IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2020] EWCA Crim 909

No. 202000638 A1

Royal Courts of Justice

Tuesday, 19 May 2020

Before:

LORD JUSTICE POPPLEWELL
MR JUSTICE GOOSE
MR JUSTICE HILLIARD

REGINA
V
LEE MICHAEL BANNERGEE

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MR B. PORTER appeared on behalf of the Appellant.

The Crown were not represented.

J U D G M E N T

MR JUSTICE GOOSE:

1 This is an appeal against sentence by Lee Bannergee, who is aged 36. He appeals with limited leave of the single Judge.

2 On 20 December 2019, in the Crown Court at Warwick, the appellant pleaded guilty to assault occasioning actual bodily harm, contrary to section 47 of the Offences Against the Person Act 1861. On 6 February 2020 he was sentenced by His Honour Judge Potter to 16 months' imprisonment and made the subject of a victim surcharge order in the appropriate amount. An order for the forfeiture and destruction of a knife was also made.

3 The offence occurred at about 5.00 a.m. on 14 October 2018. The complainant, Mr George Wilkins, lived in a flat in Brookfield House in Stratford-upon-Avon. The appellant lived in the same area. A group of people, including the appellant, had been drinking and socialising, and by 5.00 a.m. a number of them were in the complainant's flat. The appellant, however, was refused entry and he left, returning later holding a knife. He forced his way into the kitchen to confront the complainant and said to him "Get on your knees. The complainant refused and the appellant raised the knife to shoulder height and struck the complainant to the left side of his forehead. Blood streamed down the complainant's face and considerable blood staining was caused to the floor of the flat. We have seen the images of the complainant and the flat, just as the sentencing Judge did.

4 After the assault, the complainant was again told to get on his knees but again refused. The complainant this time managed to take the knife off the appellant and an ambulance was called. The appellant was told to get out of the flat; he did so. Police officers and an ambulance arrived, and the appellant was later located at his flat and arrested.

5 The complainant was taken to hospital, where he was treated for a superficial cut to his forehead which was cleaned and sutured. The medical statement did not indicate the length of the laceration but the complainant described it as three to four inches. It required four stitches to close the injury.

6 The appellant's antecedent history includes twenty previous convictions for thirty-seven offences: seven for offences against the person and eight for public order offences. Those included offences of battery, assault causing occasioning actual bodily harm and wounding.

7 In sentencing the appellant, the Judge concluded that this offence was of high culpability and greater harm, and therefore a Category 1 offence under the Assault Guideline, leading to a starting point of eighteen months' imprisonment and a sentence range of one to three years. This categorisation was based on the appellant's use of a weapon to cause the injury and the harm being serious in the context of the offence. The judge treated as aggravating factors that the offence occurred at night in the complainant's home, the appellant was under the influence of drink and he had significant previous convictions. In mitigation, the judge took into account that since this offence, the appellant had formed a new relationship and had a new child. The contents of the Pre-Sentence Report were also taken into account in favour of the appellant.

8 The judge concluded that the sentence after a trial, and taking into account the aggravating factors only, would have been three years, being at the top of the Guideline sentencing range. He reduced that sentence to twenty months to reflect the mitigation, a rather substantial reduction it might be observed.

9 Turning to the question of discount for plea the judge said this:

> "You have entered a guilty plea. It was not anything like the first opportunity because you entered a not guilty plea at the PTPH and then, in fact, it was in the warned list for October […..] shortly before that you lodged a defence

> statement denying any responsibility for any injury or any participation in the confrontation. But in early December, at a stage when the case had not been listed for trial, you contacted the prosecution, indicated that you would plead guilty and you did that. It seems to me that the credit that you deserve in those circumstances is around the 15 per cent mark."

The judge then reduced the sentence to sixteen months. He declined to suspend it because only an immediate term of imprisonment could be justified.

10 The appellant's appeal against sentence is limited to his first ground, that the judge gave insufficient credit for plea, which should have been twenty-five per cent. The single judge found that this was arguable, but that the appellant's remaining grounds were not. The appellant has not sought to renew his application for leave to appeal on those refused grounds.

11 In our judgment, there can be no sensible argument that the sentence of twenty months' imprisonment for this serious offence of assault occasioning actual bodily harm, with a knife being taken to the complainant's home at night, was wrong or excessive.

12 The appellant's single ground of appeal is that because at the PTPH, when he faced alternative charges of section 18 and section 20 wounding, and not section 47 assault, and there was no served medical evidence, he was not in a position to offer a plea of guilty. Even when he served his defence case statement, in which he denied any violence and blamed another person for the injury caused to the complainant, he says he could not have made his plea obvious. He argues that it was only when he saw the medical evidence, which confirmed that the injury caused was superficial, that he was able to offer a plea to section 47 assault, and therefore he deserved twenty-five per cent discount.

