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IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202202997/A3

NCN [2022] EWCA Crim 1820



Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 17 November 2022

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
LORD JUSTICE HOLROYDE

MRS JUSTICE FOSTER DBE

THE RECORDER OF LIVERPOOL
HIS HONOUR JUDGE MENARY KC
(Sitting as a Judge of the CACD)

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

REX

v

KYLE BUCKLEY

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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 B HOLT appeared on behalf of the Attorney General
MR C STOCKWELL KC appeared on behalf of the Offender

J U D G M E N T

1. THE VICE-PRESIDENT: Kyle Buckley, to whom (meaning no disrespect) we shall refer simply by his surname, pleaded guilty to four offences: unauthorised possession in prison of a knife or offensive weapon, contrary to section 40CA(1) of the Prison Act 1952 (count 3); assault on an emergency worker, contrary to section 39 of the Criminal Justice Act 1988 and section 1 of the Assaults on Emergency Workers (Offences) Act 2018 (count 5); attempting to cause grievous bodily harm with intent, contrary to section 1(1) of the Criminal Attempts Act 1981 (count 6); and affray, contrary to section 3(1) of the Public Order Act 1986 (count 7). He was sentenced to concurrent terms of detention in a young offender institution totalling 18 months, that total sentence to be served concurrently with a sentence which he was already serving. His Majesty's Attorney General believes the sentencing to be unduly lenient. Application is accordingly made, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer the sentencing to this court so that it may be reviewed.
2. Buckley has even now only just attained the age of 19. Sadly, he has a serious criminal record. On 17 February 2020, aged 16, he committed offences of robbery and possessing a bladed article. Two days later he committed an offence of murder. On 24 August 2020, still aged 16, he was sentenced for murder to detention for life with a minimum term of 13 years. No separate penalty was imposed for the offences committed on 17 February.
3. At the time of the instant offences Buckley was serving his life sentence at Her Majesty's Young Offender Institution Wetherby.
4. On 22 July 2021, aged 17 years and eight months, he committed the offences charged in counts 3 and 7. He was in the visits area when a fight broke out between two other inmates. He immediately ran to them holding an improvised weapon, which had a point

formed from a protruding screw. He lunged at the other inmates. Two inmates received minor wounds but neither of them wished to cooperate with an investigation.

5. On 30 August 2021, aged 17 years and nine months, he committed the offences charged in counts 4 and 5. He came out of his cell holding a kettle of hot water, ran past one prison officer and for several yards along the landing and threw the contents over another officer, Mr Greaves. Fortunately Mr Greaves turned away just in time, and the hot water landed on his back rather than his face. Buckley was heard to say words to the effect: "Think you can violate me? I'm HMP. I don't give a fuck." We take that to refer to his status as a life prisoner.
6. Other officers restrained Buckley and walked him to a different area. As Buckley was being moved he caught the eye of a female officer, Miss Jeffrey and deliberately spat in her face.
7. Mr Greaves suffered blistering over a large area of his back. He was able to return to work within a short time, but in a victim personal statement written nearly six months later he described his continuing feelings of anxiety as he goes about his work. Miss Jeffrey was not injured but was understandably distressed by what she described as a disgusting act, especially in a time of Covid.
8. When interviewed about all these matters in December 2021, Buckley admitted what he had done but said he had intended only to scare Mr Greaves and had not meant the water to land only him. By his subsequent plea, of course, he admitted that he intended to cause grievous bodily harm.
9. At the magistrates' court, Buckley indicated his guilt of the offences charged in counts 3 and 5. He pleaded guilty to those offences when he appeared before the Crown Court at Leeds. He pleaded not guilty to the other charges which he faced at that time. A trial

date in August 2022 was vacated and a new date was fixed for 12 September 2022. On that date the indictment was amended and Buckley pleaded guilty to counts 6 and 7. The judge proceeded to sentence. No pre-sentence report had been requested or directed, but the judge had an intermediary's report about Buckley which had been prepared in relation to the murder charge. The judge referred to the fact that Buckley was serving a life sentence and said: "All that is going to happen is a concurrent sentence." He agreed with Mr Stockwell KC, then as now representing Buckley, that it seemed somewhat artificial to adjourn for reports.

