Neutral Citation No. [2023] EWCA Crim 1086

IN THE COURT OF APPEAL
CRIMINAL DIVISION
CASE NO 202302117/A5

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 4 August 2023

Before:

LORD JUSTICE DINGEMANS

MR JUSTICE GOOSE

MRS JUSTICE FARBEY

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

REX
V

GEORGIA NICHOLSON

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MS S GATES appeared on behalf of the Attorney General.
MR P BEARDWELL appeared on behalf of the Offender.

J U D G M E N T

LORD JUSTICE DINGEMANS:

Introduction

1. This is the hearing of an application by His Majesty's Solicitor General, for leave to refer a sentence to this Court which the Solicitor General considers to be unduly lenient. We grant leave.
2. The respondent, Georgia Nicholson, who was born on 7 December 2000, and is now aged 22, was of previous good character. On 13 February 2023, in the Crown Court at Birmingham, after a Goodyear indication had been given, Ms Nicholson pleaded guilty to an offence of wounding with intent, contrary to section 18 of the Offences Against the Person Act 1861. The offence had occurred on 15 December 2018, at a time when Ms Nicholson was aged 18 years and 8 days. On 30 May 2023, in the Crown Court at Warwick, Ms Nicholson was sentenced to 24 months' custody suspended for 2 years, with 10 days rehabilitation activity requirement. She was also ordered to pay compensation to the victim of the offending of £4,000.
3. It is submitted on behalf of the Solicitor General that the judge passed a sentence so far outside the Sentencing Guidelines as to be unjustifiable. This was part evidenced by the fact that the judge had indicated that she wanted to pass a 6-year suspended sentence, when it is well known that a sentence of only 2 years can be suspended, and that the judge had failed to give proper weight to the effect that the attack had on the victim, Mr Afaq Iftikhar, which had left him blinded in one eye. The judge awarded credit of 25 per cent for a guilty plea when the plea was only given on the day of trial, after the witnesses had attended.
4. It is submitted on Ms Nicholson’s behalf that the sentence was lenient, but it was not unduly lenient. Substantial reductions needed to be made for Ms Nicholson's age,

immaturity and previous good character. The judge had proper regard to Ms Nicholson's pregnancy and the sentence was passed after a Goodyear indication that any sentence would be suspended. We are very grateful to Ms Gates and Mr Beardwell for their helpful written and oral submissions.

The Factual Background

5. At about 4.00 am on Saturday 15 December 2018 Mr Iftikhar, a taxi-driver, had received a job to pick up in the Birmingham city centre area. He was driving a black Volkswagen Touran people carrier. He arrived at the location for the pickup and picked up a number of passengers, including Ms Nicholson and one male passenger, Luke Burley-Fenton. Ms Nicholson sat in the front passenger seat with the remaining passengers in the middle and rear seats. During the journey Mr Iftikhar noticed that one of the passengers had begun to vomit, so he stopped the car and got out of the car. Mr Iftikhar then asked the group to leave the vehicle. At this point he noticed what he thought was someone trying to steal money from the cupholder area of his car. Mr Iftikhar asked Ms Nicholson what she was doing and told her he had CCTV in his vehicle. It is right to record that there was no conviction for theft or attempted theft of money.

6. At this point, another of the group, Mr Burley-Fenton, came from behind the vehicle and said: "What are you doing, you Paki bastard?". Mr Iftikhar then went to retrieve his mobile phone in order to contact the police. By now he was standing by the driver's side bonnet. Erin Cook approached Mr Iftikhar and an altercation occurred.
Mr Burley-Fenton and Ms Nicholson also came over and joined in, causing Mr Iftikhar to punch Mr Burley-Fenton. Ms Nicholson then attempted to hit Mr Iftikhar with a pair of heels she was holding in her hand but missed. The suspects then ran at Mr Iftikhar and Ms Nicholson and Mr Burley-Fenton began to assault him. Mr Burley-Fenton punched

him several times to the head. Ms Nicholson then attempted to hit Mr Iftikhar around the head with her high heels, which were at that stage being brandished as a weapon. The heels are what are known as “block” heels. The overall assault lasted for about 2 minutes. A witness arrived and saw Mr Iftikhar bleeding from his head saying: “Please help me, they're going to kill me”. At that point Mr Burley-Fenton and Ms Nicholson appeared again, Ms Nicholson then again went to hit Mr Iftikhar to the back of the head with the pair of heels, the heel facing the driver's head. As Mr Iftikhar turned round, he describes the long-heel part of the shoe hitting Mr Iftikhar directly in the eye. An independent witness, Mr Josko, also described the heel part of what he wrongly called “the stiletto” hitting the driver in the right eye.

