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IN THE COURT OF APPEAL
CRIMINAL DIVISION
CASE NO: 2020 02797 A4
NCN: [2021] EWCA Crim 155



Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 4 February 2021

LORD JUSTICE DAVIS

MR JUSTICE WILLIAM DAVIS

HIS HONOUR JUDGE LODDER QC

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

v

DARREN ROSE

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 JONATHAN POLNAY appeared on behalf of the SOLICITOR GENERAL
MR TOM NICHOLSON appeared on behalf of the OFFENDER

JUDGMENT

1. LORD JUSTICE DAVIS: This is an application brought on behalf of the Solicitor General seeking to challenge a sentence on the ground that it is unduly lenient. We grant leave.
2. The offender is a man called Darren Rose. He is now 29 years old, having been born on 8 April 1991.
3. On 30 July 2020 he was convicted by a jury after a trial at the Crown Court at Portsmouth of one count of aggravated burglary and one count of wounding with intent, contrary to section 18 of the Offences Against the Person Act 1861. He was in due course ultimately sentenced by the trial judge to a term of 7 years' imprisonment on the aggravated burglary count and 6 years' imprisonment on the wounding with intent count, the sentences, quite correctly, being ordered to run concurrently. Accordingly, the total sentence was one of 7 years' imprisonment. In addition, a restraining order was made.
4. The background facts leading up to this sentence can be summarised in this way. The offender had been drinking a very great deal with his then partner, a woman called Harriet Shaw. It seems that there was an argument, and, amongst other things, in the course of their discussions, he seems to have become very jealous at what he perceived to be the nature of her relationship with a man called Toby Brown.
5. At 5.30 am, in the early hours of 26 October 2019, the offender went to an address in Cowes in the Isle of Wight. That was an address where Toby Brown lived, sharing it with others: Peter Marshall, Jodie Matthews and Jack Wylds. The offender got into the house by smashing his way through the glass panelling of the front door; that is to say, by forced entry. He was carrying two wine bottles that he had bought earlier that evening and which it was evident he intended to use as weapons.
6. He first barged into the room where Mr Wylds and Mr Marshall were sleeping, shouting out for "Tony", and holding the two bottles by the neck. He then made his way upstairs and burst into the bedroom, where Mr Brown was sleeping, lying on the bed. The offender then immediately threw one of the bottles at Mr Brown. That hit him on the back of his head. The offender then said, "If you don't stand up and face me, I'm going to kill your dog". As Mr Brown then tried to stand up, the offender struck him to the head with the other bottle.
7. The young woman, Jodie Matthews, was asleep in her room directly across from Mr Brown's room when the commotion began. She woke up, hearing Mr Brown screaming for help and shouting, "Get off". She immediately got out of bed and went across the landing and into Mr Brown's room. She saw the offender leaning over Mr Brown, who was in his bed. She shouted at the offender to leave.
8. The offender then turned and charged at her, abusing her. He then struck her to the head with a wine bottle. She managed to stay on her feet and valiantly attempted to push him away. The offender is a powerfully built man and was much too strong for her. He pushed her back, causing her to fall down, perhaps fall down the stairs.
9. The offender then left the premises, but before he did so, he smashed a television set.
10. In due course Mr Brown was found to have a 2 cm laceration to his skull and notable swelling round the humerus (that is to say, the elbow) with associated tenderness. A soft tissue injury was diagnosed, his arm was placed in a sling and he was advised to take painkillers. The wound on the scalp was cleaned and the laceration closed with glue.

As for Ms Matthews, she reported ringing in her ears; but this eventually subsided. She herself had a laceration of approximately 2.5 cm in length on her forehead. The wound was cleaned but had small bits of tissue missing. She was treated with sutures and the wound was dressed.

