Neutral Citation Number: [2020] EWCA Crim 587

Case No: 202000035 A3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT CROYDON
HIS HONOUR JUDGE AINLEY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/04/2020

Before :

LORD JUSTICE BEAN
MRS JUSTICE MCGOWAN
and
MR JUSTICE MURRAY

- -

Between :

FA XUE	**Appellant**
- and -	
REGINA	**Respondent**

- -
- -

Mr Simon Blackford (instructed by **HSR Solicitors**) for the **Appellant**
The Respondent did not appear and was not represented.

Hearing date : 28 April 2020

- -

Approved Judgment

Lord Justice Bean :

1. This is the judgment of the court, to which all its members have contributed. It deals with two questions of interpretation of the Sentencing Council guideline, effective from 13 June 2011, for offences of causing grievous bodily harm (GBH) with intent to do GBH, or wounding with intent to do GBH.

2. On 9 December 2019, after trial in the Crown Court at Croydon, the appellant, Mr Fa Xue, was convicted of wounding with intent contrary to section 18 of the Offences Against the Person Act 1861 and of assault occasioning actual bodily harm (ABH) contrary to section 47 of the same Act. On the same day he was sentenced to 12 years' imprisonment for the wounding with intent and sentenced to two years' imprisonment for the ABH, the sentences to be served concurrently.

3. Mr Xue's applications for leave to appeal against his sentence for wounding with intent and for a representation order were refused by the single judge but granted by the full court at a hearing of his renewed application.

4. Mr Simon Blackford, who represented the appellant at his trial, appeared for him on the appeal. We are grateful for his submissions.

The facts

5. The facts, briefly stated, are that some time after 11:00 pm on 29 May 2019 the appellant and his girlfriend went to the home of the complainants, Mr Gao and Ms Lin, who were known to them. There had been an earlier telephone conversation between the appellant and Mr Gao and Ms Lin, and the appellant felt that Ms Lin had insulted him by calling him an idiot.

6. When the appellant arrived at the home of the complainants, he forced his way in, following a struggle at the door, and slashed Mr Gao to the face and side with a knife or razor or similar weapon, constituting the offence of wounding with intent to cause GBH. . He then attacked Ms Lin by grabbing her by the neck and trying to throttle her, constituting the offence of ABH.

7. Mr Gao suffered injuries to his face and left hip. The principal medical evidence was the discharge summary prepared by the Emergency Department at Croydon Health Services on 31 May 2019, where the facial injuries were described as "1 x superficial 5cm laceration to left side of cheek, 1 x 0.5x0.5x0.5 deep triangle type laceration to side of left face above jawline" and the hip injuries were described as "Left hip – 2 x lacerations, deep, 1 x 1cm inferior laceration, 1 x 0.5cm laceration, bleeding". The lacerations were sutured under local anaesthetic. The discharge summary also recorded "Small grazes to chest and abdomen".

8. The evidence included photographs of Mr Gao's injuries as they appeared, after suturing, on the day after the incident. Photographs 2, 3 and 8 showed the lacerations to Mr Gao's face and left hip. Photographs 4, 5, 6 and 9 showed injuries to Mr Gao's hand, neck, stomach and left-side abdomen.

9. In his victim impact statement, Mr Gao stated that the injuries caused him continuing pain and anxiety. He had trouble sleeping and was in a very low mood each day. At

the time of his statement, two and a half months after the incident, he was still not able to work. The injuries to his face were "very obvious knife-cut scars", which would cause people who noticed them to look at him in a different way.

The sentencing remarks

10. The learned judge in his sentencing remarks described the incident on 30 May 2019 as "vicious and terrifying" and the injuries inflicted on Mr Gao as "horrible". He noted that when Mr Gao gave evidence at the trial, six months after the incident, he still had visible scarring on his face and that it was apparent that this still troubled him. Mr Gao's wounds were serious, and the facial injuries were "disfiguring". The judge also considered that this was a sustained attack upon the victim in his own home. On that basis he concluded that the attack on Mr Gao fell "plainly" within category 1 of the definitive sentencing guideline for section 18 offences, due to there being greater harm and higher culpability. The judge sentenced the appellant for his wounding of Mr Gao at the starting point in the guideline for category 1 of 12 years' imprisonment.