7. Mr Iftikhar was shouting: “Please let me go, please don't hurt me”. He shouted for assistance from other members of the public and made his way to the opposite side of the road outside the Spar. All the passengers from the vehicle continued to follow him. At this point members of the public intervened. Shortly afterwards the police arrived and detained all five passengers. CCTV footage does cover the incident but from a distance and it does not really assist in working out exactly what occurred. In relation to the injury, the heel of the shoe resulted in a severe blunt force trauma to Mr Iftikhar's right eyeball, causing extensive and irreparable damage. Mr Iftikhar underwent a number of procedures to attempt to save his vision but without success. No improvement to his vision is anticipated.
8. In interview, Mr Burley-Fenton stated that the driver punched him first. He admitted he punched the driver a number of times. Ms Nicholson in interview denied causing the injuries to Mr Iftikhar, claiming that Mr Iftikhar was the aggressor, claimed he had taken her phone and she had only defended herself at the time. Mr Iftikhar provided a further

statement, confirming that he had not taken Ms Nicholson's phone.

Criminal Proceedings

9. Ms Nicholson was arrested on the day after the incident, on 15 December 2018. Material was submitted to the Crown Prosecution Service by the police in January 2019, with further discs of CCTV footage being submitted in March 2019. First pre-charge advice was provided in May 2019 but there is no explanation for the delay between March and May 2019. There then followed a series of pre-charge advices, and Ms Nicholson was finally charged on 5 October 2019, which was nearly 10 months after the incident on 15 December 2018.

10. Ms Nicholson first appeared before the Birmingham and Solihull Magistrates' Court on 4 November 2019, when no indication as to plea was recorded. The case was sent to Birmingham Crown Court and there was a pre-trial preparation hearing on 2 December 2019. At that hearing Ms Nicholson entered a not guilty plea to the section 18 charge on the indictment, but a Defence Statement was submitted which first indicated that she was prepared to offer a plea to the section 20 offence and a trial date was set for 1 June 2020 and Ms Nicholson was granted unconditional bail. The trial date was vacated and inferentially that was probably because of the Covid-19 pandemic which, of course, started in March 2020. The next hearing did not take place in these proceedings until 23 August 2021. A pre-trial review was listed on that date, and the court said it was hoped to try the case in September 2021, but that then did not prove possible. The next earliest date was February 2022, and a further hearing took place on 31 January 2022, when Ms Nicholson entered a plea to the section 20 wounding offence and the Crown were ordered to confirm by 7 February whether this was acceptable. This was not acceptable to the Crown because the Crown identified that this was a repeated attack with

a weapon to the head of Mr Iftikhar.

The Goodyear indication on 13 February 2023

11. A further year passed, and the trial was listed on 13 February 2023, although it seems even on that date, it was unlikely to go ahead. There was a suggestion that it might go ahead later that week due to listing difficulties. The witnesses had attended for trial. Prosecution counsel, who had only been instructed shortly before, was attempting to access the case papers. There was a joint application to adjourn the trial, although the prosecution agreed that the trial could take place the following day. It was at that stage that the defence raised the subject of a potential Goodyear application and stated that "if" that Goodyear indication ended with an indication of a non-immediate custodial sentence, there would be no trial required for Ms Nicholson. It was, to be fair to Mr Beardwell who had made the application, noted immediately that the court would need to depart from Sentencing Guidelines and that the decision would be a bold decision.

