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IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202101795/A3-202101797/A3-202101798/A3

NEUTRAL CITATION NUMBER: [2021] EWCA Crim 1239

Royal Courts of Justice

Strand

London

WC2A 2LL

Thursday 22 July 2021

LORD JUSTICE HOLROYDE

MRS JUSTICE CHEEMA-GRUBB DBE

MR JUSTICE MURRAY

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

REGINA

v

ETHAN GLADSTON SMITH

JASON JOHN SMITH

SEAN ROSS RILEY

Computer Aided Transcript of Epiq Europe Ltd,  
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Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR J POLNAY appeared on behalf of the Attorney General.

MR J HORNE appeared on behalf of the Offender Ethan Smith.

MR I WEST appeared on behalf of the Offender Jason Smith

MR M SCARBOROUGH appeared on behalf of the Offender Riley

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

1. LORD JUSTICE HOLROYDE: Ethan Smith, Jason Smith and Sean Riley pleaded guilty to a joint offence of causing grievous bodily harm with intent, contrary to section 18 of the Offences Against the Person Act 1861. On 17 May 2021, in the Crown Court at Durham, they were sentenced by HHJ Adkin to custodial terms of 6 years 11 months. Her Majesty's Solicitor General believes those sentences to be unduly lenient. Application is accordingly made, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer the case to this court so that the sentencing may be reviewed.
2. The offenders are brothers. At the time of the offence Sean Riley was aged 28, Jason Smith was aged 22 and Ethan Smith was aged 19. The brothers are close to one another and very supportive of one another, in particular because of family circumstances when Ethan Smith was very young.
3. On the morning of 1 January 2021 Sean Riley cycled to a house at 38 Dodds Close, Wheatley Hill, to supply cocaine to someone there. The persons present in the house were, or included, John Brown, Adam Richardson and Toni Laird. Sean Riley was attacked, beaten and robbed of the cocaine and money which he had in his possession. He says that he was lured to the house by Ms Laird and that it was Brown and Richardson who attacked him.
4. After that attack Sean Riley made his way to a nearby house where he met his brothers. CCTV footage of his short journey shows that there was a good deal of blood on his face, and he was moving with some difficulty, but he was able to walk and to push his bicycle.
5. Less than 10 minutes after he arrived, all three brothers left that house and began to walk quickly and purposefully towards 38 Dodds Close. Before they got there they saw Brown, Richardson and Ms Laird getting into a taxi. The three brothers immediately ran towards the taxi. Ethan Smith pulled a hammer from his pocket as he ran.
6. Jason Smith reached the taxi first, with Ethan Smith close behind. A CCTV camera captured what then happened. It makes alarming viewing. Jason Smith dragged Brown from the taxi. Ethan Smith immediately began to strike violent blows to Brown's head with the hammer. Brown went to the ground. Ethan Smith continued to hit him hard about the head with the hammer, striking in all six blows. Sean Riley kicked Brown more than once as he lay on the ground. The kicks were delivered with force and were aimed at Brown's head.
7. The three brothers then walked away, leaving Brown unconscious on the ground. He was obviously very seriously injured. Local residents came to his assistance and the emergency services were called. Brown was taken by ambulance to hospital. On arrival, his airway was obstructed due to facial fractures. It was necessary for him to be intubated and ventilated, a state of affairs which continued for some time. An initial body scan showed the following injuries: multiple extensive minimally displaced skull fractures; comminuted displaced fractures to the bones of the jaw; subarachnoid bleeding in the vertex and left occipital lobes of the brain, with subdural haematomas on both sides; multiple loose and displaced teeth in the oral cavity and in the stomach and, it may be noted, some left behind on the road. There was soft tissue swelling around the skull and around the eyes; a rib fracture associated with a right haemothorax; and a small left pleural effusion.
8. Riley was arrested at his home later that day. The trainers which he had been wearing during the attack on Brown were found in a bin outside his house. Drug-dealing paraphernalia was found inside. When interviewed under caution, Riley denied any

