IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA Crim 695

CASE NO 202002590/A3

Royal Courts of Justice

Strand

London

WC2A 2LL

Friday 30 April 2021

LORD JUSTICE BEAN

MRS JUSTICE FARBEY DBE

RECORDER OF NEWCASTLE

(HIS HONOUR JUDGE SLOAN QC)

(Sitting as a Judge of the CACD)

REGINA

V

JAMES CONNOR MALCOLM ROWLEY

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MR K HEGARTY QC & MR H SKUDRA appeared on behalf of the Applicant.

J U D G M E N T

MRS JUSTICE FARBEY:

1. On 21 September 2020 in the Crown Court at Warwick before HHJ De Bertodano, the applicant (then aged 21) was sentenced to 9 years' detention in a young offender institution albeit erroneously described as a sentence of imprisonment in the court record. This overall sentence had the following components: on one count of dangerous driving, 8 months; on one count of manslaughter, 9 years; on two summary road traffic offences, committed to the Crown Court for sentence, no separate penalty. All sentences were ordered to run concurrently with each other and followed guilty pleas.

2. On 7 October 2020 the case was re-listed before the judge, under section 155 of the Powers of Criminal Courts (Sentencing) Act 2000, for reconsideration of sentence. In the absence of the applicant (who had refused to attend) the judge refused to vary her sentence which remained as imposed on 21 September. The reason for re-listing concerned the judge's explanation of the length of the custodial part of the sentence but this is no longer an issue so we say no more about it.

3. The applicant renews his application for leave to appeal against sentence following refusal by the single judge.

<u>The Facts</u>

4. On 17 March 2020 the applicant drove a motorbike to the Jubilee Crescent area of Coventry. He did not have a licence to drive the bike and did not have insurance. On the way to Jubilee Crescent he was driving aggressively and dangerously. He was seen pulling away from two children very quickly, with the front of the bike rising off the ground. He had an argument with another driver and he passed through a red light at a junction. Arriving in Jubilee Crescent at around 6.35 in the evening he rode onto a grassed area in the centre. Joe Higgins was out that night with his cousin, Paul, celebrating St Patrick's Day. It was obvious that they had been celebrating something as Joe Higgins (whom we shall call "Joe" to distinguish him from his cousin) was wearing a green fancy dress topcoat and a hat. They had been to various pubs before arriving at the Jubilee Crescent area. They saw the applicant riding his bike on the grassed area with no lights and no registration plate. Members of the public in the area noticed the applicant. He nearly drove into one man's vehicle and others saw him driving up and down at speed on the green, “revving” his engine hard every time he tried to turn. He performed multiple doughnut manoeuvres - turning the bike round and round.

5. Joe, who saw what the applicant was doing, went to have a polite word with him. The

applicant stopped the bike but then drove off again, and then stopped and drove off - provoking Joe into following the bike. The applicant then got off the bike and punched Joe, who fell to the ground. Paul Higgins saw Joe fall. The applicant rode off taking Joe's hat away.

6. One witness said he saw the deliberate attempts to provoke Joe and Paul Higgins. The applicant had opened his throttle and sprayed them with mud three or four times. The witness saw the applicant get off his bike as Joe approached. He described the applicant as bouncing around like a boxer on his toes. By contrast, Joe had his hands out in a passive gesture. The applicant brought his hands up with his fists clenched and threw a punch without any warning. An 11-year-old witness described the applicant doing "mad moons" on the grass and said that Joe had told the applicant off in a nice way. The applicant had accused Joe of being jealous of his riding before revving his engine and saying to Joe before he punched him: "Do you want to get battered?" This account was confirmed by another witness, aged 12, who recollected that the applicant said: "Do you want to fight?" and Joe said "no" repeatedly. A further witness recalled the applicant laughing and running to his bike after Joe fell, turning to have a last look before leaving the scene. One man who saw the punch described it as being the most vicious he had ever seen.

7. The common thread of all the eyewitness evidence was that the applicant was driving his motorbike in a deliberately provocative manner. Joe had every reason to be concerned about his behaviour and tried to speak to him in an appropriate way. The prosecution case was that the applicant punched Joe hard and deliberately, saw him fall, must have known he was seriously injured, and then took his hat away as a trophy.

