

No. 2020/00218/A1  
IN THE COURT OF APPEAL  
CRIMINAL DIVISION  
[2020] EWCA Crim 822

Royal Courts of Justice  
The Strand  
London  
WC1A 2LL

Wednesday 24<sup>th</sup> June 2020

B e f o r e:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES  
(Lord Burnett of Maldon)

MR JUSTICE SPENCER

and

MR JUSTICE MURRAY

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**REGINA**

- v -

**ELLIS JOHN ROBERT THOMAS**

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**Mr H Baker** appeared on behalf of the Appellant

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

Wednesday 24<sup>th</sup> June 2020

**THE LORD CHIEF JUSTICE:** I shall ask Mr Justice Spencer to give the judgment of the court.

**MR JUSTICE SPENCER:**

1. This unusual appeal is brought by leave of the single judge. It is unusual because the sentence in question was a comparatively modest community order. It was imposed on the appellant in the Crown Court not long after his 18<sup>th</sup> birthday for an offence committed when he was still 17. Several co-accused, who were also under 18, were remitted for sentence to the Youth Court and were subsequently made the subject of referral orders. Had the appellant been dealt with before his 18<sup>th</sup> birthday, he would, in all likelihood, have been remitted to the Youth Court as well and dealt with in the same way.

2. It is contended on behalf of the appellant that the combination of his slightly older age and the timing of the court hearings has resulted in an unfair disparity between the appellant's sentence and the disposal of the cases of his co-accused, a disparity which this court should correct.

3. The appellant's date of birth is 24<sup>th</sup> September 2001. He is therefore now aged 18 years 9 months. The sentence against which he appeals was imposed in the Crown Court at Cardiff by His Honour Judge Bidder QC on 19<sup>th</sup> December 2019. The appellant was made the subject of a community order for a period of 18 months, with a rehabilitation activity requirement for 20 days and an attendance centre requirement for 36 hours. A victim surcharge order was made in the sum of £85. In fact, the figure should have been £20 because the appellant was under 18 at the date of the offence.

4. The offence for which the appellant was ultimately sentenced was using threatening, abusive or insulting words or behaviour towards another person with intent to cause that person to believe that immediate unlawful violence would be used against him, contrary to section 4 of the Public Order Act 1986. That is a purely summary offence, but it is a statutory alternative to the offence of affray, contrary to section 3 of the Act. A count of affray was added to the indictment in the Crown Court. The case had begun as an allegation of causing grievous bodily harm with intent, contrary to section 18 of the Offences against the Person Act 1861. That was the very serious offence for which the appellant and his co-accused were originally sent by the Youth Court to the Crown Court for trial.

5. The offence arose out of an incident on 11<sup>th</sup> April 2019 in a residential street in Tredegar, Blaenau Gwent. The appellant was then 17½ years old. He was one of a group of young males who chased and surrounded the complainant, Lewis Nutt (aged 19). There were six other young males in the appellant's group. The appellant was the oldest. The next oldest, Derian Morgan-Winter, was only three months younger than the appellant. He also is now over 18. The youngest in the appellant's group was 14 years old; the others were 15 or 16 years old.

6. The appellant's group surrounded the complainant and questioned him about who he had been with recently. One of the group (the 14 year old), punched the complainant in the face twice. He suffered a fractured cheekbone. Derian Morgan-Winter produced a knife and used it to stab the complainant, who did not in fact realise at the time that he had been stabbed. The injury was only discovered at hospital. The complainant was badly injured. He underwent an operation to insert two metal plates into his mouth which remained there for around a month, during which time he was unable to speak properly or to eat solid food. Eyewitnesses informed

the police that an attack was taking place.

7. The appellant was arrested the following day. In interview he denied assaulting the complainant. He claimed that he had left the scene before the assault took place.

8. The prosecution case was that the appellant was part of the group which attacked the complainant and that he had pushed him.

9. As we have explained, all seven defendants were initially charged with an offence of section 18 causing grievous bodily harm with intent, and in the alternative, inflicting grievous bodily harm, contrary to section 20 of the 1861 Act. They all appeared before the Youth Court on 27<sup>th</sup> August 2019. That was a month before the appellant's 18<sup>th</sup> birthday. The Youth Court sent the case to the Crown Court for trial. The prosecution indicated that if the 14 year old who had punched the complainant and Derian Morgan-Winter who had stabbed him were to plead guilty to causing grievous bodily harm, then the prosecution might be prepared to accept guilty pleas from the other defendants to the much lesser section 4 offence of threatening behaviour.

