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IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202101718/A2-202101963/A2

NCN:[2021] EWCA Crim 1162

Royal Courts of Justice

Strand

London

WC2A 2LL

Thursday 15 July 2021

LORD JUSTICE SINGH

MR JUSTICE GOOSE

HER HONOUR JUDGE DHIR QC

(Sitting as a Judge of the CACD)

REGINA

V

RAJA IFTIKHAR MALIK

and

REFERENCE BY THE ATTORNEY GENERAL UNDER S.36 CRIMINAL JUSTICE ACT 1988

Computer Aided Transcript of Epiq Europe Ltd,

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Mr A BAJWA QC appeared on behalf of the Appellant/Offender.

MR B LLOYD appeared on behalf of the Crown/Solicitor General.

J U D G M E N T

LORD JUSTICE SINGH:

Introduction

1. There are two applications before the Court. The first is an application on behalf of the offender for leave to appeal against the sentence in this case of 9 months' custody suspended for a period of 2 years; the other is an application on behalf of the Solicitor General for permission to make a Reference to this Court, under section 36 of the Criminal Justice Act 1988 ("1988 Act"), on the ground that the sentence was unduly lenient. The Registrar has referred the application for leave to appeal against sentence in this case to the Full Court, in view of the fact that there is also before the Court an application on behalf of the Solicitor General to refer the sentence as being unduly lenient.
2. On 27 May 2021 the offender was sentenced by Mr Recorder Upward QC, sitting in the Crown Court at Wolverhampton. The first count was an offence of racially aggravated common assault, contrary to section 29(1)(c) and (3) of the Crime and Disorder Act 1998. The sentence imposed was one of 9 months' imprisonment suspended for 2 years. The maximum penalty for an offence of this kind is 2 years. Count 2 was an offence of common assault, contrary to section 39 of the Criminal Justice Act 1988. No separate penalty was imposed. In addition, the offender was ordered to participate in 20 days' rehabilitation activity requirement. He was also ordered to pay compensation of £500 and the appropriate victim surcharge order was made.

The Facts

3. The facts as set out in the Final Reference on behalf of the Solicitor General are not in dispute. The victim, Mr Shaun Clemson (who was aged 34) was a civil enforcement officer employed by the local authority. On 12 August 2020 he was in the process of issuing fixed penalty notices to two women who were relatives of the offender. The two women had littered from a car which was found by Mr Clemson to be located in front of a driveway in an area in Dudley. The victim was approached by the offender, who was followed by another older male, called Nawaz, who is the offender's brother. The offender was aggressive. He said the victim was only issuing the tickets because the women were Asian. He told the women not to speak to the victim. Nawaz tried to grab the victim, however he was stopped by the two women who had got out of their car. The offender also tried to grab the victim who said that he was going to call the police. The co-defendant Nawaz then ran into the house and came back out brandishing a wooden broom handle. The victim was then chased. The co-defendant swung the broom handle at the victim and hit him on the back two or three times, just above the waist, causing the handle to break. The offender picked up the broken handle from the ground and attempted to strike the victim with it but failed to connect. The offender went back into the house and came out with a metal pole. However, the victim fled before he was struck again and sought refuge in a nearby block of flats where he remained until the police arrived.
4. The victim's body worn video recorded the offender using racially abusive language towards him. The offender referred to the victim as a "white mother fucker". The victim suffered injury during the attack of bruising and swelling to his lower back.