8. After the ambulance service arrived Joe was taken to hospital where he sadly died the next day. He had suffered a heart attack after he had been punched and there was a lack of oxygen to the brain. The likely cause of death was concussion, caused by a blow to the head, whether from the punch or from falling to the ground which in turn caused lethal post-concussive apnoea brought on by the effects of intoxication.

9. The applicant spent a couple of nights with a female friend before surrendering to the police after receiving a message from a friend to the effect of "you killed him" or "he's dead". He claimed that his handing himself in was so they could hear his side of the sorry. In interview he suggested that Joe was being confrontational and aggressive and that the punch was thrown in self-defence.

Judge's Sentencing Remarks

10. In sentencing the applicant the judge described, in moving terms, the effects of Joe's death on his family including his partner and his twin brother whose victim personal statements we have read. Joe's parents were devastated. Paul Higgins was wracked with guilt. The judge emphasised that the applicant was behaving in an aggressive manner well before he came across Joe. He was riding dangerously. He had a confrontation with another driver. He behaved in a way that deliberately provoked people. When Joe intervened he made it clear he wanted a fight. He made repeated threats. He then got off his bike specifically in order to assault Joe. The punch was sufficiently hard to bring a 17 stone man to the ground, a man who was acting as peacemaker, had his hands down and was unable to react to the blow. The blow was aimed at Joe's head (the most vulnerable part of his body) and the applicant knew from his previous criminal history the serious consequences that a blow to the head could cause.

11. Applying the Sentencing Guideline for Unlawful Act Manslaughter the judge rejected the defence submission that this was a case of medium culpability (category C) which has a starting point of 6 years' custody and a category range of 3 to 9 years' custody and found that it was a clear case of high culpability (category B) which has a starting point of 12 years' custody and a category range of 8 to 16 years. That was because death was caused in the course of an unlawful act, which involved an intention by the offender to cause harm just short of grievous bodily harm; and also because death was caused in the course of an unlawful act which carried a high risk of death or grievous bodily harm which was or ought to have been obvious to the offender. The judge considered that a person who punches someone to the head so hard that they fall to the ground is taking such a risk.

12. The judge took into consideration the applicant's personal circumstances. He was aged 21. He had received a caution for a violent offence when he was 14. When he was 15 he received a referral order for an offence of common assault. It was significant that that offence had involved him punching someone to the head which had caused the victim to lose consciousness and be hospitalised.

13. Since he was 15, the applicant had stayed out of trouble. He had been working. He planned to set up a business with his brother. He had two children (aged 1 and 5) having become a father at a very young age. The judge had read the letter from the applicant's partner, the mother of the younger child. She spoke of another side to his character, of his devotion to his daughter and how much they missed him while he was in prison. His actions would have very serious consequences on his own family as well as on Joe's family.

14. The judge accepted, as defence counsel had said, that he was sorry although remorse

would have been more strongly evidenced if he had not initially tried to put the blame on Joe by telling the police, untruthfully, that Joe was being aggressive and that he (the applicant) was acting in lawful self-defence. The judge noted the applicant's medical records which said that as a child he often misinterpreted the actions of others and their facial expressions but there was no formal diagnosis of autism and no medical reports had been presented with regard to his mental state.

15. The judge considered the aggravating factors. She took account of the fact that the offence for which the applicant was cautioned happened some time ago. The offence for which he received the referral order happened when he was a young teenager but that offending was relevant because it had involved punching someone to the head who passed out as a result. The present offence was further aggravated by the fact that it happened in a public place, where there were many members of the public including children, some of whom had had to make witness statements in the case. The applicant had fled the scene making no attempt to obtain assistance.

16. The judge considered the Overarching Guideline on Reduction in Sentence for a Guilty Plea. The defence submitted that there should be full credit of one-third because it would be unreasonable to have expected the applicant to enter a guilty plea to homicide before there was evidence of the cause of death. The judge held that that argument would have more force if the applicant had not raised the issue of self-defence at interview and had not indicated to the court in April 2020 that a plea to manslaughter was unlikely. She considered that the appropriate credit for plea was 25%. The judge considered dangerousness but concluded that the risk that the applicant posed was not significant and that a determinate sentence would be imposed.