11. The offender was arrested. In interview he claimed that the allegations were a complete fabrication and that he had not been to the address. At trial he was apparently to say that he had been invited by Mr Brown to the house and had then been attacked by Mr Brown. At all events, his defence was rejected by the jury.
12. Unfortunately, the offender has a very bad record indeed: 38 convictions for 116 offences dating back to when he was very young in 2005. These convictions include, amongst other things, numerous offences for burglary and for attempted burglary, both dwelling and non-dwelling, between 2006 and 2013, and also numerous convictions for violence, dating back to a first conviction for battery in 2005, and then with subsequent convictions for battery and for assault occasioning actual bodily harm and so on, leading up ultimately to a conviction for battery in 2018. The offender has on various occasions received custodial sentences, the longest being a sentence of 2 years' imprisonment.
13. A pre-sentence report had been obtained. Amongst other things, the probation officer indicated that the offender accepted some responsibility for the offence, although he denied having used a wine bottle as a weapon. In the assessment of the probation officer, the offence was triggered by "poor emotional control whilst the defendant was under the influence of alcohol". The probation officer went on to note that the majority of the previous offending had been linked to alcohol use. Having further assessed the matter, the probation officer assessed the offender as presenting a high risk of reoffending and of satisfying the dangerousness criteria.
14. In addition, a report had been obtained from a psychiatrist, Professor Greenberg, dated 3 October 2020. The report is lengthy, although it may be noted that Professor Greenberg had not seen the actual medical records of the offender. Professor Greenberg indicated that there was no suggestion that the offender suffered from a mental disorder of a nature or degree warranting any Mental Health Act disposal.
15. Amongst other things, Professor Greenberg said this:
 - i. "In my view there is good evidence that Mr Rose displayed a considerable degree of disruptive behaviour when he was a child and he had developed a tendency to blame his behaviour on others and not to take responsibility for his own actions. In my view, as an adult, he has continued to display this attribute. From my interview with him, there is evidence that Mr Rose has lacked concern, regret or remorse about other people's distress, behaved irresponsibly and shown disregard for normal social behaviour, has some difficulty sustaining long-term relationships, has been unable to control his anger, lacked guilt and has not learned from his mistakes, has repeatedly broken the law and blamed others for problems in his life. In my view, these difficulties are likely to amount to a diagnosis of antisocial or dissocial personality disorder ..."
16. A little further on, Professor Greenberg noted the involvement of alcohol in the offending

and also gave an indication which might suggest a lack of true remorse or any empathy so far as Mr Brown is concerned.

17. Professor Greenberg went on to say this:

- i. "He currently reports being very low in mood and sees himself as being severely depressed. He told me, and his legal team, that he had recently tried to hang himself in custody. He said that he often cries ... It was evident that he thinks that he will try to hang himself again if he is awarded a long sentence. In my view, in the absence of seeing any of his civilian or medical records, it appears that he is currently suffering with an adjustment disorder with a disturbance in emotions and conduct ..."

18. Also before the judge were detailed statements from the three victims in the house, two of whom have felt the need to move away because of what the offender did that particular night.

19. Necessarily, the judge was referred to the Definitive Guideline issued by the Sentencing Council relating to Burglary Offences and also to the Definitive Guideline relating to Assaults.

20. This was undoubtedly, and as the judge found, a category 1 matter for the purposes of the Definitive Guideline on Aggravated Burglary, involving, as it did, greater harm and higher culpability.

21. So far as greater harm was concerned, there had here been a degree of vandalism of the property; the victims had been at home on the premises whilst the offender was present; there was at least some physical and psychological injury, albeit perhaps not "significant"; and undoubtedly violence had been used or threatened against the victim -- indeed more than one victim. So far as the factors indicating higher culpability were concerned, there may not have been a significant degree of planning or organisation, but clearly this was a targeted revenge attack, and unquestionably there had been a weapon (in the form of two bottles) present on entry.

22. A possible indication of lower culpability lies in the guideline statement of "a mental disorder or a learning disability, where linked to the commission of the offence" -- though it is noticeable that Professor Greenberg had not specifically linked the background disorders of the offender to the actual offending, where alcohol clearly had played the major part in what he did.

23. By reference to category 1, the starting point under the guideline is 10 years' custody, with a category range of 9 to 13 years' custody.

24. In addition, over and above the matters necessary to be considered for categorisation, it could be said that there were further aggravating features present, in the form of the offender's previous convictions, the fact that the offence was committed at night, and the fact that the offence had caused two people ultimately to leave their homes. There could, of course, be no mitigation by reference to any plea because the trial had been contested; and the major mitigation, in so far as it did not overlap with the categorisation element, lay in the background personality disorders and so on of the offender.

25. When the judge came to sentence on 8 October 2020, he reviewed the background facts. He noted that "by some margin" the offending qualified as greater harm for the purposes of the guideline and further identified the factors that indicated higher culpability.