- involvement in the attack and denied that he could be seen on the CCTV footage. He claimed that his own injuries had been sustained in a fall from his bicycle.
9. Jason and Ethan Smith had left the Wheatley Hill area after the attack and were staying with their sister in Nottingham. Both were arrested in that city on 4 January 2021. When interviewed under caution, neither made any comment. The hammer which had been used in the attack was found in Ethan Smith's bedroom at his home.
  10. The three brothers were charged with the offence to which we have referred and sent to the Crown Court for trial. At a plea and trial preparation hearing on 8 February 2021, they all pleaded not guilty, although they indicated that they were guilty of an offence contrary to section 20 of the 1861 Act. The case was adjourned for trial on 14 June 2021. Subsequently, however, the brothers indicated that they would all plead guilty to the section 18 offence. It was in those circumstances that they came before the court on 17 May 2021. They were re-arraigned and all pleaded guilty. The judge proceeded immediately to sentence. No pre-sentence reports were thought to be necessary.
  11. Brown had made a victim personal statement on 25 March 2021, a little under 3 months after he was attacked. He described an initial period when he struggled to move his right arm and leg. That was improving, but only slowly. His mobility was poor and, even using crutches, his walking range was limited. He had no sensation in one foot. He was undergoing physiotherapy to improve the function of his limbs on his right side.
  12. Brown further reported that he had pain in his head, which came in waves every day. He was taking painkillers to ease it. He could feel, as he put it, "a number of dints" in his head. He felt self-conscious about those and wore a hat to hide them. He had only three teeth left. His mouth was painful. He could not chew. He no longer enjoyed food and he had lost weight. His mouth was numb and he often salivated without realising he was doing so. He had no sensation around his chin or bottom lip. His speech was affected. Other people found it difficult to understand him and sometimes thought he was drunk. He was self-conscious about his appearance and welcomed the need to wear a mask during the pandemic because it enabled him to hide his face.
  13. Brown said that his mental health had been bad since he was attacked. He lacked motivation, did not often leave the house and constantly felt that something bad was going to happen to him. When he did go out, it was in the company of someone else and he felt very nervous and anxious. His memory had been adversely affected, he had trouble sleeping and his sleep was disturbed by nightmares.
  14. So far as the offenders are concerned, Riley had no previous convictions, though he had received a formal caution in 2017 for possession of amphetamine. Jason Smith had been convicted in 2018 of taking a vehicle without the owner's consent and associated motoring offences. Ethan Smith had no convictions or cautions.
  15. Testimonials were provided to the court in respect of each of the three brothers. The authors of these spoke highly of the offenders, and the contents of the testimonials showed that each of them had a much better side and was generally a polite, helpful and caring young man.
  16. Submissions were made by all counsel as to the categorisation of the offence under the Sentencing Council's Definitive Guideline which was then in force. It should be noted that the recent amended version of that guideline had not come into effect at the time of the sentencing hearing.
  17. Mr Horne, Mr West and Mr Scarborough, representing the three brothers as they do in

this court, realistically accepted that the offence fell into category 1 of the guideline, that substantial custodial sentences were inevitable and that all three accused would be likely to receive similar sentences. The submissions in mitigation were sensibly directed to the length of those sentences.

18. The judge in his sentencing remarks described the joint attack on Brown as "ferociously violent" and said that it could easily have resulted in Brown's death. We respectfully agree with both those observations. He then summarised the injuries suffered by Brown. He assessed the offence as involving greater harm, because of the serious injury and the sustained nature of the assault, and higher culpability because a weapon was used, it was a group attack and it was premeditated. It was therefore a category 1 offence under the then current guideline, with a starting point of 12 years' custody and a range of 9 to 16 years.
19. The judge identified the fact that Jason and Ethan Smith had fled to Nottingham as an aggravating feature. He identified the following mitigating factors: none of the three had any significant criminal record; the character references showed a very different side to their personalities and were greatly to their credit; all were now remorseful, though they had not shown much remorse when arrested; and Jason and Ethan Smith were relatively young, though that was balanced by their having left the county to try to escape justice.
20. The judge indicated that for each of the accused the sentence after trial would have been 8 years 8 months' custody. He reduced that by 20% to reflect the guilty pleas. Thus he arrived at the sentences of 6 years 11 months. They were sentences of imprisonment in the cases of Riley and Jason Smith and a sentence of detention in a young offender institution in the case of Ethan Smith.
21. For the Solicitor General, Mr Polnay submits that those sentences did not reflect the seriousness of the offence and were unduly lenient. He submits that the starting point of 12 years' custody, for what was undoubtedly a category 1 offence, should have been substantially raised in view of the aggravating factors. Mr Polnay submits that there were five such factors: the ongoing effect on Brown; the fact that it was a group attack; the fact that it was a revenge attack with a drug background; the attempts made to dispose of evidence; and the attempts made by Jason and Ethan Smith to evade the police.
22. Mr Polnay accepts that there were mitigating factors, namely the lack of previous convictions and previous positive good character, the expressed remorse, the young age and lack of maturity of Jason Smith and Ethan Smith and the particular difficulties facing those in prison during the pandemic. He submits, however, that that mitigation did not justify the imposition of a sentence which, before reduction for the guilty pleas, was below the bottom end of the category 1 range.
23. On behalf of the three brothers it is submitted that the sentences were within the range properly open to the judge and were not unduly lenient.
24. Mr Horne, for Ethan Smith, emphasises that the offence was committed only a few minutes after Ethan Smith had seen his older brother bloodied and injured. Mr Horne points to Ethan Smith's young age (only 19) and consequent lack of maturity, which together made him more likely to react impulsively to the attack upon his brother and less able to evaluate the consequences of his actions. He was a young man of previous positive good character, and Mr Horne submits that this offence was an isolated incident. He submits that the personal mitigation was powerful and deserved to be given significant weight and that for the most part the aggravating factors asserted by the

