

NCN: [2019] EWCA Crim 130  
No: 201803216 A2  
**IN THE COURT OF APPEAL**  
**CRIMINAL DIVISION**

Royal Courts of Justice  
Strand  
London, WC2A 2LL

Friday, 25 January 2019

**B e f o r e:**

**LORD JUSTICE SIMON**

**MR JUSTICE SWEENEY**

**HIS HONOUR JUDGE BURBIDGE QC**  
**(Sitting as a Judge of the CACD)**

**R E G I N A**

v

**NICKY MAXWELL**

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**Mr M Shepherd** appeared on behalf of the **Appellant**

**Mr G Rogerson** appeared on behalf of the **Crown**

**J U D G M E N T**

**HIS HONOUR JUDGE BURBIDGE:**

1. On 29 May 2018, in the Crown Court at Carlisle, the appellant pleaded guilty to the offence of inflicting grievous bodily harm on Nathan Johnston, contrary to section 20 of the Offences Against the Person Act 1861.
2. The matter was then adjourned for an up-to-date statement about the victim's condition and for further victim personal statements and he was sentenced on 13 July 2018 to 3 years 6 months' imprisonment.
3. He was in breach of a conditional discharge imposed by the magistrates on 2 September 2016 for an offence of assault by beating by the commission of this further offence but no order was made in respect of this.
4. The appellant appeals against the sentence with the leave of the single judge.
5. On 20 April 2018, a group of friends gathered and began drinking. The party continued overnight and the next day they moved onto an address in Pennine Way in Carlisle. There were about eight people there, including the victim, Nathan Johnston, who was then aged 29, and the appellant. The drinking continued. They sat in the garden and everybody was drunk but generally happy and in high spirits.
6. At about 3,00 pm, the atmosphere changed. The appellant and Mr Johnston began to bicker. The appellant became agitated. He punched Mr Johnston with a clenched fist, making contact with his face and causing him to fall straight to the ground, banging his

head on the concrete path. That rendered him unconscious and there was blood coming from the back of his head. He came round briefly whilst an ambulance was called but then lost consciousness again. The ambulance arrived at 3.15 pm, by which time Mr Johnston's speech made no sense and he was in distress and vomiting.

7. The appellant was arrested later that afternoon at a nearby public house.
8. Mr Johnston was taken to Cumberland Infirmary, where he underwent a scan and was then transferred immediately to the Royal Victoria Infirmary. He had sustained a cerebral oedema and bilateral frontal contusions to the brain. He was transferred to the neuro theatre, where he underwent a decompressive craniotomy, that is to say the removal of a section of the skull to allow the swelling of the brain to expand. His airway was ventilated, a feeding pipe was inserted and a tracheostomy was performed. He remained in hospital on a neurosurgical ward. He was opening his eyes but not speaking. He could not obey commands and required nursing for every aspect of daily life. He also had required a urinary catheter because he had lost bladder control.
9. He was transferred to Walkergate Park Hospital as an inpatient for complex neuro rehabilitation. He was due to remain there for the foreseeable future and would need to have reconstructive cranial surgery to replace the section of the bone that had been removed from his skull or to fit a titanium plate. Though it was difficult to give an accurate prognosis, the head injury nurse specialist concluded that Mr Johnston had sustained a serious brain injury and it was likely that he would not return to independent living for the foreseeable future. This medical material was set out in a document

available to the Court dated 4 June 2018.

10. Upon arrest the appellant denied that anything had happened, saying, "He's my friend. I wouldn't do that. I've got two kids and I'm on licence. I wouldn't do anything to ruin that. I haven't been involved in anything". In interview he gave a prepared statement in which he accepted that he had been at the address and that he saw Mr Johnston sustain an injury but that he had no part in it whatsoever.
11. The judge had three victim personal statements and in part they were read by the authors to the court: from the victim's father, Kevin Johnston, dated 12 May 2018; from Kimberley Brown, the victim's partner, an undated document; and from Justine Johnston, the victim's sister, dated 8 June 2018. We have had the advantage of also reading them.
12. In passing sentence, the judge observed that this was a serious offence of inflicting grievous bodily harm. Towards the end of the party there was a dispute between the appellant and Nathan Johnston. They were bickering. A substantial amount of drink had been taken by the appellant. He became agitated and punched Mr Johnston once to the face. The blow was unexpected and hard enough to put Mr Johnston to the floor immediately. When he hit the ground, the back of his head impacted with a concrete surface causing a serious brain injury.
13. Mr Johnston's life was threatened by his brain injury and he underwent specialised treatment. The prognosis was very poor. It was the view, said the judge, of the head injury specialist nurse that he would not return to independent living for the foreseeable

future.