The Sentencing Process

5. The offender was born on 12 May 1990. He has some antecedents. He has two convictions for four offences. In November 2010 he was fined for possession of an offensive weapon. In April 2013 he was sentenced for two offences of false imprisonment and one offence of robbery. He was sentenced to a total of 8 years' imprisonment but this was later reduced by this Court to 5 years.
6. In relation to the present offending the offender appeared before Dudley Magistrates' Court on 22 March 2021 and pleaded guilty. He was then committed to the Crown Court for sentence. As we have mentioned, he was then sentenced in that court on 27 May 2021.
7. The sentencing judge had a pre-sentence report before him dated 1 April 2021. The author noted that the offender's behaviour was wholly unacceptable. It was evident that his poor decision making, his poor conflict resolution skills and impulsivity had been a factor. It was the author's assessment that unless he undertook structured intervention to address these issues his risk of reoffending and harm would not be reduced. The author noted that this had been a nasty attack. However, the offender accepted some of the responsibility as his brother hit the victim with the broom and even though he stated that he did not swing the broken broom handle, he did nothing to prevent his brother from assaulting the victim. He had also used racial language towards the victim and stated that he did this out of anger and frustration and even though he had experienced racial discrimination as a youth, he did not have an issue with white people in general. The Probation Service's statistical tools indicated that there was a low likelihood of the offender engaging in further general offending behaviour. As regards the future risk of serious harm, using the Approved Risk of Serious Recidivism calculator the offender was currently assessed as posing a low risk of harm to the public. However, the author assessed that in the light of the index offence the risk must be assessed in fact as being a medium risk.
8. The judge also had before him a victim personal statement. The victim explained how low the incident had made him feel, to the extent that he no longer felt safe at work. He had decided to take time off work because of his fears. On behalf of the offender it has been submitted that the evidence does not state whether that meant he had in fact left his employment completely. On instructions Mr Lloyd, who has appeared for the Solicitor General, informed us that he has left his job. On behalf of the offender Mr Bajwa QC points out that it is still not clear on the evidence whether that was as a result of this offending.
9. In his sentencing remarks the Recorder said that both the offender and Nawaz should be deeply ashamed of themselves. The victim had just been doing his job. When a public figure was just doing his job, he was entitled to be protected and that had to be marked by a custodial sentence. What had been said to the victim was appalling. The offender himself had suffered racial discrimination and so understood what it was like. The Recorder gave full credit for the plea of guilty and in the light of the fact that the offender had been out of trouble for some time the sentence would be suspended.
10. The co-defendant, Nawaz, had been prosecuted for common assault by beating and for possession of an offensive weapon. He was sentenced to a total of 6 months' imprisonment which was suspended for a period of 12 months, made up of 3 months for common assault and 6 months' imprisonment for possessing an offensive weapon. The

sentences were made concurrent.

Relevant Guidelines

11. At the material time there was a Definitive Guideline issued by the Sentencing Council on offences of common assault and racially/religiously aggravated common assault. At Step 2 of the sentencing exercise the guideline placed offences into three categories. Category 1 suggested a starting point of a high level community order and gave a range of a low-level community order to 26 weeks' custody; category 2 suggested a starting point of a medium level community order and gave a range of a Band A fine to a high level community order. Category 1 is at Step 1, an offence where there is greater harm, either in terms of injury or fear of injury which must normally have been present, and higher culpability. Category 2 is where there is greater harm and lower culpability or lesser harm and higher culpability. That is for the basic offence of common assault. The guideline went on to state in relation to section 29 offences only that the court should determine the appropriate sentence for the offence without taking account of the element of aggravation and then make an addition to the sentence considering the level of aggravation involved. It may be appropriate to move outside the identified category range, taking into account the increased statutory maximum.
12. We should also note that there is a guideline on the imposition of community and custodial sentences which addresses for present purposes the question of whether a custodial sentence should be suspended. It includes the following factors that would indicate that it would not be appropriate to suspend a custodial sentence, where the offender presents a risk/danger to the public and where appropriate punishment can only be achieved by immediate custody.
13. Before we leave this topic, we should refer to relevant provisions of the Sentencing Act 2020 ("the Sentencing Code"). Under section 59(1) of the Sentencing Code the sentencing court must follow any relevant sentencing guideline, unless it would be contrary to the interests of justice to do so. Under section 52(6) of the Sentencing Code, in giving reasons for the sentence imposed the court must identify the Definitive Sentencing Guidelines relevant to the offender's case and explain how the court discharged any duty imposed on it and where the court does not follow any such guidelines because it was of the opinion that it would be contrary to the interest of justice to do so, it must state why it was of that opinion.
14. It is important that sentencing judges should comply with these obligations. First, they are legal duties imposed by Parliament and courts must comply with the law. Secondly, these duties exist, not for the sake of it but because they serve the interests of justice. They help to promote certainty and consistency as between different judges. They also help all concerned including the public to understand why courts have reached the decisions that they have. This in turn helps to maintain public confidence in the administration of justice. Thirdly, they assist this Court to understand why and how a sentencing decision was reached.

Application for leave to appeal against sentence

15. Mr Bajwa QC supports the application by reference to grounds of appeal which were drafted by different counsel. Those grounds were that the sentence was manifestly excessive because (a) the judge adopted too high a starting point in all the circumstances

of the case (b) that the judge failed sufficiently to distinguish between the appellant and the co-accused whose role was more significant (c) the judge failed sufficiently to reflect the applicant's culpability.

