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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA Crim 522

CASE NO 202002809/A3

Royal Courts of Justice

Strand

London

WC2A 2LL

Wednesday 24 March 2021

LORD JUSTICE DINGEMANS

MR JUSTICE SPENCER

HIS HONOUR JUDGE PATRICK FIELD QC

(Sitting as a Judge of the CACD)

REGINA

V

HUSNAIN MIRZA

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MR J TURNER appeared on behalf of the Appellant.

J U D G M E N T

1. MR JUSTICE SPENCER: This is an appeal against sentence brought by leave of the single judge on two narrow points.
2. The appellant (who is now 18 years of age) pleaded guilty on 17 August 2020 in the Crown Court at Preston to an offence of wounding with intent, contrary to section 18 of the Offences Against the Person Act 1861 (count 2). He had originally been charged with attempted murder (count 1). On the same date he changed his plea to guilty on count 3, assault occasioning actual bodily harm, contrary to section 47 of the Act, in respect of a separate victim. The case was adjourned for sentence.
3. On 4 November 2020 the appellant was sentenced by Her Honour Judge Dodd to a term of 6 years 8 months' detention for the offence of wounding and, at that stage, 3 months' detention concurrent for the assault occasioning actual bodily harm. On 30 November 2020 the case was re-listed under the slip rule for adjustment of the sentence. The judge clarified that the term of 6 years 8 months' detention had been imposed under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000. There could not, however, be a sentence under that provision for the assault occasioning actual bodily harm because the maximum sentence for that offence is 5 years whereas section 91 applies only where the maximum sentence for the offence is at least 14 years. In the circumstances the judge varied the sentence for the assault occasioning actual bodily harm by imposing no separate penalty.
4. The two issues raised in the grounds of appeal are first, whether the judge gave sufficient credit for the appellant's guilty plea, and second, whether she made sufficient allowance for the impact of serving a custodial sentence in the difficult conditions created by the Covid-19 pandemic, particularly in view of the appellant's youth.
5. In view of the narrowness of the issues the facts can be stated very briefly. Shortly before 11pm on 30 October 2019 a fight took place between two groups of youths on Ullswater Close, Blackburn. There had been incidents earlier that evening which had led to tension building up between the two groups. A meeting had been arranged to sort out their differences which had resulted in a brief scuffle with no weapons involved and nobody was hurt. This later confrontation was very different.
6. The victim of the stabbing in count 2 was a young man called Mohammed Ellahi. His group were sitting in a car which was parked in Ullswater Close when another car pulled up. The appellant and his group were in this second car. They jumped out and surrounded the other vehicle. It seems that the appellant attacked Ellahi from behind; he stabbed him more than once. The appellant was heard to say, "I'm going to kill you, motherfucker". Another youth intervened and managed to get Ellahi away. He collapsed at a nearby bus stop. He believed he was going to die.
7. The appellant fled down an alleyway. As he did so he stabbed or slashed out at another young man from the other group, Aseeb Ali, causing a large but, fortunately, superficial wound to his side. That was the assault in count 3.
8. When the police arrived they found Ellahi bleeding profusely and foaming from the mouth. It was probably only the swift intervention of the police and the emergency services that saved his life. He was in hospital for 23 days. His injuries included a punctured lung, a laceration to the liver and a laceration to the diaphragm. Remarkably he has made virtually a full recovery. The other victim, Ali, had a 10-centimetre superficial linear wound to the abdomen which required no further treatment.
9. The police went to the appellant's home address that night but were unable to find him.