13 In considering this appeal it is necessary to start with the Sentencing Council Guideline: Reduction in sentence for guilty plea, which provides a structured approach for the court to assess the discount a defendant should receive for pleading guilty. The general guideline is that the maximum discount for a plea is one third, entered at the first stage of the proceedings, usually in the Magistrates' Court, and the minimum is one tenth if entered on the first day of the trial.

14 At paragraph D of the guideline it states:

> **"D2. Plea indicated after the first stage of proceedings – maximum one quarter – sliding scale of reduction thereafter**
>
> After the first stage of the proceedings the maximum level of reduction is **one-quarter** (subject to the exceptions in section F).
>
> The reduction should be decreased from **one-quarter** to a maximum of **one-tenth** on the first day of trial having regard to the time when the guilty plea is first indicated to the court relative to the progress of the case and the trial date (subject to the exceptions in section F)".

15 The relevant exceptions are in paragraphs F1 and F3 which provide:

> **"F1. Further information, assistance or advice necessary before indicating plea**
>
> Where the sentencing court is satisfied that there were particular circumstances which significantly reduced the defendant's ability to understand what was alleged or otherwise made it unreasonable to expect the

> defendant to indicate a guilty plea sooner than was done, a reduction of one-third should still be made.
>
> In considering whether this exception applies, sentencers should distinguish between cases in which it is necessary to receive advice and/or have sight of evidence in order to understand whether the defendant is in fact and law guilty of the offence(s) charged, and cases in which a defendant merely delays guilty plea(s) in order to assess the strength of the prosecution evidence and the prospects of conviction or acquittal [….]
>
> **F3. Offender convicted of a lesser or different offence**
>
> If an offender is convicted of a lesser or different offence from that originally charged, and has earlier made an unequivocal indication of a guilty plea to this lesser or different offence to the prosecution and the court, the court should give the level of reduction that is appropriate to the stage in the proceedings at which this indication of plea (to the lesser or different offence) was made taking into account any other of these exceptions that apply. In the Crown Court where the offered plea is a permissible alternative on the indictment as charged, the offender will not be treated as having made an unequivocal indication unless the offender has entered that plea."

16 It is not argued on behalf of this appellant by Mr Porter (who appeared for him in the court below) that he did not understand what was alleged against him. In short, he knew that he was charged with unlawfully assaulting the complainant with a knife. What was unclear was the extent of the injury caused. The medical evidence on that issue was not served until much later, when it became clear that the injuries were superficial. In these circumstances, the appellant argues that he was entitled to withhold a plea of guilty to offences charged under section 18 and section 20 of the 1861 Act, which appeared on the indictment, and to receive advice. However, this ignores the fact that a lesser alternative to either of those offences was available to him: to plead guilty to assault occasioning actual bodily harm under section 47 of the Act (see *DPP v Parmenter* [1992] 1 A.C. 699, HL. The appellant did not do so.

17 If it was never to be disputed by the appellant that he had taken a knife to the scene and had caused some injury without knowing its seriousness, he could and should have made that plain to the court and the prosecution. The appellant did not do that. He had provided a prepared statement in his police interviews, blaming another person, and then made no comment. In his defence case statement, he repeated his case in the same terms. The late serving of medical evidence simply described the superficial nature of the injury, notwithstanding the substantial blood staining caused in the flat. Whilst it led the prosecution to accept a lesser plea, the appellant had always denied any involvement in the assault. He had never stated that at least he was guilty of section 47 assault; nor did he give an unequivocal indication that he would plead guilty to that offence and he failed to enter a plea until late in the proceedings.

18 Of course, the appellant was entitled to withhold his plea of guilty as he did, but in doing so he cannot still argue for a greater discount for his plea. Further, whilst Mr Porter argued before us that the earlier indication of a plea to section 47 assault would not have been entertained or accepted by the prosecution, that is beside the point and is, with respect, irrelevant. The guideline requires a defendant to enter his plea at the earliest opportunity or indicate what (inaudible), and not when the prosecution are prepared to accept it.

19 It follows, therefore, that the appellant was unable to bring himself into the exceptions within paragraph F of the Guideline; he was not entitled to a discount of twenty-five per cent, but a lesser discount in the order of fifteen per cent, as the Judge found, because it was a late plea, but before the first day of the trial. The Judge correctly followed the Guideline.

20 In any event, however, the Judge gave the appellant slightly more than the fifteen per cent he stated. When reducing the sentence from twenty months to sixteen months he gave a discount of twenty per cent. On any view, that discount for plea was correct and we reject the argument that it should have been higher. Accordingly, we do not accept that this sentence was either manifestly excessive or wrong in principle.

21 This appeal is refused.

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This transcript has been approved by the Judge.