16. In the written submissions in support of those grounds particular emphasis was placed on the following factors. First, the applicant did not introduce the broomstick into the incident. He did not at any time strike Mr Clemson. He did not cause the injuries which in fact were sustained. Secondly, the element of aggravation based on race was not planned. The offending term was used only once and was not heard by Mr Clemson at the time. It became apparent as a result of listening to the video evidence from the body worn camera. The previous offences of false imprisonment and robbery had occurred in 2013 (some 8 years earlier) and the applicant had no convictions in the meantime. The applicant had expressed deep remorse and accepted his culpability from the outset. He had pleaded guilty at the earliest opportunity in the Magistrates' Court. It was submitted that the Recorder appears to have proceeded on the mistaken factual assumption that it was this applicant who had struck Mr Clemson in the back whilst chasing him. This was contrary to the evidence. It was submitted in writing that it was in fact Nawaz who faced a more serious charge of possession of an offensive weapon and common assault, yet he was given a shorter sentence of 3 months' custody suspended for 12 months.
17. In the circumstances, it was submitted that the sentence was wrong in principle and manifestly excessive for the following reasons. First, that the two offenders were not jointly charged. The Magistrates' Court were wrong in principle to commit this applicant for sentence at the Crown Court and did so, it appears, due to pressure from the higher court. We can see no basis for that allegation and it should never have been made. Very fairly at this hearing Mr Bajwa QC, who we stress was not the author of the original grounds or those submissions, readily conceded that the committal was entirely appropriate and made it clear that he does not pursue that particular submission.
18. Secondly, in writing it was submitted that the Crown Court sentenced incorrectly due to the wrong application of the guideline - as if the two offenders had been jointly charged. It was wrong in principle for the Recorder to take such a high starting point for this applicant which would have been thirteen-and-a-half months after trial given that a full discount of a third was due for the early guilty plea.
19. Thirdly, it was submitted that the Recorder did not apply the correct level of harm and culpability in accordance with the guideline. Taking the prosecution case at its highest, this applicant had attempted to strike Mr Clemson once. He had not actually made contact. It was submitted that the appropriate category by reference to the guideline would have been either category 3 or category 2. It is accepted that the element of racial aggravation would justify an uplift to take it into category 1 but it was submitted that even then the recommended range for a category 1 case is a high level community order through to 6 months' custody. We disagree.
20. In our judgment, none of the grounds of appeal is arguable. The Recorder was entitled to form the assessment which he did. This was a serious case, in which a public servant was first made to run away when he was trying to do his job and then was chased by two men including this applicant. Further, this applicant tried to strike the victim with the broken broomstick although thankfully he failed to connect. The fear which was caused to the victim and the longer term impact on him of the incident cannot be overlooked.

Nor can the serious aggravating factor of the use of a racial slur. People, no matter what their ethnic origins, are entitled to go about their business, especially when they serve the public, without such abuse.

21. In all the circumstances, we have reached the conclusion that the Recorder was entitled to pass a custodial sentence in this case and that the sentence of 9 months' custody was neither wrong in principle nor manifestly excessive. Indeed in our view, the judge would have been entitled to make the sentence one of immediate custody rather than suspended. We therefore refuse the application for leave to appeal against sentence.
22. We now turn to the application on behalf of the Solicitor General.

Submission on behalf of the Solicitor General

23. On behalf of the Solicitor General, Mr Lloyd submits that the sentence was unduly lenient and further, the offence required an immediate custodial sentence so that the Recorder erred in passing a suspended sentence. He submits that this was a nasty attack on a public servant who was carrying out his duties. It was racially aggravated. The victim's fear of injury was serious in the context of the offence. There was the threat and use of a weapon. There was an intention to commit more serious harm than actually resulted.
24. Mr Lloyd submits that there were also several significant aggravating features. First, not only was this an assault on a public servant but the victim was particularly vulnerable as he was working visibly in public, and Mr Lloyd pointed out at the hearing before us often such public servants will be working on their own, as this one was. Secondly, the offence resulted in the victim leaving his job. Thirdly, the offender had previous convictions. Mr Lloyd submits that in the circumstances of this case the sentence required a significant deterrent element taking it above the category range in the guideline before further adjustment for the racially aggravated element.

Submissions for the respondent

25. On behalf of the respondent Mr Bajwa QC submits that there is an important distinction between a sentence which is lenient and one which is unduly so. He reminds this Court of the decision in Attorney-General's Reference (No 3 of 1989) (1990) 90 Cr App R(S) 358 at 364, where Lord Lane CJ said:

"Leave should only be granted in exceptional circumstances and not in borderline cases."