10. The first hearing in the Crown Court was on 24<sup>th</sup> September 2019 which, coincidentally, was the appellant's 18<sup>th</sup> birthday. The appellant pleaded not guilty to the section 18 and section 20 offences. At that stage, there was no offence of affray on the indictment. The 14 year old pleaded guilty to the section 20 offence, but that plea was not accepted because there was no guilty plea forthcoming from Morgan-Winter in relation to the section 18 or the section 20 offence in relation to the stabbing.

11. At a subsequent mention hearing on 29<sup>th</sup> November 2019 the position changed. On that occasion, Morgan-Winter pleaded guilty to the section 20 offence. His plea, and the plea previously entered by the 14 year old to the section 20 offence, was accepted by the prosecution. A count of affray was added to the indictment. The appellant and his four other co-accused pleaded not guilty to affray, but guilty to the alternative section 4 offence. All the defendants, save for the appellant, were still under 18. They were all remitted to the Youth Court for sentence. The appellant was by now two months past his 18<sup>th</sup> birthday. He could not, therefore, be remitted to the Youth Court with the others, even though he, too, had been under 18 when the offence was committed.

12. The appellant's case was adjourned for the preparation of a pre-sentence report. The appellant had no previous convictions. The recommendation was for a community order in precisely the terms which the judge imposed. We observe, however, that the report proceeded on the misapprehension that the offence to which the appellant had pleaded guilty was affray, rather than section 4 threatening behaviour. There is, of course, a significant difference in the seriousness of those offences. Affray is punishable by a maximum of three years' custody; a section 4 offence carries a maximum of six months.

13. Two weeks later, on 7<sup>th</sup> January 2020, the co-accused were all sentenced in the Youth Court. Because they were all of good character and had pleaded guilty, the Youth Court was, for practical purposes, obliged by law to make referral orders instead of imposing any other sentence. The 14 year old who had punched the complainant, fracturing his jaw, and who had pleaded guilty to section 20 (inflicting grievous bodily harm) received a referral order for a period of 12 months. Morgan-Winter, who had stabbed the complainant and had also pleaded guilty to the section 20 offence, likewise received a 12 month referral order. Ironically, he, too, had attained the age of 18 three weeks earlier. The remaining four defendants, all of whom were by now 16 years old and, like the appellant, had pleaded guilty to the section 4 offence, received

three month referral orders.

14. On behalf of the appellant, Mr Baker submits in the grounds of appeal that, as it has turned out, the appellant's sentence is excessive compared to the sentences imposed on his co-accused. This had not been anticipated when the appellant was sentenced. Mr Baker submits that the appellant's role in the offending was far less serious than that of the 14 year old and Morgan-Winter, both of whom pleaded guilty to the section 20 offence, which carries a maximum of five years' custody, yet they received 12 month referral orders. The co-accused who, like the appellant, pleaded guilty to the section 4 offence, received only a three month referral order. The appellant, by contrast, received an 18 month community order with substantial requirements. Mr Baker invites the court to adjust the appellant's sentence in order to achieve some parity between those involved in the same offence.

15. In the Sentencing Council's Definitive Guideline on Sentencing Children and Young People, the nature and purpose of a referral order is explained at paragraph 6.19 as follows:

"A referral order is the mandatory sentence in a youth court or magistrates' court for most children and young people who have committed an offence for the first time and have pleaded guilty to an imprisonable offence. Exceptions are for offences where a sentence is fixed by law or if the court deems a custodial sentence, an absolute or conditional discharge or a hospital order to be more appropriate."

The guideline suggests the appropriate length of a referral order, depending upon the seriousness of the offence. For an offence of low seriousness, the suggestion is a referral order of three to five months' duration. At the other end of the scale, for an offence of very high seriousness, the suggested length of the referral order is ten to 12 months. The court determines the length of the order, but a Referral Order Panel determines the requirements of the order.

