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Neutral Citation No. [2023] EWCA Crim 1624

IN THE COURT OF APPEAL
CRIMINAL DIVISION



CASE NO2303737/A2

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday, 20 December 2023

Before:

LORD JUSTICE DINGEMANS
MR JUSTICE HILLIARD
HIS HONOUR JUDGE DREW KC
(Sitting as a Judge of the CACD)

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

REX
V
JONATHAN DA SILVA

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MR P JARVIS appeared on behalf of the Attorney General
MR R BHASIN 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 for leave to refer a sentence which His Majesty's Solicitor General considers to be unduly lenient.
2. The respondent, Jonathan Da Silva is a 35-year-old man. He was, before these matters, of previous good character. Mr Da Silva was sent for trial on an indictment containing two counts of assault occasioning actual bodily harm, contrary to section 47 of the Offences Against the Person Act 1861, one count of intentional strangulation, contrary to section 75A of the Serious Crime Act 2015, one count of making a threat to kill, contrary to section 16 of the Offences Against the Person Act 1861 and one count of controlling or coercive behaviour in an intimate or family relationship, contrary to section 76 of the Serious Crime Act 2015.
3. On 6 October 2022, Mr Da Silva pleaded not guilty at the pretrial preliminary hearing and his trial was fixed for 8 February. On 18 January 2023, because of overrunning court lists it seems, the trial was re-arranged for 21 August 2023. On 15 August 2023 Mr Da Silva indicated that he would plead guilty to the indictment. On 21 August he pleaded guilty to the five counts. On 28 September 2023 in the Crown Court at Inner London, Mr Da Silva was sentenced to a community order for 18 months, with an alcohol abstinence and monitoring requirement for 30 days, a rehabilitation activity requirement for 30 days and an unpaid work requirement for 120 hours. This was the sentence imposed on each of the five counts concurrent with each other.
4. It is submitted on behalf of the Solicitor General that this sentence is unduly lenient. The offence of strangulation alone merited a starting point of 18 months' custody and the plea of guilty was late. Mr Da Silva merited a term of immediate custody regardless of

whether or not the sentence in aggregate should have been below the 24 months which might be suspended and it was submitted that the sentence should in any event have exceeded 24 months.

5. It is submitted on behalf of Mr Da Silva that although the sentence may have been lenient it was not unduly lenient. The judge was entitled to give more than the 10 per cent credit suggested by the prosecution, there was genuine remorse, the judge had an insight into the relationship difficulties, Mr Da Silva had been open about matters, Mr Da Silva had been in custody for the equivalent of a three month sentence of imprisonment before being granted bail, the pre-appeal report from probation shows that Mr Da Silva has engaged positively with his community order even though he is struggling emotionally with his current situation and seeking therapy. We are very grateful to Mr Jarvis and Mr Bhasin for their helpful written and oral submissions.

Factual background

6. Mr Da Silva and the victim, whose name it is not necessary to give, first met at a party in August 2021. They embarked on a relationship together and the victim moved in to Mr Da Silva's home.
7. From the beginning of the relationship Mr Da Silva controlled the victim and set about isolating him from family and friends. He repeatedly accessed the victim's social media accounts and accused him of cheating whenever he went to visit his mother. The count of coercive or controlling behaviour ran from 1 August 2021 to 19 August 2022.
8. The first time that Mr Da Silva became physically violent towards the victim was in March 2022 and this was the first count of assault occasioning actual bodily harm. Mr Da Silva repeatedly punched the victim in the face. He also placed the victim in a choke hold and tried to strangle him. That offence was not charged as intentional

strangulation because the statutory provisions relating to intentional strangulation had not yet come into force.

9. On the same occasion Mr Da Silva tried to gouge the victim's eyes and started saying that he needed to be "rebooted", which made little sense to the victim. Mr Da Silva tried to force the victim to sleep with him and dragged him across the floor, resulting in an injury to his hip.
10. The victim decided not to alert the police and the relationship continued but he reported matters to a friend, including a Mr Redjep who recalled that on 21 March 2022 he had received a call from another mutual friend to say that the victim had been assaulted. The victim then sent Mr Redjep some photographs of his injuries showing a graze above his nose and a scratch below his nose and scratches on his neck and ears. At around this time the victim messaged Mr Da Silva saying, "What you have done to me is unforgivable. You have humiliated me, degraded me and abused me. You are sick and need help."
11. On 19 August 2022, so some five months later, the victim called the police to say he had been attacked. Shortly after midnight the police arrived outside a fast food restaurant. The victim was there with some bags, he was wearing pyjamas and was in a distressed state. This was the occasion of the second count of assault occasioning actual bodily harm, the intentional strangulation and the threat to kill.
12. The victim explained to the police that Mr Da Silva had been feeling unwell throughout the day. The victim had gone to visit Mr Da Silva at the hair dressing salon where he worked but Mr Da Silva had told the victim to go home. The victim had gone back to the flat. Mr Da Silva had got back to the flat at about 8.30 pm in the evening. He accused the victim of cheating. It was obvious to the victim that Mr Da Silva was in a mood. The victim told Mr Da Silva that he could not do this anymore, at which point Mr Da Silva