11. The judge mentioned in his sentencing remarks that he had reviewed a psychologist's report prepared in relation to the appellant and that he accepted that the appellant's cognitive ability is much lower than many others. He also noted, however, that the appellant had shown himself capable of deciding to come to this country, to keep his "head down" and to work for a period of some 13 or more years. The judge also accepted that the appellant had not got into trouble since his arrival in the United Kingdom. The judge had therefore taken these aspects into account, and no complaint is made by Mr Blackford in that regard.

The section 18 guideline

12. The definitive guideline for section 18 offences was brought into effect from 13 June 2011, along with guidelines for other assault offences. The guideline sets out three offence categories, category 1 requiring the sentencing judge to find that the offence involved greater harm in terms of its impact on the victim and higher culpability of the offender. Category 2 requires there to be greater harm and lower culpability, or lesser harm and higher culpability.

13. The guideline lists the following factors as indicating greater harm:

> "● Injury (which includes disease transmission and/or psychological harm) which is serious in the context of the offence (must normally be present)
>
> ● Victim is particularly vulnerable because of personal circumstances
>
> ● Sustained or repeated assault on the same victim"

Submissions

14. Mr Blackford for the appellant submits that the judge departed from the guideline and chose the wrong starting point by mistakenly classifying the wounding with intent offence as falling within category 1. While he conceded that there was higher culpability, he submitted that (i) the injuries sustained by Mr Gao were not serious in

the context of the offence and (ii) the assault was not "sustained" in the sense intended by the guideline. It was not suggested in this case that Mr Gao was particularly vulnerable because of personal circumstances. Accordingly, this is not a case involving greater harm, and therefore the sentencing judge should have classified the offence as falling within category 2 on the basis of there being higher culpability and lesser harm.

15. Mr Blackford submitted that section 18 offences embrace a substantial range of injuries, including, at the higher end, quadriplegia, deep wounds penetrating and injuring vital organs with the most serious consequences short of death and seriously and permanently disfiguring facial injuries, including the cutting of facial nerves, blinding in both eyes and interference with ability to speak. He submitted that Mr Gao's injuries did not come close to that level of seriousness. He fully accepted that the attack on Mr Gao was "a very nasty attack on a man in his own home" and that the injuries that he suffered were "extremely unpleasant and totally unacceptable".

16. Mr Blackford referred to a number of cases where this court had been called upon to construe the phrase "serious in the context of the offence", giving as his leading example the case of *R v Duff* [2016] EWCA Crim 1404, where the victim had lost half of his ear and the defendant had pleaded guilty to causing grievous bodily harm with intent in relation to an assault where the victim lost half his ear. The judgment of this court in *Duff* noted the following at [6]:

> "The effect on Mr Jordan of losing part of his ear is, unsurprisingly, permanent and he has been greatly affected by it. The missing piece of his ear cannot be re-attached. Mr Jordan's social life was affected. He felt deformed and he struggled to sleep. At the time when the case was before the Crown Court he had been unable to return to work."

17. The sentencing judge in *Duff* had found the injury to be serious within the context of a section 18 offence:

> "… because it has led to a permanent, visible, significant cosmetic disability, of which the victim is acutely aware and which he will have to endure for the rest of his life".

18. The sentencing judge had also found the offence to be:

> "… a sustained attack … it started with punches; it went on to an attempt to throttle, followed by biting off part of the victim's ear and it only ended when other members of the public pulled you off".

19. For both of these reasons, the sentencing judge in *Duff* had concluded that this was a case of greater harm. It was accepted by the appellant in that case that it was a case involving higher culpability. Accordingly, the sentencing judge sentenced on the basis that the offence fell within category 1 of the definitive guideline.

20. The Court of Appeal, however, disagreed, noting at [13] that:

> "… we are persuaded that Mr Nutter is right to say that within the bracket of grievous injuries covered by section 18, this was not at the top end of the scale and that therefore it should have been placed in category 2 … ."

