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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2020] EWCA Crim 1434



No. 202001787 A4

Royal Courts of Justice

Thursday, 8 October 2020

Before:

LADY JUSTICE GREEN
MR JUSTICE SPENCER
HIS HONOUR JUDGE MENARY QC

REGINA
V
DANIEL MARCUS CUMMINS

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5 New Street Square, London, EC4A 3BF

Tel: 020 7831 5627 Fax: 020 7831 7737

CACD.ACO@opus2.digital

MR I. WEST appeared on behalf of the Appellant.

J U D G M E N T

MR JUSTICE SPENCER:

- 1 This is an appeal against sentence brought by leave of the single judge.
- 2 On 10 June 2020 in the Crown Court at Sheffield the appellant, who is now 36 years of age, was sentenced by Her Honour Judge Sarah Wright to an extended sentence of 18 years' imprisonment for offences of robbery and unlawful wounding, comprising of a custodial term of 13 years and an extension period of five years. That was the sentence for the robbery, but the judge made it clear that it reflected the overall criminality of both offences. For the unlawful wounding, there was a concurrent sentence of three years' imprisonment.
- 3 The appellant had entered guilty pleas to these two offences, Counts 3 and 4, on 6 February 2020, the first day of the trial. The jury acquitted the appellant on Count 1, trespass with intent to commit a sexual offence, contrary to s.63(1) of the Sexual Offences Act 2003, and Count 2, sexual assault contrary to s.3 of the Act. The judge adjourned sentence for the preparation of reports: a psychologist's report and a pre-sentence report. Owing to the pandemic, sentencing was delayed until 10 June.
- 4 The grounds of appeal on which the single judge granted leave are, in short: first, that the judge sentenced on the wrong factual basis; second, that the judge should have allowed greater credit than 10 per cent for the appellant's guilty pleas; and third, that the judge was wrong to find the appellant a dangerous offender and to impose an extended sentence. There was a fourth ground of appeal on which leave was refused; namely, that the judge applied the wrong sentencing bracket under the Guideline, but this morning Mr West made it clear, very properly, that he does not seek to pursue or renew that ground. We are grateful to Mr West for his written and oral submissions.
- 5 At the forefront of the appeal is the complaint that the judge sentenced on a factual basis inconsistent with the jury's verdicts of acquittal on Counts 1 and 2. It is, therefore, necessary to set out in some detail the facts and how the case was put.
- 6 The complainant was a young woman. She lived with her two-year-old daughter. She was known to the appellant, but only because he had met her very briefly when he visited her home a few weeks earlier to help deliver and erect a child's trampoline, which she had been given by a friend of the appellant. The prosecution case was that consequently the appellant knew where the complainant lived and that she and her young child lived there alone.
- 7 On the night of 11/12 August 2019, the complainant was asleep in bed and her daughter was asleep in a separate bedroom when the appellant entered the house through a first-floor bathroom window, having climbed up a drainpipe. This was at about 2 o'clock in the morning. He was armed with a knife. He entered the complainant's bedroom. She woke up. As she went to get out of bed, the appellant told her to lie down. He said he had a knife. He told her to lie on her front. She said that the appellant then grabbed her pyjama bottoms. She feared she was going to be raped. She grabbed her phone. The appellant shouted at her to give him the phone and there was a struggle, during which the appellant punched her in the face and caused a slash wound to her upper lip with the knife. The appellant managed to grab her phone and left her bedroom. On his way out, he also stole her backdoor keys.
- 8 The complainant suffered a laceration through her upper lip, which required stitches, bruising to her cheekbone and eye, and scratches to her neck and face. We have seen the photographs of the injuries. She was plainly terrified by the experience.