14. The judge indicated that he had considered the victim personal statements, including that of Mr Johnston's partner and the mother of their child. Their accounts of the impact of this offending, said the judge, and we agree, were intensely moving. The harm caused not just to Mr Johnston but to all those who had affection for him was immense. Mr Johnston' life and their lives had been wrecked by the appellant's drunken thuggish behaviour.
15. In respect of the guidelines, it was suggested by defence counsel Mr Shepherd, who appears before us today and had asserted before the judge at sentence, that this was a category 2 case with a starting point of one and a half years and a range of one to three years after trial.
16. The judge did not accept that contention and formed the view that in the context of this case the harm caused was so significant and enduring that the strict application of the guidelines was “inapt”, as he put it, and it would be contrary to the interests of justice to apply them. It would be difficult to imagine, the judge said, a section 20 offence where the consequences of drunken violence would be more significant than in this case.
17. The appellant's position, said the judge, was aggravated by virtue of his previous convictions. He had convictions for 37 offences, including battery committed in October 2007; breach of an antisocial behaviour order of the same date; further breaches and a conviction for harassment on 11 July 2008, for which he was imprisoned; and battery, for

which he was sentenced on 13 June 2016; and again a further assault on 2 September 2016 when the appellant hit a woman in a motor car. The conditional discharge was imposed for that offence, which the appellant was in breach of by virtue of this conviction. He had been sentenced on 9 September 2016 to 30 months' imprisonment for dealing in cocaine and so was on licence when he assaulted Mr Johnston, another significant aggravating feature, said the judge.

18. Further, the judge said it could not be said that the awful circumstances of this offence were a one-off: the appellant had appeared before the courts regularly for violence and antisocial behaviour; though, through good fortune in the past, no serious harm had been caused.

19. The appellant was entitled to a 25 per cent reduction for pleading guilty. In interview and at the Magistrates' Court he had denied striking any blow and had denied any involvement in violence before he entered his plea. The judge said his protestations through his advocate of being remorseful had to be seen in the context of that interview. The appellant, said the judge, did not appear sorry then and the judge did not think that he was really sorry now, save perhaps for himself.

20. Had he been convicted after trial, the judge said that the sentence would have been close to the maximum for the offence: 4 years and 8 months. The sentence he imposed was in fact 42 months' imprisonment.

21. The grounds of appeal settled by Mr Shepherd and advanced orally before us today can

be asserted in the following manner. First, that it was wrong for the judge to take a starting point of 56 months for an offence involving some provocation and a single blow without a weapon. Mr Shepherd seeks to draw the distinction between a perpetrator who delivers multiple blows and someone who engages in a group attack. Also he contends it should have been a sentence within the guidelines, even if that were to be at the top of the range of category 1. Mr Shepherd further asserts that it was wrong for the judge to make no allowance for the mitigating factors.

22. Due to the catastrophic nature of the injuries caused to the victim, the prosecution were asked to respond to this appeal and Mr Rogerson, who appears today, has also drafted a skeleton argument to assist the court in response to the appellant's grounds.

23. First, we consider: was it wrong for the sentencing judge to take a starting point before discount for plea having considered aggravating and mitigating factors of 56 months?

24. In his sentencing remarks at page 3C of the transcript the judge said this, after having stated that the maximum sentence for a section 20 was a term of 5 years' imprisonment:

"There are also guidelines for section 20 offences. Judges generally have to follow guidelines unless the court is satisfied that it would be contrary to the interests of justice to do so.

In this case, it is suggested by defence counsel that this case could be categorised as what the guidelines say is a Category 2 case with a starting point of 1 year and 6 months' custody and a range of between 1 and up to 3 years, but after a trial.

My view is that in the context of this case, where the harm caused is so significant and enduring, I have formed the view that the strict application of

the guidelines is inapt, and it would therefore be contrary to the interests of justice simply to apply the guidelines here. It is difficult to imagine a section 20 offence where the consequences of drunken violence could be more significant than in this case."

25. Indeed, there is power for a judge not to apply the guidelines: that emanates from section 125 of the Coroners and Justice Act 2009. That provides:

"(1) Every court-

(a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and

(b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function, **unless the court is satisfied that it would be contrary to the interests of justice to do so.**"

26. The central issue for this court, therefore, was the judge correct in his determination that to sentence strictly within the ambit of the guidelines would be contrary to the interests of justice or to start at a point near the maximum would create a manifestly excessive sentence for this offending.

27. We commence our assessment of this, first, by following the steps set out in the appropriate guidelines. Step 1 requires a determination of the offence category by reference to harm and culpability. Greater harm factors are present for injury which is serious in the context of the offence. Here, substantially so. Mr Shepherd has described the injury as catastrophic, significant and enduring. Those are terms we would adopt. An all-pervading injury was caused to the victim here.