21. In relation to the remark of the sentencing judge that Mr Gao still had visible facial scars at the time of the trial, Mr Blackford also noted that the judge said that one "can only hope that he makes a full recovery from them". Mr Blackford submitted that the judge could not have said this if it were clear that the facial injuries were permanently disfiguring. In *Duff*, the victim's disfigurement was permanent, and yet it was still not considered serious within the context of the offence. *A fortiori*, Mr Gao's injuries in this case cannot constitute greater harm for purposes of the sentencing guideline.

22. Mr Blackford also submitted that the offence could not be classified as a "sustained incident", having lasted "a very few minutes". Mr Blackford noted in his skeleton argument that Mr Gao's evidence was that the fight lasted for about two minutes, although he also noted that that may be the part of the fight which followed the struggle by the door.

23. Mr Blackford observed that, as a factor indicating greater harm, the fact that an offence is a "sustained assault" was somewhat anomalous as it concerns behaviour of the offender and would seem to be more relevant to culpability. However, as it is in the guideline, it needs to be addressed. He submitted that something more than simple repetition is required as otherwise the vast majority of section 18 offences would come within category 1 by virtue of that factor alone, and it will not be necessary for the sentencing court to consider the physical and psychological effects of the assault on the victim, which could not have been the intention of the Sentencing Council in formulating that guideline. Mr Blackford submitted that, in order to ensure that the focus remains on the victim when giving assessing this factor, an assault should not be considered "sustained" unless it goes on for considerably longer than the average length of a fight or brawl.

24. Mr Blackford referred to the decision of this court in the case of *R v Grant Smith* [2015] EWCA Crim 1482, [2016] 1 Cr App R (S) 8, where the court considered the test for "sustained assault" in the section 18 guideline. The defendant had been convicted on a charge of wounding with intent to cause GBH. The incident in that case was summarised by the court at [7]-[8] as follows:

> "7. … At about 3 am, the appellant broke in [to the home of the victim, Mr Snudden]. He was in possession of a baseball bat, which the appellant used to threaten Mr Snudden. … He then struck Mr Snudden, who raised his arms to protect himself, and the blow inflicted upon him with the baseball bat caused him to sustain two fractures to his left arm and lacerations to his forehead. This ultimately required nine stitches.
>
> 8. … Mr Snudden and the appellant began to tussle. Mr Snudden got the appellant into a headlock and punched him in the face in self-defence, but at this point Mr Snudden felt disorientated and woozy. He lay down on

> the bed, at which point the appellant swung the baseball bat and struck him on the rear of his head. Such was the force of the blow that the bat broke into two pieces. This blow caused Mr Snudden to sustain a laceration behind his left ear, which subsequently required three stitches. Mr Snudden was, however, still capable of defending himself, and in due course the appellant left the property through the front door followed by Mr Snudden. …"

25. In considering whether these facts amounted to a sustained assault, the Court of Appeal expressed doubt at [18] whether a difference between one and two blows could justify moving the starting point for the offence from 6 years' to 12 years' custody, ultimately concluding that the assault in that case was not "sustained" for purposes of the guideline for section 18 offences. Having drawn our attention to this passage in *Grant Smith*, Mr Blackford admitted that the case is, perhaps, of limited assistance given that, although there were only two blows with the bat, there was a continuing struggle.

26. Mr Blackford returned to the case of *Duff* on this point, noting that, although the court did not expressly address the question of whether the assault had been "sustained", it must not have considered the assault to have been "sustained" to the point of constituting greater harm and therefore bringing the assault in that case within category 1. The assault in *Duff* had involved several punches, as well as an attempt to throttle, before ending in the ear being partly bitten off. The incident in this case was not more sustained than the incident in *Duff*.

27. For those reasons, Mr Blackford submitted, there are no factors in this case indicating that this was an offence causing greater harm, and therefore the sentencing judge should have classified the offence as falling within category 2, for which the starting point is six years' custody, with a range of 5 to 9 years' custody. Mr Blackford acknowledged that there were aggravating features in the use of a weapon and the assault having occurred in Mr Gao's home, however he submitted that those factors were largely taken into account in concluding that there was higher culpability. He noted that there were two victims, but Ms Lin was much less seriously injured than Mr Gao and the offence against her had been the subject of a separate charge for which the appellant had also received a substantial sentence. Accordingly, he submitted, the sentence should not be much above the starting point of 6 years.

