[2019] EWCA Crim 1716
2019/02751/B2 & 2019/00580/B2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 8th October 2019

B e f o r e:

LORD JUSTICE HADDON-CAVE

MRS JUSTICE COCKERILL DBE

and

HIS HONOUR JUDGE BATE
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v -

PETER FARBAR

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Miss P Ahluwalia appeared on behalf of the Applicant

Mr T Dunn appeared on behalf of the Crown

J U D G M E N T
Approved

Tuesday 8th October 2019

LORD JUSTICE HADDON-CAVE:

1. On 21st July 2017, in in the Crown Court at Canterbury, before His Honour Judge Smith, the appellant, Peter Farbar, was convicted of two offences of causing grievous bodily harm with intent (counts 1 and 3), contrary to section 18 of the Offences against the Person Act 1861. On that day he also admitted one offence of failure to surrender to custody, contrary to section 6 of the Bail Act 1976. On the same day, the appellant was sentenced to a total of six years and nine months' imprisonment by His Honour Judge Smith, comprising six years' imprisonment, concurrent on counts 1 and 3, and an additional consecutive term of nine months' imprisonment for the offence of failure to surrender to bail.

2. The appellant appeals as of right in respect of the finding of failure to surrender, pursuant to section 13 of the Administration of Justice Act 1960, which is treated as a criminal contempt under section 6(5) of the Bail Act 1976. His applications for leave to appeal against the sentence for the offences of causing grievous bodily harm with intent and for leave to appeal against conviction in respect of the finding of contempt of court for failure to surrender have been referred to the full court by the Registrar. We grant leave.

3. There are three issues in this appeal: first, whether the bail conviction should stand; second, whether 68 days spent in custody prior to extradition should count against sentence; and third, whether the appellant should be allowed to adduce fresh evidence in respect of his mental health, and, if so, what effect that might have had or should have upon his sentence.

4. The court is grateful to the Registrar and to the Criminal Appeal Office team for referring this matter to the full court. The court is also grateful to Miss Ahluwalia for her very helpful and clear written and oral submissions.

The facts

5. The facts of this case are briefly as follows. In August 2018 the appellant's family instructed Messrs Shire and Company (the appellant's solicitors) to consider the merits of an application for leave to appeal against sentence. The appellant was then held in HMP Elmley where he was examined by Dr Naguib. The matter however has something of a longer history.

6. HC lived on the top floor of a block of flats called Marine Terrace. On 18th March 2015, he took delivery of a new washing machine and dryer with the assistance of his brother, EC. They also removed a washing machine from HC's flat. Whilst the men removed the washing machine, a pram belonging to HC was in their way. They moved it to one side in the communal hallway of the block to enable them to move the appliances around freely.

7. When they reached the ground floor and went out of the front door of Marine Terrace, they noticed the pram lying outside on the pavement. They returned upstairs and knocked on the door of the flat by which the pram had been left. It was answered by the appellant's son, Erik. They asked why the pram had been thrown out, and told Erik to put it back where it had been previously. An argument then developed and Erik tried to pin HC to the wall. Punches were exchanged and Erik punched HC in the face. Erik's younger brother, Villiam, joined in the melee, and a fight developed between HC and EC on the one hand, and Erik and Villiam on the other.

8. The appellant then appeared in the doorway. EC shouted "Careful, knife". The knife was a

kitchen knife with a blade which was nine or ten inches long. EC suddenly shouted "Stop", and then said that he was dying. He had a large knife wound in his back. He had been stabbed with the knife (count 3). HC saw that his brother had a large wound to his neck. The appellant then attacked HC and attempted to stab him in the neck and throat. HC's ear and finger were wounded (count 1).

9. The appellant was arrested and interviewed. He gave a prepared statement which stated that he did not have a knife at any stage during the incident. He very shortly thereafter absconded to Slovakia. On 1st December 2016, a European Arrest Warrant was issued in respect of the appellant. On 8th March 2017, he was apprehended and arrested in Slovakia. On 15th May 2017, he was extradited to the United Kingdom and he was convicted and sentenced, as we have said, on 21st July 2017 in the Crown Court at Canterbury.

10. The appellant is now aged 54. He was of previous good character. Prior to this incident, he worked and provided for his family in Slovakia.

11. In passing sentence, the learned judge said that this was an innocuous incident that became unpleasant, frightening, violent and wholly unnecessary. It became spectacularly dangerous and gravely more serious due to the actions of the appellant. He took a knife and used it to attack two men in conflict with his sons. No other person was armed during the incident.

12. The judge was satisfied that the appellant did not use the knife simply to gesture and threaten, in the hope that it would stop the fight, as he asserted in evidence. The appellant took the knife and used it deliberately and intentionally to inflict injury. It was simply good fortune that there was not more serious injury caused to the complainants during the incident. The appellant's conduct had elevated this offence into something altogether different. It was aggravated by the fact that there were two victims.