12. Following further discussion, the defence agreed to upload the application for a Goodyear later that day. The two-page application for a Goodyear was then uploaded. The basis of plea admitted that Ms Nicholson had swung her shoes towards the back of Mr Iftikhar's head, and he turned and a shoe hit him in the eye, as corroborated by the independent account of Mr Josko. It was suggested that all previous attempts to hit Mr Iftikhar with the shoes had missed and it was further submitted that the blow was not premeditated and not deliberately aimed at Mr Iftikhar's face. It stated that the shoes had not been deliberately carried as a weapon. The application also dealt with Ms Nicholson's age at the time of the offence, and the application also addressed the issue of significant delay (4 years and 2 months by February 2023). It referred to Ms Nicholson being dyslexic and having been diagnosed with epilepsy. It also referred to the fact that Ms Nicholson was

in steady employment and pregnant, and the birth was due in July 2023. It was suggested that 10 per cent credit on account of any guilty plea should be applied.

13. There were some authorities referred to in the application. These included Attorney-General's Reference No 26 of 2015 [2015] EWCA Crim 1119; [2015] 2 Cr App R(S) 53, that related to a female intoxicated defendant, glassing a victim in the face in a pub, after a minor altercation, who had received a 2-year suspended sentence. It might be noted that the injuries in that case were only minor cuts, the defendant had a pre-existing mental health condition, and that mental health condition and the medication taken for it had reacted with the alcohol. R v Beattie-Milligan [2019] EWCA Crim 2357; [2020] Cr App R(S) 10, dealt with an unjustified 11-month delay between arrest and notification of prosecution as a proper reason to mitigate the sentence, justifying a reduction of 6 months. There was also reference to R v Wright [2021] EWCA Crim 1445; [2022] 1 Cr App R(S) 42, where there was a 25-year-old defendant who was 4 months' pregnant at the time of sentencing. The case had taken 3 years to conclude and delay in pregnancy were taken into consideration when a suspended sentence was imposed. The sentence however was only one of 8 months which had been also reduced to 6 months.

14. When the judge asked at the Goodyear hearing the factual basis for the plea, namely whether it was the same facts as for the section 20 offence previously offered and rejected, the Crown clarified that the prosecution case remained intentional wounding and therefore section 18 and not section 20. The assault had taken place with a weapon, namely the heels, and that the assault was directed at Mr Iftikhar's head. It was accepted that Mr Iftikhar had turned around at the last minute, such that particular harm to the eye could not be foreseen, but that did not detract from an intentional attack with a weapon to the head.

15. The judge when ruling on the Goodyear application indicated that she found that the violence was not premeditated and was instantaneous, albeit intent must be accepted by virtue of the plea. The judge also found that the court could take into account unjustified delay and that the court can depart from Guidelines in exceptional circumstances before the judge went on to indicate that any plea to the section 18 offence would result in a suspended sentence.

16. It might be noted that it seems from what was said by the judge during the sentencing remarks which followed on a later date, that at the time the judge was labouring under the misapprehension that a sentence of 6 years could be suspended and that the period for which that sentence could be suspended could be for 3 years. Following that indication Ms Nicholson then pleaded guilty to count 1. The prosecution requested that the separate offence with which Ms Nicholson had been charged, namely affray, lie on the file and a pre-sentence report was ordered for Ms Nicholson.

The sentencing hearing

17. A pre-sentence report was obtained. Ms Nicholson was sentenced by the judge (then sitting at the Warwick Crown Court) on 30 May 2023 to a total of 24 months' custody suspended for 2 years, with the additional requirements already indicated. The pre-sentence report reported that Ms Nicholson stated that Mr Iftikhar had snatched her phone from her hands and her sole intention was to calm the situation down. The report noted that Ms Nicholson was somewhat dismissive of the gravity of Mr Iftikhar's injuries and Ms Nicholson also focused on the ramifications of the incident for her rather than Mr Iftikhar. Ms Nicholson accepted she had drunk copious amounts of alcohol on the night of the incident. She had completed her formal education and had been in employment for 5 to 6 years.