- Next morning the appellant handed himself in at the police station. In a prepared statement, he denied knowing the victim of the stabbing and denied assaulting him. He gave a false account of his movements that night, saying that he had been out with a friend and had stumbled across the incident but had played no part in any violence.
10. The section 18 wounding was plainly a category 1 offence under the Sentencing Council Guideline, with a starting point for an adult of 12 years and a range of up to 16 years. The appellant had no previous convictions for violence. There was a pre-sentence report in which the appellant had expressed remorse but minimised his actions. The timing and location of the offence were an aggravating feature, as was the fact that this was a stabbing in the context of group disorder, in which the appellant had deliberately armed himself with a knife, which he took to the scene and used to inflict injury on two people.
 11. The judge said in terms in her sentencing remarks that she bore in mind the difficult conditions in prison at the moment as a result of the pandemic. She considered that had the appellant been an adult the sentence would have been 12 years after trial. She concluded that the appropriate level of credit for the guilty plea was 15% or a little more, which would reduce the starting point for an adult to 10 years. The appellant was just short of his 17th birthday at the time of the offence. The judge made a further reduction of one-third on account of the appellant's youth, resulting in the sentence of 6 years 8 months.
 12. On count 3, the assault occasioning actual bodily harm on the other victim, the judge said that the appropriate sentence for an adult would have been 6 months after trial, but allowing for the appellant's age and with credit for his plea there would be a concurrent sentence of 3 months. As we have already explained that sentence was subsequently varied to no separate penalty.
 13. In order to understand the first ground of appeal (inadequate credit for the guilty plea to section 18), it is necessary to say a little more about the history of the case. When the appellant appeared in the Magistrates' Court on 2 November 2019, he was charged with attempted murder and the section 47 assault. The Better Case Management form confirms that he indicated pleas of not guilty. We note that the form also invited a defendant to indicate whether any plea to an alternative offence was offered – here it was not. The form indicated that the appellant denied possession of a knife; he admitted presence at the scene of the two offences but denied both allegations.
 14. The appellant was sent for trial at the Crown Court. The indictment contained the same two counts, attempted murder and assault occasioning actual bodily harm on the second victim. At the plea and trial preparation hearing (PTPH) on 2 December the defendant entered not guilty pleas to both counts. There was no indication that he might be prepared to plead guilty to section 18 wounding as an alternative to attempted murder. The trial was listed for 20 April 2020. However, in view of the impact of the Covid-19 pandemic the trial was subsequently adjourned to 26 August 2020.
 15. On 13 July 2020 legal aid was transferred to different solicitors and Mr Turner, who has appeared before us today, came into the case on behalf of the appellant. The appellant was produced at court on 13 August, and again on 17 August, in order to have a conference with counsel. On 17 August the judge gave leave to amend the indictment to add the count of wounding with intent (count 2). The appellant thereupon pleaded guilty to that count and also changed his plea to guilty on count 3, assault occasioning actual bodily harm.

16. The principal ground of appeal is that the judge was wrong to allow only 15% credit for the guilty plea to the section 18 wounding. Mr Turner's argument is that the appellant entered his plea of guilty to that count as soon as it was added to the indictment and he should therefore have received credit of one-third because he had pleaded to the offence at the earliest opportunity. Alternatively, it is submitted that he should have received substantially greater credit than the 15%, which is all the judge allowed.
17. We have considered the matter carefully but we are unable to accept that submission. It might have had some force had there ever been a formal concession, prior to the date of plea, that the appellant admitted unlawfully causing the wound. However, he plainly did not. We have already referred to the contrary indication given in the Magistrates' Court but it went further than that because in the defence statement, dated 3 February 2020 and served several weeks after the PTPH in the Crown Court, the appellant said this:

"The defendant denies the allegations in their entirety. He did not stab anybody and furthermore at no stage did he have possession of a knife or any other weapon."

18. It follows that only much later, on 17 August, was there a complete change of stance on the part of the appellant in finally accepting (for the first time) responsibility for this very serious stabbing. That was only days before he was due to stand trial on 26 August. In those circumstances, the issue is whether the judge was entitled to allow only 15% credit for plea.
19. We observe first, that in fact the credit the judge allowed was nearly 17%. In accordance with the Sentencing Council Guideline the reduction of one-third from the adult sentence of 12 years should have been made before the reduction for plea, not after. Twelve years less one-third reduced the appellant's sentence to 8 years (96 months). The sentence the appellant received after credit for plea was 6 years 8 months (80 months), a reduction 16.66%.
20. The situation of pleading guilty at a late stage to a new count added to the indictment which is not in law an alternative to a count already on the indictment is not uncommon. It will often have been preceded by informal discussions. Each case will turn on its own facts but the proper approach was considered by this Court in R v West [2019] EWCA Crim 497; [2019] 2 Cr App R(S) 27. There the defendant was charged with attempted robbery. He pleaded not guilty at the PTPH. On the day of trial the indictment was amended, for the first time, to add as a second count an allegation of assault occasioning actual bodily harm to which the defendant pleaded guilty. The judge considered that after a trial the sentence would have been 18 months' custody. He reduced this to 16 months, taking into account the timing of the plea of guilty. That approximated to a reduction of 10% which would be the appropriate level of credit for a plea on the day of trial.
21. It was argued on appeal that the plea of guilty was entered at the first opportunity as the indictment was only amended on the day of trial. At the PTPH there had been an informal discussion between counsel as to whether the prosecution would accept an alternative plea to assault but nothing had been said in open court.
22. It was held on appeal by this Court that an informal discussion of that kind was insufficient to trigger an accused's entitlement to any discount for an earlier indication of

a plea of guilty. Giving the judgment of the Court, Jeremy Baker J said at paragraph 12:

"It seems to us that in order to attract such a discount, the court will normally have to be notified, usually in open court and with the applicant present, that an accused is willing to plead to an alternative offence. This did not happen in this case and we are satisfied that the informal discussion between counsel was no more than that and was not a sufficient indication of the applicant's own preparedness to enter a plea of guilty to the offence of assault."