26. He also refers to Attorney-General's Reference (No 60 of 2012) [2012] EWCA Crim 2746, at paragraph 19, where Hughes LJ said:

"The procedure for referring cases under section 36 ... is designed to deal with cases where judges have fallen into gross error, where errors of principle have been made and unduly lenient sentences have been imposed as a result."

27. Further, Mr Bajwa submits that a custodial term of 9 months' imprisonment is not lenient. The maximum sentence for this offence is 2 years. The Recorder must have taken a starting point after trial of thirteen-and-a-half months. This was more than twice the

maximum in the suggested range in the relevant guideline before account was taken of the element of racial aggravation.

28. In relation to the racially aggravated element of the current offence Mr Bajwa submits that the offensive phrase was used spontaneously and only once. It appears not to have been heard by the victim although it came to light via the body worn camera subsequently. It was not mentioned in the victim's statement at the time. Mr Bajwa submits that the offender's previous convictions for robbery and false imprisonment were not particularly significant in the context of this offence. They were committed some 8 years earlier. The offender had not committed any offences in the intervening period. He was at the time of those offences aged only 22 and the offences were dissimilar. Furthermore, Mr Bajwa submits that the Recorder was entitled to make the custodial sentence in this case a suspended one. He reminds this Court of the Sentencing Council's Guideline on imposition of community and custodial sentences which so far as material sets out factors indicating that it would not be appropriate to suspend a custodial sentence: (i) offender presents a risk/danger to the public; (ii) appropriate punishment can only be achieved by immediate custody and (iii) history of poor compliance with court orders. The first and third of those factors were not present in this case. Mr Bajwa submits that the Recorder was entitled to reach the conclusion that an immediate custodial sentence was not necessary because the alternative package which he did impose was adequate in the circumstances of this case.
29. Mr Bajwa also draws attention to what is said in the guideline about factors indicating that it may be appropriate to suspend the custodial sentence which are (i) a realistic prospect of rehabilitation; (ii) strong personal mitigation and (iii) immediate custody will result in significant harm and impact upon others. Mr Bajwa submits that the Recorder clearly found that at least the first factor was satisfied in this case. In relation to the last factor the Recorder must have had regard to what this Court said in R v Manning [2020] EWCA Crim 592; [2020] 4 WLR 77 in relation to the impact of the current pandemic on conditions in prison.

The approach to be taken by this Court

30. In giving the judgment of this Court in Attorney-General's Reference (No 4 of 1989) (1990) 90 Cr App R 366 at 371, Lord Lane CJ said:
- i. "The first thing to be observed is that it is implicit in the section [section 36] that this Court may only increase sentences which it concludes were *unduly* lenient. It cannot... have been the intention of Parliament to subject defendants to the risk of having their sentences increased - with all the anxiety that this naturally gives rise to - merely because in the opinion in this Court the sentence was less than this Court would have imposed. A sentence is unduly lenient ... where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors could reasonably be considered appropriate... It must always be remembered that sentencing is an art rather than a science; that the trial judge is particularly well placed to assess the weight to be given to various competing considerations; and that

leniency is not in itself a vice. That mercy should season justice is a proposition as soundly based in law as in literature."(emphasis in original)

31. Lord Lane CJ went on to state that even where this Court considers that a sentence was unduly lenient, it still has a discretion as to whether to exercise its powers.

Conclusions

32. As we have said, in refusing the application for leave to appeal by the offender, this was a serious case. We do not underestimate the impact on the victim or the need to protect those who, like him, are going about their work serving the public. Nor do we underestimate the seriousness of the element of racial aggravation in this offence.
33. In our view, the sentencing judge would have been entitled to make the sentence one of immediate custody. Nevertheless, we must remind ourselves that the role of this Court, under section 36 of the 1988 Act, is not to ask what sentence would have been imposed by members of this Court, but whether the sentencing in fact passed was outside the range that was reasonably open to the court below. In the end, we have reached the conclusion that the sentence and the fact that it was suspended cannot be regarded as unduly lenient applying that strict test.
34. We bear in mind the sentence that was passed on the offender's brother although we recognise that it did not have the element of racial aggravation. Nevertheless it was he who brought out the broomstick initially and used it to strike the victim and in fact caused the injuries.
35. For completeness we have also taken into account the report which has been prepared for this Court from the National Probation Service for the purpose of this hearing, which shows that the offender has had a good record of compliance with the requirements of the sentence to date.
36. For the reasons we have given, we refuse the application for leave on behalf of the Solicitor General.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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