13. The learned judge also found that the appellant discussed with his family the best ways to minimise his liability. They discussed what lies to tell and sought to blame the victims. The appellant also resisted being brought to justice by fleeing the jurisdiction.

14. The appellant's personal mitigation included his ill-health, and the fact that he was a family man, along with his good character and age. The judge was of the view that this was a one-off incident and that the appellant was not dangerous within the meaning of the Criminal Justice Act. He went on to say that none of the days spent by the appellant in Slovakia pending extradition was to be credited against his custodial term.

15. It was for these reasons that the judge passed the concurrent terms of six years' imprisonment for each of the section 18 offences, together with the consecutive term of nine months' imprisonment for the bail offence.

16. We turn to each of the three issues raised in this appeal.

The First Issue: The Bail Offence

17. The Registrar of Criminal Appeals referred this matter to the full court because of her view that the appellant was convicted and sentenced in respect of a bail offence which offended against the rule of specialty. The Registrar invited both counsel to serve written submissions in relation to that issue. We have been assisted by Miss Ahluwalia's submissions and Mr Dunn's submissions on behalf of the prosecution in relation to this matter. They are both agreed that the conviction and sentence for the bail offence cannot stand and should be quashed.

The Law

18. The legal framework arises from the European Council Framework decision on the European Arrest Warrant of 13th June 2002 (2002/584/JHA; OJL 190/1, 18.7.02, (the "Framework Decision")).

19. Article 8 of the Framework Decision specifies the requirements as to the context of an extradition warrant, which is required to contain the nature and legal classification of the offence or offences in respect of which extradition is sought. Article 8 of the Framework Decision is given effect by section 146 of the Extradition Act 2003, which reads in the material part as follows:

> "**146. Dealing with person for other offences**
>
> (1) This section applies if a person is extradited to the United Kingdom from a category 1 territory in pursuance of a Part 3 warrant.
>
> (2) The person may be dealt with in the United Kingdom for an offence committed before his extradition only if –
>
> (a) the offence is one falling within subsection (3); or
>
> (b) the condition in subsection (4) is satisfied.
>
> (3) The offences are –
>
> (a) the offence in respect of which the person is extradited;
>
> (b) an offence disclosed by the information provided to the category 1 territory in respect of that offence;
>
> (c) an extradition offence in respect of which consent to the person being dealt with is given on behalf of the territory in response to a request made by the appropriate judge;
>
> (d) an offence which is not punishable with imprisonment or another form of detention;
>
> (e) an offence in respect of which the person will not be detained in connection with his trial, sentence or appeal;
>
> (f) an offence in respect of which the person waives the right that he would have (but for this paragraph) not to be dealt with for the offence.

…"

20. The rule of specialty is that an extradition defendant may only be dealt with for the offence or the offences for which he or she has been sought: see *R v Seddon* [2009] EWCA Crim 483; [2009] 2 Cr App R(S) 9 (per Hughes LJ at page 146 at [5]).

21. In *Seddon* (above) the Court of Appeal Criminal Division considered an applicant who had absconded to Spain following a conviction for blackmail. He was extradited back to the United Kingdom, pursuant to a European Arrest Warrant, and was sentenced to eighteen months' imprisonment for blackmail and to an additional four months' imprisonment consecutive for an offence under the Bail Act 1976. The question for the court was whether or not the offence under the Bail Act 1976 had been disclosed by the information provided to the Spanish authorities. Accordingly, the application of section 146(3)(b) of the 2003 Act quoted above was in issue. The court held that section 146(3)(b) of the 2003 Act requires that the exception be limited to an offence disclosed by the information provided in respect of the extradition offence. Hughes LJ, in giving the judgment of the court, stated as follows at [24]:

> "Exercising our duty to construe section 146(3)(b) so far as possible consistently with the international obligations which this country has undertaken through the Framework Decision, it is quite clear to us that the section did not extend to permit Mr Seddon to be dealt with in Manchester for the Bail Act offence which was wholly extraneous to and additional to the extradition offence of blackmail and to which there was the merest passing reference in the warrant. ..."

22. The court went on to give the following general guidance at [28]:

> "That course, of including in the European Arrest Warrant a request for surrender in relation to the Bail Act offence, is the course which should be taken wherever there is a realistic possibility that the court should have open to it upon surrender process not only for the substantive offence but also for the bail offence. We draw attention to the existence of the alternative procedure referred to in section 146(3)(c) of the 2003 Act. It remains open to any appropriate judge to seek specific consent from the requested State to proceedings for any specific offence and even after surrender ... Much the best course is to include the reference to the Bail Act offence specifically as one of the extradition offences for which surrender is sought and so to say plainly from the beginning in the European Arrest Warrant."