10. Although Buckley was 18 when convicted, he had been 17 when he committed the offences. The maximum sentence for the offence charged in count 6 is life imprisonment, and even as a 17-year-old Buckley would have been eligible for a sentence of long-term detention under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000, now section 250 of the Sentencing Code. This was not therefore a case in which the maximum sentence available for an adult offender exceeded the maximum sentence available for the offender at the time he committed the offences.
11. The judge indicated that for all except count 6 he felt bound to pass sentences of a length which would have been appropriate for detention and training orders. He said that no one would suggest that the count 6 offence would not have come within the provisions of section 91.
12. In his sentencing remarks the judge summarised the circumstances of the offences. He identified the mitigating factors: Buckley was still very young, the intermediary's report showed that he had faced difficulties in his life and was to some extent vulnerable, the incidents had been very short-lived and Buckley had expressed remorse. The judge considered the sentences which would have been appropriate for an adult and halved

them to reflect Buckley's youth. Having regard to the timing of the guilty pleas he gave credit of one-third on counts 3 and 7 and one-quarter on count 6. He concluded that the offence charged in count 5 did not pass the custody threshold.

13. In those circumstances the judge imposed the following sentences of detention in a young offender institution: count 3, four months; count 5, no separate penalty; count 6, 18 months; count 7, six months. He ordered that all those sentences should run concurrently, thus making the total term of 18 months' detention in a young offender institution to which we have referred.
14. As to the existing sentence, the judge in his sentencing remarks said that, bearing in mind all the features of the case which he had identified:

- i. "... it seems to me that the sentence I impose upon you should be concurrent to the sentence you are currently serving. Ordinarily, somebody like you would expect a determinate sentence to be consecutive, thus extending the period of time before you can apply for parole. But ... the determinate period of your life sentence was 13 years, imposed upon you when you were a 16-year-old. These things happened not that long within that sentence after you had been taken into custody, and it seems to me that looking at totality as a whole it would be wrong, given your age at the time of this and your age at the time of your sentence, to make these matters consecutive. I do bear in mind that the very existence of them, obviously, will be something that the parole board is bound to take into account when they consider at what stage you should be released."

15. On behalf of the Solicitor General, Mr Holt submits that the judge fell into error in a number of respects and that the sentencing was unduly lenient. Mr Holt makes the following three principal submissions.

16. First, the judge should have considered whether Buckley was a dangerous offender. He should have obtained a report for that purpose and should have considered imposing an

extended sentence. If he had decided not to impose that type of sentence, he was required to give his reasons.

17. Secondly, having regard to the circumstances of the offences and the aggravating features, each of the individual sentences was lenient and, taken together, they were unduly so. It was a particular error to impose no separate penalty for spitting at an emergency worker.
18. Thirdly, the judge was wrong to order the sentences to run concurrently with the life sentence. By doing so he failed to impose appropriate punishment for the offending and in effect delegated his function for the Parole Board. The failure to impose a consecutive sentence was likely to erode public confidence in the sentencing system.
19. In his submissions in response, Mr Stockwell KC submits that an extended sentence was unnecessary given that Buckley was already serving a life sentence; that the sentences imposed were appropriate to the circumstances of the offending, in particular having regard to Buckley's youth; and that the judge was right to conclude that it would not have been just and proportionate to impose a consecutive sentence and so to increase the minimum term on such a young offender.
20. We are very grateful to both counsel for their succinct, focused and very helpful submissions. As was indicated in the course of the hearing, the court has been provided with two additional reports from the young offender institution where Buckley is currently held. They do not affect our decision.
21. We accept that, in accordance with the relevant statutory provisions, the judge should have spelled out his approach to the issue of dangerousness more fully than he did. We reject, however, the submission that he should have imposed an extended sentence. Given Buckley's young age; the fact that he will be in custody for at least the remainder

of his minimum term, possibly longer; and the fact that when released he will be subject to licence conditions for the rest of his life, such a sentence was clearly not necessary to protect the public, and not appropriate.

