained or repeated assault. We do not wish to be more specific or precise than this because we acknowledge that each case will entail a very fact-specific assessment.”

We are persuaded that on the facts of this case, whilst coming very close to the sort of sustained incident which by itself could put the offence into Category 1, the nature of the attack carried out by the appellant does not on its own quite qualify for a finding of greater harm by reference to that identified factor as set out in the guideline.

So far as the injuries are concerned and the question of whether they might merit a finding of greater harm, we were assisted by the case of Sowter [2018] EWCA Crim 1332, the facts of which bear some comparison to the circumstances here and where the court specifically considered and applied the case of Smith. In Sowter it was unsuccessfully argued that the offence was not sustained, the assault involving, as it did, 10 blows with a large knife delivered in the course of a frenzied attack. The injuries, however, amounted to four wounds, two of which were serious and two of which were not. A further argument advanced on appeal was that the wounds sustained did not amount to injuries that should be assessed as serious in the context of an offence contrary to section 18 and accordingly did not of themselves point towards the offence being categorised as one involving greater harm. In the course of the judgment, the court quoted paragraph 14 of Smith, where it was stated:

> “First, with regard to the injury, the question is whether the injury was serious ‘in the context of the offence’. It is axiomatic that all violence within the context of a section 18

> offence is serious, but some violence is more serious than others. The purpose behind the words 'which is serious in the context of the offence' in the guidelines is to distinguish between that level of violence which is inherent or par in a standard section 18 offence and that which will, by definition, go beyond what may be viewed as par for the course. In our view, given that there is such a marked disparity in the starting point between categories 1 and 2, the sorts of harm and violence which will justify placing a case within category 1 must be significantly above the serious level of harm which is normal for the purpose of section 18."

The court in Sowter rejected the defence argument as to the wounds that had been caused to the victim in the case under consideration, stating:

> "The starting point must be the rubric for step 1 in the guideline which states:
>
> 'The court should determine the offender's culpability and the harm caused, or intended, by reference only to the factors below (as demonstrated by the presence of one or more). These factors comprise the principal factual elements of the offence and should determine the category.'
>
> We observe that the focus is not simply on the harm caused but also on the harm intended. Here there were repeated slashes with a very large knife. The intention by his plea was to cause really serious injury. His words during the incident and afterwards demonstrated that intention, quite apart from his actions and the nature of the weapon. It was pure good fortune that the injuries were not far more serious or even fatal. Quite separately, this was undoubtedly a sustained assault on the same victim which was one of the factors indicating greater harm; indeed the rubric we have just quoted suggests the presence of only one factor may demonstrate the required harm. Whilst recognising the need for what has been described in subsequent cases as the 'nuanced' approach in Smith, we have to look at the harm factors as a whole."

We consider that the level of harm sustained in this case, combined with the number of blows with the two bottles in the context of what was undoubtedly a lengthy struggle, which in itself was indicative of the appellant intending to cause a serious level of harm, could arguably justify a finding of greater harm. We have, however, been persuaded that in the context of the stark difference between the starting points this offence should be assessed as coming within lesser harm, albeit that conclusion is only reached by the finest of margins. Further, the combination of two factors, each of which very nearly merit a finding of greater harm, is still relevant when assessing where the case should be positioned in the relevant category range.

So far as the two post-sentence medical reports are concerned, it is perhaps questionable whether the court should receive them at all. The position was analysed in the case of Rosen [2018] EWCA Crim 2164, at paragraph 38, in this way:

> "The circumstances in which this Court will receive fresh evidence on a sentence appeal were considered in R v Rogers [2016] 2 Cr.App.R (S) 36. The Court's function is to review sentences passed below and not to conduct a sentencing hearing. If fresh evidence is relied upon, rather than the mere updating of reports used below or reports on progress in custody, the provisions of section 23 Criminal Appeal Act 1968 apply. The Court will scrutinise intensely any application to give a factual explanation that was not before the sentencing court: see paragraph 7."

It is to be noted that at the time of trial the defence were in possession of at least the psychologist's report upon the appellant which has never been served. It was, however, suggested at the sentence hearing that it did not address the issues that the defence wanted to explore as potential mitigation. Notwithstanding the history, we are prepared to consider the reports and assess the degree to which they have any material impact upon our consideration of sentence. We are unpersuaded that the opinions expressed by the two experts do have any significant impact on the issue of culpability such as might lead to the conclusion that the sentence was by reason thereof manifestly excessive. As a document entitled "Joint Statement" prepared by the two experts states in its conclusion, they have identified that the appellant has a low IQ, autistic traits and PTSD traits. The issue of the appellant's PTSD was, it seems to us, an issue that the defence relied upon at trial in support of

self-defence and which the jury must have rejected. In any event, we do not assess the evidence contained in these reports as amounting to a mental disorder or learning disability that can be said to be linked to the commission of the offence. The findings in the reports could be thought to be pointing to matters that might have some potential relevance to an unsuccessful defence run at trial. We do not consider that of themselves they would amount to material establishing a lower culpability factor. Even if the evidence did so establish, however, the court then has to engage in a balancing exercise as between the higher culpability feature arising from the use of two weapons in the course of the attack, and a lower culpability factor that could arise from the appellant's pre-existing mental state. One does not cancel out the other.

Conclusion

In reviewing the sentence passed by the Recorder, this court is not constrained by the sentencing judge's approach. Our task is to decide whether the sentence is to be assessed as being manifestly excessive in the context of our analysis of the relevant factors in the guideline. There are two features of the offence that could have justified a finding of greater harm: the sustained nature of the incident and the level of harm caused. We have concluded that the Recorder was wrong to identify those guideline features as being present here for the reasons which we have already outlined, but that is only by a fine margin. From the appellant's perspective this case comes perilously close to one that should be assessed as coming within greater harm in the context of an offence contrary to section 18.

So far as culpability is concerned, the higher culpability factor arising from the use of a weapon is accepted as being present. The appellant did not just use one weapon but rather two and he did so by way of delivering very forceful blows to the victim's head. It is mere good fortune that the injuries were not even more severe than in the event they were. We do not accept that the medical evidence concerning the appellant's mental state that is now available is of a nature that clearly establishes a lower culpability factor but, even if it did so, then we consider that the weight of the evidence is limited and the factor indicating higher culpability is very much the predominant one in the sentencing exercise.

Accordingly, we consider that the Recorder should have placed this offence in Category 2 and not Category 1 of the guideline. That said, the nature and duration of the attack, coupled with the harm that was caused, operates in our judgment so as to move the appropriate sentence to the top of the Category 2 range, i.e. nine years. The mitigation represented by the appellant's good character, coupled with the matters set out in the two reports that we have read with care, does justify some downward movement. We do not, however, consider that the Recorder's logic in reducing the sentence by a year because the appellant's mother was the person who reported him to the police is in any way justifiable. That feature of the case reflected no credit on the appellant and was irrelevant to the sentence he should have received.

We, however, do have the benefit of the contents of the two reports which the Recorder did not and making some allowance for all that is set out in those, may legitimately have some impact by way of downward movement from that which the guideline would indicate as being appropriate by reference to the harm and culpability factors combined with the other aggravating features of this case. That analysis leads us to the same result as that reached by the Recorder, albeit by a different route.

Standing back and looking at this case in the round, we must ask ourselves whether seven years after trial in the context of an attack of this nature, carried out even by someone with the character traits as described by the two experts instructed post-sentence, can be said to be manifestly excessive. We have no hesitation in answering that question in the negative and accordingly this appeal must be dismissed.