23. Similar exhortations appear in the judgment of the court in the recent case of *R v Shepherd* [2019] 2 Cr App R(S) 26.

24. We have carefully examined the European Arrest Warrant in relation to the appellant. The warrant states in section (b):

> "**(b) Decision on which the warrant is based:**
>
> 1. Arrest warrant or judicial decision having the same effect: Warrant of arrest dated 11th May 2015 issued at Canterbury Crown Court for failing to answer bail in respect of two offences of wounding with intent, contrary to section 18 of the Offences against the Person Act 1861."

25. Sections (c) and (e) of the warrant go on to deal expressly with the two offences of wounding under section 18. No further reference is made to the failure to answer to bail. It is plain to us that the reference in section (b) of the warrant is, as in *Seddon*, merely a passing reference to the bail offence, and it does not satisfy the test of specialty enunciated by Hughes LJ. The bail offence was not an offence for which the appellant was being extradited. He was being extradited in respect of the two section 18 offences alone.

26. We note that there were no other grounds upon which the bail offence could be validated. No consent to include the bail offence was sought, and there was no waiver of the specialty rule by the appellant. Accordingly, in our judgment, the concession helpfully made by Mr Dunn on behalf of the prosecution that the conviction for failing to surrender to custody could not stand is correctly made. Thus, we quash the conviction on indictment 20157069 for failure to surrender to bail and we quash the consecutive sentence of nine months' imprisonment in respect of that offence.

The Second Issue: Days spent in custody ordered not to count

27. Both Miss Ahluwalia and Mr Dunn agree that the judge fell into error when he refused to allow days spent in custody in Slovakia pending extradition to count against the sentence which he passed. In his sentencing remarks the judge expressly said (at page 3H):

> "None of the days spent in custody in Slovakia will count towards your sentence."

28. Under sections 240ZA and 243 of the Criminal Justice Act 2003, days spent in custody awaiting extradition are to count against sentences of imprisonment served in the UK and a judge has no power to disallow days spent in custody pending extradition. Indeed, those sections of the Criminal Justice Act 2003 compel a sentencing judge to specify in open court the number of days that an individual has spent in custody pending extradition and to credit those days against any custodial sentence.

29. It is agreed that 68 days were spent by the appellant in custody pending extradition. Accordingly, we direct that the concurrent sentences of six years' imprisonment should be adjusted, in any event, to take account of the 68 days spent in custody pending extradition, pursuant to section 240ZA and 243 of the Criminal Justice Act 2003 – that is to say, they should be credited against his custodial sentence.

The Third Issue: The Medical Report

30. We turn, finally, to the medical report issue. Miss Ahluwalia urges the court to admit a medical report by Mr Naguib, a consultant psychiatrist. She submits that the report should be taken into account when considering the appropriate sentence to be imposed upon the appellant.

31. Mr Naguib interviewed the appellant on 18th December 2018, through an interpreter. He concluded that the appellant suffered from adjustment disorders and moderate to severe depression. Miss Ahluwalia submits that, had the sentencing judge had the report before him, it would have impacted upon the length of sentence which he passed. In any event, she submits that we should now take this report into account.

32. Despite her succinct and helpful submissions, we are unpersuaded that we should take into account this report, even if it were to be admitted. The appellant's former solicitors, Messrs Haskell and Company, have explained that full medical records were submitted to the sentencing judge. They say that at no time did the appellant indicate that he had any mental disorders, still less indicate the same during his evidence. Although, he gave evidence about his physical problems (which do not seem to have been so great that he could not cut down cherry trees with a chainsaw). The opportunity to put forward any further medical evidence was at the time the sentencing judge was seised of this matter. No cogent reason has been advanced as to why such a report was not obtained then. In any event, we are wholly unpersuaded that the "diagnosis" which Mr Naguib has come to bears any real weight. His diagnosis appears to be based almost wholly on anecdotal, self-reports by the appellant. There appears to have been no contemporaneous evidence for his diagnosis. Further, it is troubling that much of the diagnosis in the report appears to be based on answers given by the appellant following prompting. Furthermore, Mr Naguib is not a forensic psychiatrist. We are unpersuaded that any weight should be given to his report, which is far from compelling.

33. For those reasons we refuse the application to adduce this further medical evidence.

34. Accordingly, subject to the slight adjustment, which we have indicated, of the deduction of 68 days for time spent on remand, the concurrent terms of six years' imprisonment for the two section 18 offences under counts 1 and 3 are to stand. However, as we have indicated, the concurrent sentence of nine months' imprisonment for the bail offence is quashed.

35. **MISS AHLUWALIA:** My Lord, there is one matter in relation to costs. Can I seek fourteen days to make any submissions to the Registrar?

36. **LORD JUSTICE HADDON-CAVE:** Indeed.

37. **MISS AHLUWALIA:** I am very grateful.