- 9 The prosecution case was that the appellant deliberately targeted the complainant with the intention of committing a sexual offence. The defence case was that the appellant had intended to enter the property of a drug dealer who lived in the same street in order to steal from him, but he got the wrong address. It was all a mistake. There had been no intention to commit a sexual offence. The appellant accepted that he was in possession of a knife. His case was that when he realised he was in the wrong house and was trying to leave the bedroom, the complainant went for him and the injuries were caused in the ensuing struggle. That broadly was the account he had given to the police in interview.
- 10 In order to establish the offence in Count 1, the prosecution had to prove that the appellant knew he was a trespasser in the premises and intended to commit a sexual offence on the premises. To establish the offence in Count 2, the prosecution had to prove that the appellant intentionally touched the complainant and that the touching was sexual either because by its very nature a reasonable person would consider the touching sexual, or because the appellant's purpose or intention was sexual. We have read the judge's written directions of law to the jury and those propositions were clearly explained in the summing-up.
- 11 In view of the appellant's insistence that he had got the wrong house, when he eventually gave the name of the drug dealer who allegedly lived in the same street the police made enquiries. There was, it seems, no one of that name living in the vicinity, although Mr West tells us there was some rather more general police intelligence that there might have been some drug dealing going on in the area.
- 12 When the case came back for sentence in June, Mr West had helpfully provided the judge in advance with written submissions. He acknowledged in those submissions that the judge was entitled to form her own view on the factual basis for sentence, provided it was consistent with the jury's verdicts. He contended in those submissions that the jury had been presented with two stark alternative cases in the trial: deliberate targeting of the complainant for a sexual motive, according to the prosecution; or a targeted robbery of a drug dealer that went wrong, according to the defence. The jury had rejected the prosecution case. Mr West submitted to the judge that given the stark choice between the two cases there had to be some compelling reason before the judge could depart from the appellant's account and his case before the jury.
- 13 The prosecution opened the facts briefly at the sentencing hearing in view of the long delay. Mindful of Mr West's written submissions, prosecuting counsel submitted to the judge that the acquittals were not necessarily inconsistent with the prosecution case that the appellant always intended to break into the complainant's house. The acquittals merely demonstrated that the jury were not satisfied that the appellant had an intention to commit a sexual offence, or went as far as committing a sexual offence. Prosecuting counsel submitted that the acquittals said nothing about whether the jury believed or rejected the appellant's account that it was all a case of mistaken identity.
- 14 In her sentencing remarks, the judge found that the appellant had deliberately armed himself with a knife, knowing he was going into the house of a young woman who would be on her own. To effect entry, he had climbed up a drainpipe and through a small bathroom window. It had clearly been well planned. He had gone armed and worked out a way to get into the property which he knew was the complainant's house. He went past the open door leading to the bedroom where her two-year-old daughter was sleeping and then entered the complainant's bedroom. The judge continued:

"Having heard the evidence in the case, I am entirely satisfied and sure that you deliberately targeted that young woman's house to enter because of her

vulnerability. I completely dismiss your account that you had intended to enter a house in that terrace occupied by your drug dealer. There was not a shred of evidence that anyone who lived in that terrace had ever dealt in drugs or that the man you finally named at trial had ever lived on that terrace, and you were well aware of precisely where [the complainant] lived and her personal circumstances.

Having reached her bedroom door, you then deliberately entered her bedroom and crossed the room to where she was in bed. I completely reject your account given in evidence that as you stood at the door [the complainant] flew at you and attacked you and that you then responded and that she was never on the bed during the incident. I accept her account entirely, and I am sure, having heard the evidence from [the complainant] that as she became aware of you in her room she moved to get out of bed. You walked across the bedroom to where she was. You told her to lie down on the bed. You threatened her, telling her that you had a knife, and then you told her to turn over onto her front and took hold of her pyjama bottoms. The photographs show the distance that you must have travelled from the doorway to her bed.

Whilst I remain true to the jury's verdicts that this was not a sexual assault and that you did not enter the premises with intent to commit a sexual assault, I am sure that her description of what happened in the bedroom was correct and she was certainly in fear that you may sexually assault her or worse. As she then resisted your touching of her clothing and tried to turn over, you punched her. When you saw she had a phone, you punched her again. You took her phone. It was you who initiated the unlawful violence. You punched your victim and slashed at her with a bladed article in her own bedroom when you could quite easily have avoided any confrontation by not approaching her bed, by turning round in the doorway and by leaving immediately. I reject entirely your account that you then panicked, and I reject entirely your account that you took her phone and keys in panic."