16. As the single judge observed in granting leave, the cliff edge of the appellant's 18<sup>th</sup> birthday in this case means that there has been a significant difference in the way he has been sentenced, compared to his co-accused. The Sentencing Council Guideline recognises, at paragraph 6.1, that there will be occasions when an increase in the age of the child or young person will result in the maximum sentence on the date of the finding of guilt being greater than that available on the date on which the offence was committed (primarily, turning 12, 15 or 18 years of age). The guideline suggests, at paragraph 6.2, that in such situations the court should take as its starting point the sentence likely to have been imposed on the date on which the offence was committed. This includes young people who attain the age of 18 between the commission of the offence and the finding of guilt for the offence, although when this occurs the purpose of sentencing adult offenders has to be taken into account, namely, the punishment of offenders, the reduction of crime (including its reduction by deterrence), the reform and rehabilitation of offenders, the protection of the public, and the making of reparation by offenders to persons affected by the offences.

17. Although the present situation does not fall four-square within that paragraph, the message is that the court should take as its starting point a sentence equivalent to that which the appellant would have received at the time the offence was committed. The fact that the appellant was the oldest of all the defendants (albeit only by three months) provided some justification for a

somewhat more severe sentence than those imposed upon his co-accused. He should have known better. Had he been three months younger, and thus young enough to be remitted to the Youth Court along with the others, his referral order could well have been longer than the three month order for the others charged with the section 4 offence, because he was older. However, the difference in age which led to his being sentenced as an adult was not so great as to justify the discrepancy which has resulted in the unusual circumstances of this case.

18. Looking at the matter in terms of disparity, the question is whether a right-thinking member of the public would consider that something had gone wrong with the administration of justice when this appellant received a substantial community sentence with significant requirements attached to it, yet his co-accused received shorter and less onerous referral orders instead, including, in particular, a defendant who was only three months younger and who had pleaded guilty to the much more serious offence of inflicting grievous bodily harm: see *R v Fawcett* (1983) 5 Cr App R(S) 158.

19. That said, the real problem in this case arises simply from the accident of the appellant's age and the timing of the relevant court appearances, which has resulted in the cliff edge of an adult sentence at the age of 18.

20. With the question of disparity in mind, we have looked at some of the pre-sentence reports for the co-accused who received referral orders to see what in practice those orders would involve, as compared with the requirements of the appellant's community order. We note that the referral order would be designed to provide appropriate support and guidance and to equip the defendant to avoid further involvement in offending behaviour. The interventions would include attending appointments with the Youth Offending Service to build a positive relationship. There would be work done to help the defendant understand the impact of further offending and to foster and develop victim empathy. There might be reparation hours as a means of providing some recompense for his involvement in the offence. If appropriate, there would be support in relation to substance misuse and emotional health.

21. The appellant has now served six months of his community order. We have been provided with a report from his probation officer. The report is extremely positive. The appellant has attended all his appointments and has engaged well during supervision sessions. He remains positive about avoiding further offending. He has completed six of the 20 days of the rehabilitation activity requirement. It has not been possible for him to complete any of the 36 days of the Attendance Centre requirement for the simple reason that, at present at least, that facility is not available in the area where the appellant lives. Whether that is attributable to the restrictions of the Covid-19 pandemic is unclear. The report indicates that the probation service intended, in any event, to address the non-availability of an attendance centre in the light of the outcome of this appeal, presumably by applying to the Magistrates' Court to remove the requirement of the community order.

22. Since the onset of the current lockdown restrictions, the appellant has maintained telephone contact with his probation officer, as required. No concerns have been raised. The appellant no longer associates with his peers known to the criminal justice system. He has recently found himself employment at a local food factory, working 12 hour shifts on a rota basis. His eventual plan is to gain the necessary qualification and authorisation to start employment with his father in the construction industry. He lives with his parents who are both very supportive.

23. Looking at the matter broadly, it seems to us that the appellant has already performed and achieved much of what would have been involved in a referral order, had it been available. We

think that in these circumstances, in order to achieve some degree of parity and fairness between the defendants, it is appropriate that we should reduce the length of the community order and the extent of the requirements. We shall reduce the length of the community order from 18 months to nine months and substitute a rehabilitation activity requirement of ten days, rather than 20 days. We quash the attendance centre requirement. This should mean that the appellant will continue to benefit from the advice and support of his probation officer for another three months, whilst completing the valuable rehabilitation activity requirement. The community order will then come to an end.

23. We also quash the victim surcharge order of £85 and substitute an order in the correct sum of £20.

24. To that extent, the appeal is allowed.

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