Solicitor General were already reflected in the starting point for a category 1 offence. In those circumstances, he submits, the judge was correct to make the significant downward adjustment he did to the guideline starting point.

25. Mr West, for Jason Smith, submits that the judge was in the best position to assess the aggravating and mitigating features of the case and was entitled to reach the conclusion he did, even if another judge might have imposed a longer sentence. He emphasises that the sentence complied with the judge's statutory duty to pass a sentence which was within the offence range even if not in the category range. Mr West goes on to argue that under the recent amended guideline, which came into effect on 1 July 2021, this offence would have been placed into category 2A, with a starting point of 7 years' custody and a range of 6 to 10 years. He does not accept Mr Polnay's argument in this regard, that the appropriate classification under the new guideline would be category 1A. From that starting point, Mr West argues that it would be unfair to punish the offenders more severely by reason of timing of the sentencing hearing, if they would have been sentenced more leniently had they contested the case to trial and been convicted after 1 July.
26. Mr Scarborough, for Riley, points out that Riley had been the victim of a violent attack, having been lured to 38 Dobbs Close so that he could be robbed and it was that attack upon him which had led to the commission of the offence. He too argues that this offence was an isolated incident. Riley had not attempted to evade the police or to dispose of evidence. He submits that the judge was in the best position to assess the aggravating and mitigating factors and was entitled to reduce the guideline starting point as he did.
27. We are grateful to all counsel for their submissions.
28. The judge was required to follow the existing guideline, not a guideline which had not yet come into effect. It cannot be said that it was contrary to the interests of justice for him to do so. This serious offence was undoubtedly a category 1 offence under the applicable guideline. We accept that the category 1 range under that guideline covered injuries more serious than those sustained by Brown. We cannot however accept the submission that the judge should have made an initial downwards adjustment to the starting point on the basis that Brown's injuries should be regarded as coming at the lower end of the category 1 range.
29. We agree with Mr Horne that it is important to take care not to double count, as additional aggravating factors, features of the offence which are already reflected in the guideline starting point for the appropriate category. On the evidence available to the judge, we think that the continuing effects of the injury were sufficiently reflected in that substantial starting point. We do not think that the actions of Riley in putting his trainers in the bin, and of the two younger brothers in going to stay with their sister, adds significantly to the seriousness of the offence. The fact that the hammer was found in Ethan Smith's bedroom is a clear indication that there had been no real attempt to destroy evidence or to escape arrest.
30. There were however a number of features of this offence which in our view clearly did call for a significant upward adjustment above the starting point.
31. First, it is clear that all three brothers left the house intent on violence. This is not an offence which was long premeditated or carefully planned; but in the minutes they were together indoors, the offenders clearly did form a plan to take revenge on those who had

attacked Riley or were thought to have done so. This was not therefore a spontaneous or immediate reaction to the robbery of Riley. The judge was correct to conclude that there was a considered decision to seek revenge.