- 15 Pausing there, it is convenient to consider the first ground of appeal at this stage. Mr West, in his grounds of appeal and in his oral submissions, makes exactly the same submission he made to the judge at the sentencing hearing. He emphasises that the jury's verdicts show they rejected any possibility that there was any sexual element to the offending. The only logical alternative, he says, is that the appellant entered her house for financial gain, but that would make no sense. There was no suggestion she was wealthy or otherwise a likely target, nor was it likely that he entered the house to inflict gratuitous violence. Had he been deliberately targeting the house of someone he knew, and whom he knew would recognise him, he would have been expected to use some disguise by covering his face, but he did not. Mr West submits that the judge had no option, sensibly, but to sentence on the appellant's account and that was the only basis compatible with the jury's verdicts. Mr West went so far in his oral submissions as to say that we were entitled to override the judge's findings of fact.
- 16 We have considered these submissions carefully, but we are quite unable to accept them. The relevant legal principles were clarified and stated by this court in *R v King* [2017] EWCA Crim 128; [2017] 2 Cr Ap R(S) 6. It was held that the correct approach by the judge after a trial as to the determination of a factual basis on which to pass sentence was clear. If there was only one possible interpretation of a jury's verdict or verdicts, the judge had to sentence on that basis. When there was more than one possible interpretation, the judge had to make up his or her own mind to the criminal standard as to the factual basis on which to pass sentence. If there was more than one possible interpretation and the judge was not sure

of any of them, in accordance with basic fairness, the judge was obliged to pass sentence on the basis of the interpretation most favourable to the defendant.

- 17 Applying these principles, we are quite satisfied that the judge here was fully entitled to make the factual findings which she did, despite the acquittals on Counts 1 and 2. Those acquittals did not mean that the jury accepted the appellant's case as a whole. They merely demonstrated that the jury were not sure that he intended to commit a sexual offence once he was inside the house or not sure that what he did in touching her was or was intended to be sexual. In essence, the jury's verdicts on those counts turned on their analysis and finding as to the appellant's intention rather than as to the facts of what actually happened. The judge set out very clearly in her sentencing remarks the reasoning for her findings to the criminal standard that the appellant had deliberately targeted the complainant's house, knowing she was vulnerable, and her reasons for rejecting the appellant's account of what happened in the bedroom. The judge's findings were faithful to the jury's verdicts and not at all inconsistent with those verdicts. We therefore reject the first ground of appeal.
- 18 In her sentencing remarks, the judge identified the relevant Sentencing Council guidelines for the offences of robbery and wounding. She was satisfied that under the guideline for robbery in a dwelling this was a Category 1A offence. There was high culpability because a knife was produced and used to inflict violence and very significant force was used. There was Category 1 harm because physical and psychological harm was caused to the victim. She was left with prominent physical scars to her face. The immediate and enduring emotional and psychological impact of the attack had been profound. She lived with the unshakable belief that the purpose of the break-in was rape. This would affect her for the rest of her life. In her impact statements the complainant described in detail of the physical and psychological effects upon her and her young daughter.
- 19 The guideline starting point for Category 1A is 13 years' custody with a range up to 16 years. The judge found there were four aggravating factors. First, the victim had been targeted due to her vulnerability. Second, there was the timing of the offence and entering the complainant's home in the middle of the night. Third, the offence was committed whilst the appellant was heavily under the influence of crack cocaine. Fourth, the complainant's two-year-old daughter was present in the home. The judge did not state in terms the extent of the uplift for these aggravating factors. However, by imposing a custodial term of 13 years after ten per cent credit for plea, it must follow that the sentence after trial would have been 14 ½ years or thereabouts.
- 20 The judge likewise found that there was greater harm and higher culpability in relation to the wounding offence, which was also category 1 under the relevant Guideline for that offence. There is no complaint about the concurrent sentence of three years' custody.
- 21 Mr West had contended in the grounds of appeal that the judge was wrong to say that there was serious physical and psychological harm caused to the victim, and he was suggesting in the grounds that it should have been a Category 2A offence rather than 1A with a starting point of nine years and a range up to 14 years. In the event, he has abandoned that ground of appeal. As the judge said, no one should underestimate the lifelong trauma the appellant had caused to the complainant. There was plainly serious psychological harm.
- 22 We think that 14 ½ years' custody before credit for plea, was amply justified. This was a very serious case of its kind. The sentence had to reflect the overall criminality of the robbery and the wounding and all the aggravating features which the judge identified.
- 23 It is convenient next to deal with the complaint in the grounds of appeal that the judge should have afforded greater credit than ten per cent for the guilty pleas. The history of the