23. We observe that the relevance of the case of West to the facts of the present case is that, as in the present case, in West the count which was added to the indictment for the first time on the day of trial was an allegation which was not an alternative to the count that was on the indictment already. It is exactly the same situation. The appellant's position in the present case is no stronger (and if anything weaker) than the defendant's position was in West, in that there is no suggestion that prior to 17 August 2020 there had been any indication from the appellant or his solicitors that he would plead guilty to section 18 as an alternative to attempted murder. We note that on the Digital Case System (DCS) there was an exchange of "widely shared comments" between counsel on 30 March 2020, in which defence counsel said that the case would not resolve as an attempted murder but "if the Crown want to indicate that a section 18 is acceptable then we can always seek to take instructions". However, on 30 March the appellant's solicitors uploaded a bail application in which it was asserted that the appellant might be acquitted altogether. The Recorder of Preston granted bail at a hearing on 31 March, with a condition of residence at a specified address but that address proved unsuitable and the appellant remained in custody.
24. We note that the draft amended indictment including the section 18 count was uploaded to the DCS on 28 July 2020. We bear in mind the change of solicitors and counsel in July 2020 and the difficulty of arranging a conference with the appellant in custody. We also note that it took two conferences at court to obtain the appellant's agreement to plead guilty to the section 18 offence; indeed he did so only after an indication from the judge that the sentence for an adult before credit for a plea would not exceed 12 years.
25. In his grounds of appeal and in his oral submissions this morning Mr Turner has referred to a more recent decision of this Court in the case of R v Shuli & Toska [2020] EWCA Crim 181. Mr Turner submits that that case supports his submission that here credit should have been a full one-third. At the invitation of the Court, Mr Turner expressly confirmed that it was his submission that this appellant should have received full credit of one-third for his late guilty plea entered only a few days before trial following several months of complete denials. It seems to us on closer examination that the case of Shuli & Toska turned on a different point altogether, namely whether the judge had been entitled to withhold full credit of one-third in circumstances where the defendant had indicated unequivocally in the Magistrates' Court, as recorded on the Better Case Management form, that he would plead guilty. It was held by this Court that there was no justification in the circumstances for withholding full credit and that extended also to a further count on the indictment which was added at the PTPH (a similar allegation of conspiracy, but in relation to a different drug). The passage in the judgment on which

- Mr Turner relies (at paragraph 14) does no more than state what the Sentencing Guideline sets out: that full credit of one-third should be allowed where the guilty plea is indicated at the first stage of the proceedings, which will normally be the first hearing at which a plea or indication of plea is sought and recorded by the court. As the rest of the judgment makes clear, that was quoted in paragraph 14 as the foundation for the court's conclusion that the judge had fallen into error by not allowing full credit when guilty pleas had been indicated at the very first stage in the Magistrates' Court.
26. In the present case, having disputed the prosecution case until days before trial, the appellant could never have expected to receive full credit of one-third, or even the credit he would have received for pleading guilty at the PTPH (25%). The very most he could ever have expected was somewhere up to 20%. In fact, as we have explained, he received nearly 17%. There was no error of principle by the judge and the credit she allowed was within the range she was entitled in her discretion to allow in all the circumstances of the case. Accordingly, we reject the first ground of appeal.
27. The second ground of appeal is that the judge failed to make sufficient allowance for the impact of the pandemic in the light of guidance in the case of R v Manning [2020] EWCA Crim 592. The judge said in terms, as Mr Turner concedes, that she did take into account the impact of the appellant having to serve his sentence in the difficult conditions resulting from the pandemic. She was not obliged to specify the extent of the reduction and we see no reason to think that she did not make appropriate allowance for that additional feature of the mitigation. There is nothing, in our view, in this second ground either.
28. We observe that the appellant was perhaps fortunate that the judge did not apparently increase the sentence for the section 18 wounding to reflect the additional criminality of the assault in count 3 committed against a separate victim who was slashed with a knife and could have suffered far more serious injury. The judge would certainly have been entitled to do so. That, in our judgment, offsets any conceivable complaint that insufficient allowance was made for the impact of adverse prison conditions or the level of credit for plea.
29. Accordingly, we are satisfied that this sentence was neither wrong in principle nor manifestly excessive and the appeal must be dismissed.

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

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