26. Having referred to the possible indication of lower culpability, in the form of the personality and other disorders of the offender, the judge then shortly said this:
- i. "I therefore form the view that, although this case does come within category 1, it is at the bottom end of the range. Category 1 has a starting point of 10 years, with a range of 9 to 13 years."
27. The judge then went on, having so stated, to identify the various aggravating factors. So far as mitigation is concerned, the judge said that:
- i. "... again, your personality disorder can be taken as a fact of mitigation here where it is not linked to the commission of the offence. In other words, where it comes into the equation because of the difficulties you have in coping with a long prison sentence and so forth."
28. The judge also made a finding of dangerousness. But he decided not to impose an extended sentence, taking the view that the sentence was of a sufficient length not to require the exercise of discretion of imposing an extended sentence.
29. Overall, the judge ended up with a figure of 9 years' imprisonment, he indicating he had also taken into account Covid conditions in prison.
30. These matters seem to have stood. Unfortunately, when he passed sentence the judge expressly stated that the offender would be required to serve *half* his sentence, following which he would be released on licence. That, although not noticed at the time, was incorrect: because, by virtue of the alteration in the position as expressed in the Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020, which applied to this case, the offender would have been required to serve *two-thirds* of his sentence before being eligible for release on licence.
31. That was, shortly after the sentence hearing, noted by counsel then appearing for the prosecution. The matter was raised with the judge that same day. The judge then in effect indicated that the offender had "*a legitimate expectation*" that he would only serve half the sentence indicated, and that factor caused the judge to reduce the sentence on the aggravated burglary count to one of 7 years' imprisonment, with the concurrent sentence of 6 years on the other count. Thus it was that the sentence ended up as a total sentence of 7 years.
32. On behalf of the Solicitor General, Mr Polnay submits that such a sentence was unduly lenient. It went significantly below the bottom of the range specified in the relevant guideline for aggravated burglary and had, he submits, gone beyond the bottom of the range for no adequate or sufficient reason. Indeed, he said that the reason given was an illegitimate reason, in that the judge had wrongly reduced the sentence from 9 years to 7 years because of his view that a legitimate expectation had arisen. But, as Mr Polnay submitted, the general principle is that, when passing a custodial sentence, the sentencing judge ordinarily should have no regard to the potential release date as set by Parliament: see *Burinskas* [2014] 1 WLR 4209. Further, even where a mistake is made by the judge in that regard in his or her initial sentencing remarks then ordinarily the judge should not consider that "*a legitimate expectation*" had arisen whereby the sentence should be

reduced simply to give effect to the mistake that had been made. The correct sentence should then be passed once the error has been exposed, unless there is some rare or exceptional circumstance justifying a contrary course: see the case of Hardy [2013] EWCA Crim 36.

33. Here, there demonstrably was no such rare or exceptional circumstance which could justify a further reduction from the sentence previously announced by the judge. It seems to us, therefore, that Mr Polnay's points are well made.
34. On behalf of the offender, Mr Nicholson has valiantly sought to uphold a sentence of 7 years' imprisonment. He stresses in particular the effect that prison will have on this offender, especially given his various personality and other such disorders. He refers to the suicidal and depressive thoughts that the offender has experienced. Mr Nicholson did try to justify the judge's reduction from 9 years to 7 years; but ultimately, he really was driven to accept that the judge's reasons for reducing the sentence from 9 to 7 years were not valid reasons. Nevertheless, he said, 7 years could not in all the circumstances be styled an unduly lenient sentence.
35. We are in no doubt that a sentence of 7 years' imprisonment in total was an unduly lenient sentence and we are in no doubt that this court should interfere. This was shockingly serious offending. By reference to the guideline, the starting point should have been 10 years. There then were significant aggravating factors on top of that before mitigation came in, including allowance for the impact of the offender's personality and other disorders. We think, in fact, that a sentence of 9 years' imprisonment, as initially imposed by the judge, can be styled as lenient: the offender could well have expected to receive a sentence in double figures. However, this was the trial judge who had had the benefit of the conduct of the trial. He clearly had wished to display a degree of lenience towards this offender, which was a matter for him, and Mr Polnay very fairly accepts that the initial indicated sentence of 9 years could not be categorised as "unduly" lenient even if it was certainly a lenient sentence. We are prepared to agree with that.
36. In all the circumstances, we allow this Reference. The sentence imposed by the judge on count 2 is quashed and is increased to 9 years' imprisonment. The concurrent sentence of 6 years' imprisonment on the other count will stand.
37. We wish to add that, in indicating that the sentence is increased to 9 years, we have very much taken into account, and we think the offender should be commended, for, his excellent conduct recently in prison in coming to the assistance of prison warders as noted in the recent prison report. That is greatly to his credit and is an encouraging sign.

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

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