18. The pre-sentence report confirmed that Ms Nicholson was 23 weeks' pregnant, due to give birth in July 2023 and had recently been diagnosed with epilepsy. Her risk of re-offending was assessed and she was assessed as being unsuitable for unpaid work. Five character references were provided and those showed that Ms Nicholson worked hard, was a useful member of society and was very sorry and regretful about the incident.
19. The victim personal statement for Mr Iftikhar explained the extensive difficulty that he had faced as a result of the incident. He can no longer drive, and he has therefore lost his job with significant financial implications. He struggles to go out in daylight as his other eye is irritated too and he has reduced vision due to pressure on it. He has repeatedly had to use a range of ointments to manage his eyes and he has to have the help of a carer for some tasks. He bumps into objects and sometimes falls as a result of his reduced vision. His depth perception has also changed so it is harder to pick up everyday objects. He is now suffering depression and anxiety and fears being attacked again, and he is taking antidepressant medication. He said the consequences of his injuries had destroyed his family life and his deteriorating mental health had resulted in his marriage breaking down in 2021. He had become homeless as he was not entitled to financial support as he was not a British National and he was in debt and owed thousands of pounds. He referred to some of the earliest words of his son being: “I can't see anything”, as he mimicked his father, something Mr Iftikhar found extremely distressing. Mr Iftikhar had also spoken about losing faith in the court and justice system after the incident. There are medical statements about Mr Iftikhar's injuries.

The Sentence

20. The prosecution Sentencing Note for the hearing on 30 May 2023 was uploaded. Counsel, who appeared on the day, was covering for trial counsel who had fallen ill. The

note did not deal with the Sentencing Guidelines for a section 18 offence due to the earlier Goodyear indication having been given. At the hearing on 30 May 2023, prosecution counsel opened the facts and Mr Iftikhar's impact statement was read. In mitigation, the defence relied on the substance of the Goodyear application and set out Ms Nicholson had been out celebrating her birthday at the time of the offence and she had been suffering from stress as a result of the proceedings. She was due to give birth 7 weeks after the sentencing hearing and was by then on Universal Credit, awaiting a move onto maternity pay whilst living with her parents. She was also living with her partner at the same location. Ms Nicholson had saved £4,000 to make as a compensation payment to Mr Iftikhar.

21. During sentencing the judge queried whether it was agreed that the shoe was not raised as a weapon. Defence counsel stated that the shoes were carried for a lawful purpose (a change from one pair of footwear to another) and carried in Ms Nicholson's hands, so used as a weapon, although not originally intended to be used as a weapon. The judge went on to find that the offence fell within medium culpability B and category 1 harm due to the significant effect of the injury on Mr Iftikhar. That gave a starting point for sentence of 7 years' imprisonment, with a range of 6 to 10 years' imprisonment. There were aggravating features that the offence was committed under the influence of alcohol and mitigating features were Ms Nicholson's previous good character and her age at the time of the offence. The judge went on to indicate that the sentence she would have passed following trial would have been one of 6 years' custody. She then afforded Ms Nicholson a 25 per cent credit for plea, reducing the sentence to 54 months (4 years 6 months). The judge then went on the refer to the Goodyear indication previously given and repeated her findings that the violence was not planned or premeditated, and the shoe

was not originally carried as a weapon and there was an unacceptable delay in bringing the matter to trial and because of personal circumstances, namely that Ms Nicholson was pregnant. The judge indicated that she was going to suspend the sentence for 3 years. The judge asked:

> "I can suspend, can I, or is 2 the maximum?"

22. The judge was told 2 years was the maximum. The judge then said that she would suspend for 2 years with a number of conditions including 10 days' rehabilitation activity requirements and payment of compensation. Mr Beardwell, for Ms Nicholson, then said:

> "... your Honour has suspended for two years; of course, your Honour will have to determine the length of the sentence to be suspended.
>
> [THE RECORDER]: I thought I said it.
> [COUNSEL]: Your Honour didn't, but I imagine your Honour intended twenty -- [before the judge interrupted and said] Sorry I thought I said six years."

23. We interpose to say that the judge had said 6 years but had then given credit for plea, giving a sentence of 4 years 6 months. Counsel replied:

> "Your Honour can't suspend six years."