proceedings is important. The appellant gave a prepared statement in interview in which he admitted intending to burgle a drug dealer's house. At the Plea and Trial Preparation Hearing (PTPH) on 10 September 2019 he entered not guilty pleas to all four counts on the indictment. The judge on that occasion noted "accepts the burglary but not the offences charged." This was expanded somewhat in the court log, which records "accepts theft and s.47, but not currently indicted that way." It is clear, therefore, that there was no indication at that stage that the appellant would plead guilty to the much more serious offence of robbery and the offence of s.20 wounding. We should emphasise that Mr West did not appear on that occasion and, indeed, there was an attempt to change solicitors after that hearing before trial. Mr West only came into the matter later and is not able to explain why guilty pleas were not entered to Counts 3 and 4 at the PTPH.

- 24 The defence statement was dated 23 January 2020. It said that the appellant accepted entering the complainant's property and that a physical confrontation took place. He accepted he was responsible for the assault and injuries caused and he accepted that he took the phone and keys when he left. Again, there was no indication that he would change his plea to guilty of robbery and guilty of s.20 wounding. It seems that he was keeping his options open to some extent at least on the precise basis of plea for any offence he was eventually prepared to admit. It was not until the first day of the trial that he asked to be re-arraigned and guilty pleas were entered.
- 25 Mr West contended in his written submissions for the sentencing hearing that the appellant had admitted his guilt from the outset. As he put it, it was the unproven suggestion of a sexual element which distracted minds from the issue of the lesser offences the appellant had already admitted. In his oral submissions, Mr West explained that when the appellant appeared first in the Magistrates' Court, the charges at that stage were burglary and assault. None of that, however, explains why it was that the guilty pleas eventually entered could not have been entered at the very latest at the PTPH.
- 26 In her sentencing remarks, the judge did not expand upon her reasoning for allowing only ten per cent credit for the guilty pleas, but in our view there was no need for her to do so. She was applying the well-known principles in the relevant Sentencing Council guideline. A discount of ten per cent for a plea on the first day of trial is the recommended reduction. There had been no indication prior to the first day of the trial that there would be a change of plea on Counts 3 and 4. The Guideline we acknowledge refers to when a guilty plea is "indicated" rather than when it is actually entered, but, as we have explained and as Mr West has very fairly conceded, there was no indication of these guilty pleas, and certainly not the robbery, until the day of trial. We therefore reject this ground of appeal.
- 27 Finally, we turn to the complaint in the grounds of appeal that the judge was wrong to find the appellant a dangerous offender. The judge had the benefit of a pre-sentence report and also a report from a forensic psychologist ordered by the court itself. The authors of both reports were instructed to address the issue of dangerousness based on the prosecution case that the defendant specifically targeted the home of a lone female when deliberately armed with a knife and punched her and slashed at her with a knife causing wounds to her face and neck. The appellant had relatively minor previous convictions for theft, failing to comply with a community order, producing cannabis and criminal damage. He had no conviction for violence.
- 28 The forensic psychologist was of the opinion in her report that the appellant had none of the developmental factors associated with increased risks of violence, such as significant trauma and abuse, or exposure to violent attitudes, or mental health problems. He was, however, susceptible to substance abuse as a way of coping. He appeared to be on the periphery of drug culture. His experience of anxiety and panic attacks was linked to his

poor coping and problems managing negative emotions. The psychologist suggested that, as there was no history of serious violence, this offence appeared to be out of character. He used drugs as a way of coping with the breakdown of a relationship.