Analysis

"Serious in the context of the offence"

28. The question of whether a particular section 18 offence is "serious in the context of the offence" for purposes of the sentencing guideline has arisen in a number of cases. Mr Blackford referred us to at least eight decisions of this court where the question has been addressed since the sentencing guideline was introduced in 2011. As this court has often had occasion to observe, however, given the fact-specific nature of this type of assessment, the determinations made by in other cases by reference to other fact patterns are of limited value. Mr Blackford conceded as much.

29. In *Grant Smith*, to which Mr Blackford had referred us on the question of what constitutes a "sustained assault" under the sentencing guideline, this court also had to consider the question of whether the injuries in that case were "serious in the context of the offence". In that regard, the court said the following at [14]:

> "… 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 ."

30. We agree. In this case, the injuries suffered by Mr Gao are, of course, very serious on a scale of assaults generally. But they are considerably less grave than the injuries suffered by victims in many cases involving section 18 offences that come before the Crown Court and before this court; and thus they are not injuries that are "significantly above the serious level of harm which is normal for the purpose of section 18". We add that for these purposes it makes no difference whether the charge is one of wounding with intent to cause GBH (as in the present case and also *Grant Smith*) or of causing GBH with intent (as in *Duff*).

"Sustained or repeated assault"

31. In relation to the question of sustained or repeated assault, this court in *Grant Smith* said the following at [18]:

> "… 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."

32. Again, we agree. There were repeated blows in this case against Mr Gao, at least four of which resulted in lacerations to his face or left hip. There is no indication in the evidence whether the "triangular type laceration" to the face involved more than one blow. We note that blade cuts were inflicted on two different areas of the body, and that the assault occurred over a period lasting a couple of minutes. There was a struggle at the door which preceded the assault, and that struggle continued as the appellant inflicted blows on Mr Gao before turning to assault Ms Lin. This was a "nasty attack", as Mr Blackford accepted. But it was not, in our view, a sustained or repeated assault that was so prolonged or persistent as to take it out of the norm for section 18 offences and therefore to constitute greater harm, justifying a starting point of 12 years', rather than 6 years', custody.

33. We have noted that Mr Blackford conceded – inevitably – that this was a case of higher culpability because of the use of the knife as a weapon. Accordingly, in our judgment, the appellant's offence of wounding with intent falls within category 2 of the guideline, on the basis that there is higher culpability and lesser harm. The starting point is therefore 6 years' custody.

Aggravating and mitigating factors

34. The next step is to consider aggravating and mitigating factors. The fact that the attack on Mr Gao involved the use of a weapon is reflected in the determination that there is higher culpability and should not be double counted. But the fact that the weapon was carried to the scene by the appellant for the purpose of the attack, showing a degree of premeditation, is a significant aggravating factor justifying an increase from the category 2 starting point. Another is that the attack, while not in our view "sustained" in the sense required to constitute greater harm, nonetheless involved a series of blows aimed at different areas of the body, including the face and neck. A third aggravating factor is that the attack took place in the victim's own home. A fourth is that the attack involved two victims, and while the assault on Ms Lin was properly the subject of a concurrent sentence it plainly fell to be taken into account in reaching a just and proportionate sentence on the main charge.

35. Were it not for the appellant's previous good character, this combination of aggravating factors would in our view have justified a sentence at the top of the category 2 range for section 18 offences, namely 9 years' imprisonment, which we note is also the bottom of the range for a category 1 offence. Mitigating for the appellant's previous good character and the fact that this appears to have been an isolated incident, we consider that the correct sentence is one of 8 years' imprisonment.

Conclusion

36. Accordingly, we allow the appeal. The sentence of 12 years' imprisonment imposed on the appellant in respect of his conviction for wounding with intent will be quashed

and a sentence of 8 years' imprisonment imposed on him instead. The concurrent sentence for the attack on Ms Lin remains unaffected.