24. The judge stated that was the issue at the Goodyear operating outside the Guideline. Counsel accurately confirmed that a sentence of imprisonment of 2 years could be suspended but no longer. The judge then sentenced Ms Nicholson to a total of 2 years' custody suspended for 2 years, with a 10-day rehabilitation activity requirement and payment of compensation.

Events after sentence

25. We have an updated pre-sentence report from Probation dated 10 July 2023. This shows that Ms Nicholson has attended her supervision sessions, is open and honest and is very

emotional when the offence is addressed. It was said that going into custody would have a detrimental effect on her and her baby and the baby would then be cared for by her partner and parents. In fact, we were told this morning that the child was born on 12 July 2023 and is now 23 days' old. We are also told that the child is being breast fed about every other hour. We had an updated report from the offender manager, dated 28 July 2023, in which it was reported that Ms Nicholson had formed a strong bond with her baby.

Relevant provisions of law

26. The offence specific guideline is Sentencing Guidelines for Causing Grievous Bodily Harm with Intent. "Medium culpability" is defined to include cases involving the use of a weapon or weapon equivalent that does not fall in the higher culpability bracket and *lesser role* in group activity and other cases falling below high and low culpability. It is common ground that the heel in this case was a weapon equivalent. "Harm" is classified on the basis of severity and permanence of the injury suffered, with category 1 harm reserved for the most serious of injuries that are particularly grave or life threatening and result in permanent, irreversible injury, which has a substantial impact on the victim's day-to-day activities. Category 2 harm includes grave injury and permanent irreversible injury not falling within category 1.

27. In relation to the approach to be adopted when sentencing defendants that are over 18 but under 25, guidance was given in R v Clarke [2018] EWCA Crim 185; [2018] 1 Cr App R(S) 52. The Court made it clear that turning 18 years is not a cliff edge, and that the youth and immaturity of someone in Ms Nicholson's position is still an important and relevant consideration for the purpose of sentencing. The Guideline on Sentencing Children and Young People can have weight when considering sentencing involving

young adults. Section 6.46 of that Guideline sets out the deductions that the court might find it appropriate to apply as being broadly within the range of a-half to two-thirds of the adult sentence for those aged 15 to 17. The emotional and development age of an offender is of at least equal importance to their chronological age.

28. In R v Petherick [2012] EWCA Crim 2214; [2013] 1 WLR 1102, the Court of Appeal set out at paragraphs 17 - 20 that the sentencing of a defendant inevitably engages not only the defendant's right to family life but also potentially that of dependent children and it set out the approach to be taken in that case.

29. In R v Cheeseman [2020] EWCA Crim 794, the Court recognised the weight to be given to the interests of an unborn child in reducing a custodial sentence of 6 years to 4 years, in order to make that offender eligible for release at the same time as the child would leave the Mother & Baby Unit. We were informed today that a Mother & Baby Unit can accommodate a child up to the age of 18 months.

30. So far as this case is concerned, guilty pleas were entered following a Goodyear indication. In that case the Court of Appeal had provided guidance on the steps to be followed when an indication was sought ahead of any plea being entered. The court might ask for assistance from counsel as to facts and, if necessary, a written basis of plea and submissions and the decision in that case is now reflected in the practice set out in the Criminal Practice Direction at CPD VII Sentencing (see Indications of Sentence).

31. In terms of the Solicitor-General referring a case in which a sentence was passed further to a Goodyear indication, paragraph 71 of Goodyear made it clear that, if counsel for the prosecution had addressed his responsibilities in accordance with the previous paragraph, the discretion of the Attorney General to refer a sentence would be wholly unaffected by the advanced sentence indication process. Of course, if a sentence indication has been

given in accordance with these Guidelines before referring the eventual sentencing to this Court, the Attorney General's decision would no doubt reflect that the defendant had pleaded guilty in response to the sentence indication, properly sought and given by the judge. Different considerations may arise where Goodyear indications are initiated by the judge.