grabbed the victim's possessions and started throwing them on the floor and at the door. The victim went out to buy some food. When he was gone Mr Da Silva telephoned the victim and accused him of leaving him while he was unwell. The victim explained he was buying them dinner. When he got back to the flat, Mr Da Silva repeatedly shoved the victim with enough force to knock him off balance. He also went for the victim's face, as if to gouge his eyes again. The victim grabbed Mr Da Silva's arms in an attempt to stop that. Mr Da Silva tackled the victim to the bed before grabbing the victim's metal water bottle and trying to strike him with it, using it as a club. The victim grabbed his arms to stop him and Mr Da Silva said: "If you fucking leave me I'm going to kill you." The victim told Mr Da Silva he could not put up with this anymore and Mr Da Silva seemed to calm down. He said he would stop and he showed the victim messages he had sent to the hospital in which he had written saying that he needed help with his anger and was a danger to others. The hospital had sent Mr Da Silva a form to fill in and the victim offered to help him complete it but Mr Da Silva erupted again and started to throw shoes and clothes at the victim and block his way out of the flat. Mr Da Silva threw a chair that knocked out one of the door hinges. He then whipped the victim around the face with a pair of shorts and he told the victim he would knock him out and kill him. The victim took that threat seriously. The victim felt trapped and scared with no means of escape. He went to the door but Mr Da Silva punched him to the left side of his face causing him to fall to the floor by the radiator. The victim was dazed and confused and Mr Da Silva screamed at him to get out. He then started to stamp on the victim's chest with force and to kick the victim in the back. He grabbed his suitcase and smashed it down on his face. He tried to punch the victim again but the victim was able to push him away. The victim ran to the door but Mr Da Silva blocked him and he punched him in the nose. He then

started to twist and pull the victim's nose, causing a nose bleed. Then he put his arm around his neck for a time trying to choke him. At the same time Mr Da Silva tried to punch the victim with his free hand and he tried to gouge his eyes again and Mr Da Silva ripped the victim's shirt and pyjamas. The victim got to the door and Mr Da Silva poured water over him as he unlocked the door and ran out.

13. As a result of the attack the victim sustained what he described as a busted nose, a swollen and bruised cheek and cuts and abrasions to the face. His mouth was swollen and there were marks on his neck and abrasions on the back and shoulder. The police took the victim to hospital so the injuries could be treated.
14. The police also went round to Mr Da Silva's address but he had gone. The police arrested him later that morning and took him into custody. The police officers noted that Mr Da Silva had an injured hand. In interview Mr Da Silva answered "no comment" but he did produce a prepared statement in which he denied committing any offences against the victim. He wrote that any force he may have used had been in self-defence.
15. The police spoke to the victim's friends and families in order to learn more about their relationship and that suggested strongly that there had been a controlling and coercive relationship between them and that the victim had become withdrawn. The police had spoken to the victim's mother who had had no concerns initially about the relationship but then spoke about the deteriorating nature of the relationship. She recollected that after the assault her son was in a bad state. He looked lost, he was very quiet and he stayed with his parents while he recovered.

Sentencing

16. There were victim personal statements from the victim about the dramatic effect that Mr Da Silva's offending had had on his life. He now took anti-depressants and suffered

from panic attacks and anxiety. He had no confidence anymore and sometimes he had suicidal thoughts. His physical injuries had healed but the emotional scars had not. He was seeking counselling to help him to cope.

17. The victim's mother provided a personal statement. She wrote that it was devastating to learn that her son had been the victim of domestic violence. She and her husband had had to pick up the pieces and they had been overwhelmed by stress and anxiety. That was not helped by the fact that her husband himself had an illness and his health had suffered.
18. There was a pre-sentence report. In his interview with the author, Mr Da Silva agreed with the facts set out in the victim's account of events. Mr Da Silva said he felt embarrassed and ashamed of his behaviour. The author was prepared to accept Mr Da Silva's remorse as genuine but felt that Mr Da Silva lacked any real insight into the impact of his conduct on the victim. The author recorded that Mr Da Silva had possessive traits in his behaviour to the victim. Mr Da Silva told the author that he worked as a self-employed hairdresser and disclosed his earnings. He spoke about previous relationships and that he had never behaved like this towards a partner before. Mr Da Silva described himself and the victim as recreational users of cocaine and MDMA and they consumed alcohol together. Mr Da Silva said he was seeking private therapy to help him deal with childhood trauma. He did not elaborate on that. He said he wanted to address the causes of his offending and seemed genuine to the pre-sentence report writer. The author assessed Mr Da Silva as possessing a medium risk of harm to future intimate partners.
19. The author concluded that while a sentence of immediate imprisonment would serve to punish Mr Da Silva, it would also mean him losing his job and home and he expressed