22. The real issues, in our view, are as to the appropriate total length of the sentence for these offences and as to whether that total term should have been consecutive to the minimum term under the life sentence. Those issues are interlinked, because they are different aspects of the difficult decisions which the judge had to make about totality and about what would constitute just and proportionate punishment for these offences in the context of the existing sentence.
23. The Sentencing Council's Totality Guideline makes clear that where consecutive sentences are to be passed, the court must consider if the aggregate length is just and proportionate. If it is not, one way of achieving a just and proportionate total may be to reduce the length of one or more of the sentences.
24. We accept the submissions that each of the individual sentences was lenient and that the offence of spitting at an emergency worker merited at least a short concurrent custodial term. We do not think that the judge made any other error of principle in relation to his categorisation of the offences under the relevant guidelines, nor do we think he is to be criticised for making all the sentences for the present offences concurrent with one another. Provided that the total sentence properly reflected the overall seriousness, its structure was of less importance.
25. The judge did however make generous allowance for the mitigating features. Moreover, in reducing the sentences to make allowance for youth and thereby to recognise the lesser culpability of a young offender, he made a more substantial reduction than would normally be expected in the case of a 17-year-old. Had it not been for the existing life

sentence, we would have seen force in Mr Holt's submission that the total custodial term was unduly lenient for these offences. As we have said, however, our focus must be on the application of the totality principle.

26. It was open to the judge to order that the total term, however structured, should run consecutive to the life sentence. The effect of such an order is that the determinate sentence would commence on the expiration of the minimum term of the life sentence and the offender would be eligible to apply for release on parole after he had served the relevant part - in this case half - of the determinate sentence. We do not agree with the suggestion that the judge was in effect abdicating his responsibility to impose appropriate punishment for these offences. Rather, it seems to us clear that he reached the conclusion that it was appropriate in all the circumstances of the case to order that these sentences should run concurrently with the life sentence. His reasons for taking that course focused on Buckley's youth and immaturity and on the practical effect of the life sentence.
27. We too give considerable weight to those aspects of the case. We have however come to the conclusion that in this difficult sentencing process the judge failed to impose a just and proportionate total sentence. With respect to him, he failed sufficiently to reflect the fact that these were serious offences, made all the more serious by being committed in a penal establishment and by involving attacks on prison officers. They were committed in two separate incidents several weeks apart. The attack on Mr Greaves in the second incident was particularly serious, being a deliberate act done with intent to cause grievous bodily harm. Young though Buckley is, and reluctant though we are to add to what is already a heavy sentence for him, we are driven to the conclusion that it was necessary for the judge to impose a sentence which ran consecutive to the life sentence. Buckley's youth and the mitigating features identified by the judge make it possible to keep that

additional term comparatively short, but we do not think he can escape some additional punishment.

28. In our judgment, and being as favourable as we can to Buckley, just and proportionate punishment can be achieved by ordering that the total term of 18 months reached by the judge should run consecutively to the life sentence.
29. We therefore grant leave to refer. We quash the sentences imposed below. We substitute for them sentences of four months' detention on count 3, one month's detention on count 5, 18 months' detention on count 6 and six months' detention on count 7. We order that those sentences will run concurrently with one another,
30. but that the total term of 18 months must run consecutive to the life sentence. The effect of our decision from Buckley's point of view is that when he has completed his minimum term, he will have to serve the appropriate part of the 18 month sentence before being eligible for consideration for release on parole. As the law presently stands the appropriate part will be one-half, namely nine months.

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

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