32. It is, in our view, important to add that it was a desire to seek revenge for the theft of controlled drugs against a background of drug dealing. We agree with Mr Polnay that this case had always been presented by the prosecution on the basis that it was the robbery of a drug dealer and a revenge attack in response to that robbery. That approach to the case had not been disputed in the Crown Court. It is too late for any of the brothers to seek to dispute it now.
33. Secondly, the offence involved a group attack, three onto one. The three were armed with a hammer, which had been brought to the scene for use as a weapon, and they had the advantage of surprise. The one had no chance of defending himself.
34. Thirdly, although the attack was of comparatively short duration, it involved numerous blows and was carried out with brutal violence. The repeated ferocious strikes with the hammer were followed by kicks to the head as Brown lay unconscious and helpless on the ground.
35. Fourthly, it was an attack in a public place. The attack itself could have been witnessed by innocent persons and the aftermath certainly was.
36. It was then necessary to make a downwards adjustment to reflect the mitigating factors which were correctly identified by the judge. It is clear that each of the offenders has a much better side and we accept that this offence was out of character and, in that sense, an isolated incident. We recognise that it cannot have been easy for them to admit their guilt, knowing that they faced lengthy custodial sentences, and we accept that their guilty pleas are evidence of genuine remorse. We understand why their close relationship as brothers led all three to involve themselves in this serious offence; but that is an explanation for their conduct, not a justification of it.
37. We have given particular thought to the position of the youngest brother, Ethan Smith. We agree with the submission that at 19 he was likely to be less mature and more impulsive than his older brothers. Against that, however, we have to take into account that it was he who armed himself with a hammer and he who used it in such a ferocious way. Balancing those considerations, we agree with the judge's conclusion that all three sentences should be of the same length.
38. We have also given careful thought to the submission of Mr West to the effect that the judge's sentence can be justified by a consideration of the amended guideline now in force. As we have said, the judge was bound to follow the guideline which was in fact in force, and in considering this application for leave to refer, we too must follow that guideline. No argument was addressed to the judge that a guideline which had been published but not yet brought into effect might properly be considered by a sentencer. There was, therefore, no opportunity for any submissions on either side as to whether such an approach would be correct in principle; or as to the consequences of such consideration in this case, if it were thought to be appropriate in principle; or as to the appropriate categorisation of the offence under the amended guideline. Those were all issues which, had they been raised, would have called for careful attention. We agree with Mr Polnay that there is therefore a substantial obstacle to this court being asked to consider an argument which was not raised in the court below, and which might very well have required further medical evidence if there was an issue as to whether the offence

would fall into category 1A or 2A of the amended guideline. We also note that on the listed timetable of proceedings, the case would in any event have been tried before the new guideline came into effect. In those circumstances, we do not regard this submission as an argument which can assist any of the defendants.

39. That said, we do accept that significant weight can properly be given to the mitigating factors which we have identified.
40. It follows that to a substantial extent we agree with the judge's identification of the relevant aggravating and mitigating factors. With all respect to the judge however, we are wholly unable to agree with his decision as to the balancing of those factors. We entirely agree with the submission of counsel that where mitigating factors are present, appropriate weight must be given to them. In our judgment, however, it was simply not open to the judge to conclude that the mitigating factors here were so substantial as to result in an overall adjustment downwards from the starting point to a level below the bottom of the category 1 range. For that reason, sentences of 8 years 8 months before giving credit for the guilty pleas were, in our view, unduly lenient.
41. In our judgment, giving as much weight as we can to the mitigating factors, they can be regarded as somewhat outweighing the aggravating factors. For that reason, the lowest sentences which, in our view, were properly open to the judge, before giving credit for the guilty pleas, were sentences of 11 years' custody in each case. The reduction of 20% which the judge made for the guilty pleas was appropriate, given that those pleas were indicated soon after the PTPH. In considering our decision on this application, we think it appropriate to round down slightly the arithmetical result of applying that reduction to the sentences which we have found to be appropriate before plea. We recognise, of course, that a consequence of our conclusion is that the appropriate sentences are such that Parliament requires a greater proportion of them to be served in custody before release on licence.
42. For those reasons we grant leave to refer. We quash the sentences imposed below as being unduly lenient. We substitute for them sentences of 8 years 6 months' imprisonment in the cases of Jason Smith and Riley and 8 years and 6 months' detention in a young offender institution in the case of Ethan Smith.
43. The effect of our decision is that each of the three brothers now has a sentence of 8 years 6 months and must serve two-thirds of that sentence before being released on licence.

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

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