32. Finally, when considering whether to suspend a custodial sentence, the first step is the consideration of the Sentencing Council Guidelines for Imposition of Community and Custodial Sentences. The Guidelines emphasise that a suspended sentence is a custodial sentence, and that the impact of a custodial sentence is both punishment and deterrent. The Guideline set out factors to be weighed when considering whether to suspend the sentence. This Court has indicated that it will not readily interfere with the assessment of a sentencing judge engaged in the exercise of whether a sentence should be suspended or not. The Court will only interfere when the decision as to whether to suspend a sentence is plainly wrong in principle, see R v Forest Jameson [2017] EWCA Crim 93; [2018] 1 Cr App R(S) 1.

The Appropriate Sentence

33. In our judgment, the sentencing exercise went wrong because the judge was persuaded to give a Goodyear indication and was not given any assistance with the relevant sentencing offence specific guidelines, and because the judge appeared to believe a sentence of 6 years' imprisonment could be suspended and could be suspended for a period of 3 years. As it is, this Court is left in the unfortunate situation of having to revisit a sentence on a young woman, aged 22, who was 18 at the relevant time of the offence, of previous good character, who has just given birth and who has paid £4,000 in compensation, but who caused grievous bodily harm with intent where the harm was in the form of a permanent

injury to Mr Iftikhar, being the loss of his eye and, as it turns out, the loss of his job as a taxi-driver.

34. In these circumstances, we can only do our best, having regard to the relevant legal principles. First, we can discern no basis on which it can be said that it is in the interests of justice to sentence outside the Guidelines. Secondly, the index offence was classified as category 1 harm, culpability B. The starting point for a category 1B offence is, as already indicated, 7 years, with a range of 6 to 10 years' imprisonment. Statutory aggravating factors in this offence include that the offence was committed against a person providing services to the public as a taxi-driver. The other aggravating factor was that the offence was committed under the influence of alcohol and, it might also be noted, that it was part of a group attack. The fact that Mr Iftikhar was a taxi-driver was important, a sentence of 8 years, before mitigation might be expected having started with a starting point of 7 years, before turning to mitigating factors.

35. We then consider the mitigating factors. A very important mitigating factor was age and lack of maturity. Having read all that we have, we consider that a discount of 25 per cent for age is reasonable. This gives a sentence of 6 years' imprisonment. We then turn to the other mitigation. There are no previous convictions and there is positive good character, as appears from the character references and indeed the information that we have from the offender manager. There was also a delay in the proceedings which has caused understandable difficulties both to Mr Iftikhar and Ms Nicholson, although it is right to report that Ms Nicholson did not admit the section 18 offence until the day of trial. There is also the feature that Ms Nicholson has paid £4,000 by way of compensation, and it is apparent that this represents all that she had managed to save from her work. Finally, we note that Ms Nicholson has given birth, although there are

arrangements that can be made according to the offender manager, for care to be provided by her parents and partner in her absence.

36. Doing the best that we can, we would reduce the sentence of 6 years to reflect those mitigating factors, to one of 4 years 6 months but there is also a discount for plea. It is right to note that Ms Nicholson did admit the section 20 offence and at the time a discount for plea of about 20 per cent would have been justified. However, Ms Nicholson only admitted the section 18 offence on the day of the trial, and it is apparent that a discount of 10 per cent is justified but no more. This would give an overall sentence of 48 months, or 4 years. We note that this is lower than the judge's proposed sentence of 54 months (or 4 years 6 months) which the judge intended to suspend but had no lawful power to do so.

37. We turn then to address the final issue which has been raised this morning, which is the amount of time that a child can spend in a Mother & Baby Unit. As an act of mercy, we will reduce the 4-year sentence to one of 3 years, to take account of that fact. Whether the child is admitted with Ms Nicholson and whether the child and Ms Nicholson are placed in a Mother & Baby Unit are matters which are not within our control, but the effect of reducing the sentence that should have been imposed of 4 years to one of 3 years, means that becomes a possibility.

38. In all those circumstances, we hope we have reflected, as fairly as we can, the immense damage caused to Mr Iftikhar and all those points of mitigation properly available to Ms Nicholson. We therefore allow the Reference and impose a sentence of 3 years' imprisonment on Ms Nicholson.

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

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