28. It is difficult to see how the statutory factors indicating higher culpability are engaged.



They are not. That is Mr Shepherd's point. Neither are any of the express other aggravating factors listed. This was a single but forceful punch which felled the victim, who on falling struck his head on concrete. Therefore, the culpability is first to be described as the lower of the two. It might also be said in this respect that there was a lack of premeditation on behalf of the applicant and a modest degree of provocation. It certainly could not be classified as a greater degree than normally expected.

29. However, within step 2 there are a non-exhaustive list of the aggravating factors and mitigating factors relating to the offence and the offender that the court is obliged to consider that not only could result in an upward or downward adjustment from the starting point of the initial category but, as the guideline makes clear:

"In some cases it is may be appropriate to move outside the identified category range."

30. As far as statutory aggravating factors are concerned, one is engaged: that is to say the appellant's significant criminal record, including for violent conduct. As to other aggravating factors, a number are engaged. Ongoing effect upon the victim. This alone would enable the sentencing judge to move well outside the category range and into the other category. Failure to comply with a current court order by breaching conditional discharge, also for an assault. The offence was committed whilst on licence. There can be no complaint that the sentence would run from the date of imposition and therefore some period in custody awaiting sentence after recall would not count. That is the consequence of reoffending and could provide no mitigation. Another aggravating factor was the commission of the offence when under the influence of alcohol.

31. This is not exhaustive and one might add in light of the victim personal statements the significant effect of the offending on the family of the victim. He is the father of a young child. The child has lost the fact that his father cannot play an active role in his day-to-day life. His partner, Kimberley Brown, is disabled with a degenerative spinal condition, who not only relied upon the victim for her care and to carry out the physical things she could not do, now has to do her utmost to meet his needs.

32. In these circumstances, within the guidelines the judge would be entitled to reach the highest range of category 1. Factors reducing seriousness or reflecting mitigation, must be considered: of course there was one blow. The sentencing judge determined there to be no real evidence of remorse and whilst some cognisance might be taken of the fact that the appellant's father was ill, there was limited mitigation from any starting point before discount of 25 per cent by reason of plea.

33. The respondents refer this court to the case of *R v Dodds* [2013] EWCA Crim 22. This too was a case in which the injury caused was significant and was life-altering in that the victim had suffered an acute subdural haematoma and had required a craniotomy. He survived the operation but had dysphasia and right upper limb weakness and was significantly disabled. In confirming a sentence of 3 years after discounting one-third for an early guilty plea for a case where the violence perpetrated was one punch, Haddon-Cave J (as he then was), giving judgment of the court, referred to the fact that the Recorder who sentenced Dodds took an effective starting point of four and a half years and said:

" ... as this court has repeatedly said, the sentencing guidelines are just that — guidelines — and not a straitjacket. This is particularly true of the sentencing

guidelines for assault."

34. He then referred to the Court of Appeal Criminal Division judgment in *R v Triston Channer* [2011] 1 Cr App R (S) 75 at paragraph 16:

"First, as this court has frequently stressed, sentencing guidelines are just that — guidelines — particularly in relation to assaults, where circumstances are infinitely variable and seriousness may be reflected in various criteria. It is in our view wrong and may lead to error to attempt to force a specific case into a particular guideline box on the basis of the limited criteria by which cases may be categorised in the guidelines. Any sentence must take into account all relevant matters, and thereby reflect the justice of the particular case."

35. Haddon-Cave J then went on to say of the Recorder who had imposed the sentence in Dodds, at paragraph 11 of that case:

"We can find no fault with the Recorder's reasoning or approach to this sentence. He expressly recognised that the current offence was one of greater harm but lesser culpability, but he was in our judgment fully entitled to step back and take account of (a) the serious additional aggravating features in this case which increased culpability, and (b) the very serious life-threatening and life-long nature of the victim's injuries."

36. Therefore the sentence was upheld in that case.

37. Mr Shepherd seeks to distinguish Dodds. True it is there are two potential factual differences in Dodds. We do not refer to Dodds to rely on the specific facts, rather how the sentence was expressed and how a judge should view the sentencing guidelines and approach the sentencing guidelines.

38. As we have indicated by the step-by-step analysis of the guideline in the instant case, of this particular appellant, we are of the opinion that the sentencing judge was right to

conclude that the factors in this case took the offence well into the category 1 area and beyond and he explained clearly and amply why he was doing that. He took into account all factors, increasing the weight of them where appropriate, reducing the weight and purport of others, such as the very limited mitigation. The injury here caused was extreme and there were many aggravating factors over and above even the life-changing injury caused.

39. Whilst this caused the judge to move substantially and significantly away from any starting point in either category and close to the maximum sentence for the offence, we cannot say the sentence imposed was manifestly excessive.

40. Therefore, this appeal is dismissed.