17. The judge referred to the starting point and category range for a category B offence. Given the aggravating factors the judge could not reduce the sentence below the starting point. The sentence after trial would have been 12 years' imprisonment. After 25% credit for the guilty plea the sentence was 9 years for the manslaughter. The sentence for the dangerous driving would have been 12 months after trial; after full credit for plea, the sentence was 8 months which was to be concurrent, having regard to totality.

Grounds of Appeal

18. On behalf of the applicant Mr Kevin Hegarty QC, who appears with Mr Henry Skudra, submits that the judge failed to apply the sentencing guideline properly and ought to have treated the offence as a category C case. He says that the unlawful act was a single punch rather than a blow with a weapon which in fact did not involve an intention to cause harm falling just short of grievous bodily harm. The punch left no physical mark. Joe had a

substantial blood alcohol reading - over three times the drink drive limit. As a consequence, it was relatively easy to knock him down and the alcohol had the effect of augmenting the effects of concussive brain injury. The agreed medical evidence was that Joe's concussion occurred either as a result of the blow or from his head hitting the ground. Mr Hegarty submits that it is far more likely to have been the latter than the former. He submits that it is clear from the sentencing remarks that the judge placed too great an emphasis on the preceding driving of the applicant on a motorbike leading up to the confrontation. That did not involve Joe until the very end. Furthermore, it is submitted that it is fanciful, particularly in the absence of any evidence, to suggest that the applicant's strike to Joe was so hard as to inflict harm, falling just short of grievous bodily harm, yet it did not leave a mark. For these reasons Mr Hegarty submits that the judge erred in finding that this is a clear example of a category B case.

19. We disagree. The applicant went out that night, riding his motorbike in a deliberately provocative way. When Joe understandably reacted to his unsafe conduct he did not stop. After he had got off the bike he made threats of violence and was seen to be dancing like a boxer before punching Joe to the head. Even at his age it ought to have been obvious to the applicant that his unlawful act carried a high risk of death or grievous bodily harm. Having seen Joe fall to the ground, he stole his hat and performed a celebratory dance and left. In our judgment, the judge was entitled to conclude that this was a vicious and aggressive course of conduct intended to cause harm, falling just short of grievous bodily harm. It is nothing to the point that the punch left no mark.

20. The medical evidence was to the effect that alcohol would have augmented the effects of the concussive brain injury from which Joe died. The medical evidence shows that apnoea is not usually life-threatening; but Joe was doing nothing wrong, nothing unusual and nothing that the applicant could not have foreseen.

21. Mr Hegarty submits that the judge failed to take proper account of the applicant's personal mitigation and gave too much weight to aggravating factors. In our judgment, the judge gave careful consideration to mitigating factors, particularly the applicant's age and family circumstances. No proper criticism of the judge can be made in this regard. Nor do we accept that she can be criticised for concluding that the sentence should not be reduced below the category B starting point.

22. Mr Hegarty submits that the judge relied inappropriately on other cases (R v Coyle [2020] EWCA Crim 484; R v Taiwo [2020] EWCA Crim 902) when her task was to apply the sentencing guideline. While the judge mentioned these cases as examples of cases where manslaughter by one punch was treated as a category B offence, it is plain that she considered the facts of the present case and applied the Sentencing Guideline scrupulously. It would not be a fair reading of her sentencing remarks to say that she was

unduly influenced by other cases.

23. Finally, it is submitted that the judge ought to have afforded the applicant full credit of one-third for his guilty plea. The respondent's notice points out that in interview the applicant said that he had acted in lawful self-defence. He did not resile from that position in the Magistrates' Court. At a hearing in April 2020 it was said on his behalf that a guilty plea to manslaughter was unlikely. It was only after service of the medical evidence that the applicant, for the first time, accepted that he had acted unlawfully. The level of credit for a plea was in these circumstances appropriate. In our judgment, 25% credit took generous account of any difficulties faced in accessing legal advice on plea during the pandemic. The position would have been different if causation had been the only matter in issue.

24. In our judgment, for the reasons given by the respondent the 25% discount is unimpeachable. For these reasons the sentence imposed by the judge was neither arguably excessive nor wrong in principle. This renewed application is dismissed.