[2019] EWCA Crim 1190

No: 201901566

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

, 5 June 2019

Before:

Lord Justice Simon
Mr Justice Lavender
HIS HONOUR JUDGE Edmunds QC

Regina
and
Jason Roy Walker

Mr N Lewin appeared on behalf of the **Applicant**

Edmunds
JUDGE On 9 March 2019, having pleaded guilty before magistrates to two offences of possession of a bladed article in a public place, the appellant was committed to the Crown Court at Plymouth, where on 24 April 2019, he was sentenced by his Honour Judge Darlow to a total of thirteen months' immediate imprisonment made up of sentences of seven months and six months consecutively. There were the usual orders for the forfeiture and destruction of the knives and the surcharge provisions applied. The appellant now appeals against those terms of imprisonment with leave of the single judge.

The circumstances were that in the early hours of Friday, 8 March 2019 the appellant was seen behaving erratically by door staff in front of the Popworld nightclub in Union Street, Plymouth. He had been there for a number of hours during which he had asked to come inside the club on four or five occasions but had been refused entry as he seemed very drunk.

At about 1.10 am the appellant said to a member of the door staff, “If you don't let me in you'll regret it. Have you seen Freddy vs Jason? I can be your worst nightmare.” That was an obvious reference to a well-known film of the slasher genre. He was holding a can of cider at the time, and the handle of the knife was seen in the inside left breast pocket of his jacket. Two members of door staff took hold of the appellant, removing the knife from his jacket and flagging down a passing police car. That knife was found to have a four-inch blade.

The appellant was arrested and searched whereupon the police found a second knife, this time with a six-inch blade, concealed in the lining of his jacket. That knife was removed with some difficulty.

The appellant went on to make admissions in interview, saying that he was in possession of the knives because he had a fear of being in public without one, and that seems to have been linked to certain mental health difficulties he had at the time. He denied trying to conceal the second knife. It appears rather that the knife had cut a hole in the pocket into which it had been placed and slipped into the lining. For our part, we have seen photographs of the two knives concerned.

Passing sentence, the judge observed that at the time the appellant was in possession of the knives he was drunk and threatening others, although not with the knives. Of the defence submission that the offences were

correctly categorised as A2, he said, “[…] but if it is an A2 it is a very high A2”, and that if the appellant had contested the matter he would have been looking at a total sentence of twenty months.

The judge noted the appellant's poor record, particularly for drug offences and offences of dishonesty and an abject failure to engage on any long-term basis with community disposals. The judge also took account, he said, of the early guilty pleas; that neither of the knives had been produced, and bore in mind the question of totality, together with the appellant's behaviour in prison, it being to his credit that it appears that for the first time in his adult life he had succeeded in detoxifying entirely from drugs, whether prescribed or not.

Having concluded that had the appellant contested the matter, the total sentence would have been twenty months, the judge gave credit for the plea, reducing the total by seven months to thirteen months, which he structured as to seven months on the more accessible knife and six on the less accessible one.

Following sentence, Mr Lewin understandably and appropriately, queried that the sentence was significantly outside the A2 bracket, and the judge stated that each of the two separate offences had a bracket of three to twelve months and that he had gone for ten months on each.

By way of background, the appellant was aged 43 at the date of sentence, he had 22 previous convictions between the period 1991 and 2015, largely for theft and kindred offences and for drugs offences. There were assaults as a juvenile but no violence as an adult, save a single section 5 Public Order Act offence in 2009. He was last imprisoned for threatening criminal damage in 2015.

An initial Pre-sentence Report assessed the appellant as having a high risk of reoffending. That took into account the decline in his mental health, the lack of support and stable, protective lifestyle factors, and assessed him as posing a medium risk of causing serious harm. That report concluded that no recommendation could be made until a mental health assessment had been undertaken, and as a result an Addendum Report was provided which stated that the mainstay of the appellant's mental health problems was his substance misuse. His previous engagement and compliance with probation and the agencies to which he had been referred in the community suggested a level of ambivalence on his part to making any changes in his life.

Whilst his behaviour in custody had been positive, there was nevertheless a pattern of his behaving well in custody and quickly relapsing on release. The report said that he was not suitable for any community sentencing options and the most effective way to manage his risk was the imposition of a custodial sentence.

Although the appellant advances four grounds of appeal, we agree with the single judge that the real point is whether the judge was justified in taking a starting point of twenty months after a trial for carrying both knives. Mr Lewin has repeated his submissions that these were category 2A offences and has argued that the matter should have been dealt with either by concurrent sentences or that there had been inadequate allowance for totality, and we are grateful for his helpful submissions.

We must tackle the question of whether the categorisation of the offences was correct. Each offence clearly fell into Culpability A, being knives. In the context of this case, they would fall into harm Category 1 if they were committed in circumstances where there was a risk of serious disorder and into Category 2 if not. Whilst some judges may conclude this offence fell into Category 2, in our judgment the circumstances taken together mean that this was an offence in which the visible knife, which we shall call the primary knife, was possessed in circumstances where there was a risk of serious disorder. This was a drunk man in a city centre area, specifically Union Street, Plymouth in the early hours, persistently failing to enter the nightclub and making threats expressly referencing a well-known, slasher movie at a time when the handle of a knife was readily visible in his jacket pocket to those to whom he spoke. The overt threat referencing knife violence demonstrates that risk when combined with the other factors.

We acknowledge that the knife was not produced, albeit that it was visible, but of course, had the appellant produced the knife he would doubtless have faced the much more serious offence of threatening with a blade in a public place, contrary to section 139AA(1) of the Criminal Justice Act 1988. Therefore, we conclude the judge was, if anything, too generous to the appellant in any concession that these offences may be at the top end of A2.

In our judgment, the starting point for the primary knife was one year, six months with a range one year through

to two years, six months. The secondary knife was within the jacket lining and difficult to extract, so we conclude did not give rise to any risk of serious disorder, and therefore, would merit a starting point of six months. There are factors increasing seriousness, namely his previous convictions, although none, of course, involved the possession of knives. The fact that he was under the influence of drink is a factor that we have already taken into account in assessing the starting point.

In mitigation there was little more to be said than that he had made substantial efforts to address his drug problems whilst in custody, including achieving a drug-free status for what we understand to be the first time in his adult life. That is to be commended, and it is impressive, although it remains the case that there has been a pattern in the past of his doing well in custody, only to relapse on release.

We do not consider that the balance of the aggravating and mitigating factors indicates any substantial departure from the starting point. Those starting points aggregated would fully justify a sentence of two years, and a reduction of four months would in our judgment properly reflect the issues of totality within the totality guideline. The appellant was entitled to and received full credit for his guilty pleas. In our judgment, however a sentence is structured, a person who goes out in these circumstances, with not one but two knives, must expect to be treated significantly more severely.

Given the circumstances of the offences and the Pre-sentence Report and addendum, there was no alternative other than for the sentences to be of immediate custody. Although for the reasons we have given, we might have structured the sentence somewhat differently, the overall sentence of thirteen months cannot in our judgment be described as manifestly excessive, and accordingly, this appeal is dismissed.

Lord Justice Simon
Thank you for your submissions, Mr Lewin.

MR LEWIN: My Lords, thank you.