- 29 The psychologist's interpretation was that the appellant's decision to target a lone female was to make the robbery easier. His behaviour during the robbery indicated that the aggression he showed was reactionary and when confronted he panicked. He was not inherently violent. Her opinion was that the gravity of the offence had been the trigger for the appellant to re-evaluate his life. He did not have entrenched violent attitudes or underlying personality problems. She assessed the appellant as posing a low risk of committing further specified offences and of causing serious harm and did not consider that he met the test for dangerousness.
- 30 The pre-sentence report took a different view. The appellant repeated to the probation officer his account that he had targeted the wrong house, his intention being to steal drugs and money from a drug dealer. He had consumed crack cocaine before the offence. On seeing the complainant, he soon realised he had the wrong house and panicked. In interview he did, however, show some insight into the fear the complainant would have felt. The author's view was that the offence represented a significant escalation in the seriousness of his offending. He had a long-term involvement with the local drug community and had used crack and crack cocaine for much of his adult life. The probation officer's conclusion was that although this was the first such offence, the premeditated nature of the appellant's actions and their significant outcomes were a matter of acute concern. Her assessment was that there was a significant risk of similar behaviour in future towards lone young females and there was a high risk of serious harm. His actions were premeditated and reckless, undertaken to satisfy his own immediate needs, and without due consideration for the profound impact they would have on the victim.
- 31 In her sentencing remarks, the judge expressed surprise that the forensic psychologist appeared in her report to have accepted without question the appellant's account that the complainant had lunged at him and that he had simply attempted to push her away to get out of the house, leading to the psychologist's conclusion that his aggression was "reactionary" and that he had panicked. The judge regarded the probation officer's report as much more considered and well balanced. She quoted the relevant passage from the pre-sentence report.
- 32 The judge gave the reasons for her conclusion that the appellant posed a significant risk of serious harm to the public through the commission of further specified offences. He had deliberately targeted and entered the home of a vulnerable young woman by climbing a drainpipe and entering through a window, having clearly pre-planned the offence. He deliberately armed himself with a knife, knowing that it was likely that the only people he would encounter were the young woman and her two-year-old child. The presence of a child had not deterred him. He had entered the complainant's bedroom and crossed the room to her bed. He had attacked her telling her to lie down and turn onto her front. He had punched her and slashed her face with a knife and then left the property. He continued to minimise his offending and failed to acknowledge his culpability. He therefore remained a danger.
- 33 In the grounds of appeal, Mr West suggested that the judge should have acceded to his request to allow the psychologist to reconsider her conclusion in the light of the judge's concern about her report. In his written submissions before sentence, in the knowledge of the report from the psychologist, Mr West had suggested that if the issue of dangerousness was to be considered further, despite the terms of the psychologist's report, the defence would ask for the matter to be adjourned so that they could instruct their own psychologist

to address any particular concerns the court might still have. The judge had declined to adjourn further.

- 34 In his oral submissions, Mr West developed these points. He went as far as to submit that if the judge was going to reject the opinion expressed by the psychologist who had been instructed by the court, it was incumbent upon the court to allow the defence to instruct an expert of their own, or at the very least to ensure that the psychologist who had provided the report to the court at the court's request should have the opportunity of commenting further.
- 35 We have considered all these submissions carefully. Again, we are quite unable to accept them. The judge had presided over the trial. She had the benefit of two reports which came to differing conclusions. She was not bound to accept either of them. She was entitled, and indeed obliged, to examine each of them critically. There was no obligation on her to adjourn for yet a further report simply because she disagreed with the analysis of one of the experts. The judge was required to reach her own conclusion on all the "information" before her (as the statute provides), and this is what she did. She explained her reasoning carefully.
- 36 This ground of appeal could only succeed if we were persuaded that the judge was plainly wrong to make the finding of dangerousness; in other words, that no reasonable judge could have reached the conclusion that she did. That is the test. We think the judge's conclusion was entirely justified and perfectly correct. The uncertainty over the appellant's precise motivation for the offence and for his targeting the home of a lone female made his conduct all the more troubling and made him potentially even more dangerous. The consequence of such pre-planned targeting of a vulnerable young woman's home is all too clear to see in the devastating impact on this complainant. An extended sentence was clearly necessary.
- 37 For all these reasons, and despite Mr West's valiant submissions, we are satisfied that the sentence passed by this very experienced judge was neither manifestly excessive nor wrong in principle. The appeal is dismissed.
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