the view that Mr Da Silva's risk could be managed in the community. He recommended a community order with a number of requirements.

20. There were also a number of character references before the court that showed that Mr Da Silva had many excellent and positive qualities and that the offending was out of character.
21. The judge was referred to sentencing guidelines for actual bodily harm, threats to kill and using coercive and controlling behaviour and the recent authority of R v Cook [2023] EWCA Crim 452, [2023] 4 WLR 71 which had suggested that a starting point in relation to strangulation should be 18 months.
22. In the Recorder's assessment the behaviour was likely to have been fuelled by a combination of drugs and alcohol. This was a case where the Recorder concluded he could take an exceptional course and not pass a custodial sentence. He decided to follow the recommendations in the pre-sentence report and impose a community order with requirements. He concluded that was open to him because Mr Da Silva was a man of previous good character, pleaded guilty, remorse was genuine and demonstrated a determination to overcome the causes of his offending.

Post-sentence report

23. We been provided with a post-sentence report from the probation service which shows that Mr Da Silva has complied with the terms of his orders and positively engaged with the requirements imposed on him.

The guidelines

24. In relation to the assault occasioning actual bodily harm guidelines it seemed to be common ground below that this was a Category 2A offence with a starting point of 18 months for each offence. The threat to kill was a Category 2B offence with a starting

point of one year with a range of 26 weeks to two years six months and the offence of strangulation had a starting point of 18 months (see R v Cook) although it was also plain that such a sentence might be suspended in accordance with the relevant sentencing guideline (see R v Borsodi [2023] EWCA Crim 899). The coercive and controlling behaviour was suggested below to be a Category 2B offence with a starting point of 26 weeks, with a range of a high level community order to one year custody.

25. There were aggravating features to the offending, namely that it was committed in a domestic context and the history of violence in relation to the later offences and there was abuse towards the victim by the offender. We have considered the relevant guideline of “Overarching principles, domestic abuse” which makes it plain that domestic abuse will always be serious. There are also mitigating features of the absence of previous convictions, positive good character and remorse accepted by the judge to be genuine. Any sentence must also be just and proportionate and have regard to the principles of totality. It is inappropriate simply to add sentences together for separate offending, as appears from the Totality guideline.

The appropriate sentence

26. We grant leave for the Reference. It is plain that the judge considered that what he was doing was exceptional in imposing a community order but we consider that he was wrong to find that he was entitled to do so. A court must apply the sentencing guidelines unless the court finds it is not in the interests of justice to do so. The judge did not make any such finding in this case and we can see no grounds for such a finding. We do not consider that a community order provided a sufficient restriction on Mr Da Silva's liberty so that it could be imposed.

27. Having reflected on the whole of the criminality disclosed by all of the offending before

the court and having regard to the aggravating factors, but also considering principles of totality at this stage, we consider that a sentence of 33 months before discounting for mitigation and plea was appropriate. There was substantial mitigation which we assess as meriting a reduction of eight months. This would give a sentence of 25 months before discount for plea. The plea was indicated shortly before trial and a reduction of between 12 and 15 per cent was merited. Using 12 per cent simply for the purposes of ease of calculation, the reduction is three months when rounded up. This gives a total sentence of imprisonment of 22 months.

28. This means that the real issue on the Reference now becomes whether or not to suspend the sentence. We have regard to the factors indicating that it would not be appropriate to suspend a custodial sentence. The first factor is that the offender presents a risk or danger to the public. We have already related the probation service's finding in relation to that and risk to future intimate partners.
29. The second factor is that appropriate punishment can only be achieved by immediate custody. Mr Jarvis submitted that the offending could only be dealt with by custody because it was repeated and not stopped. Mr Bhasin submitted that this ignored all the other relevant factors in the assessment and was not the appropriate approach to the relevant guideline. So far as the third factor was concerned, history of poor compliance with orders, that was not applicable.
30. Factors indicating that it might be appropriate to suspend a custodial sentence are a realistic prospect of rehabilitation. That is present and it is apparent from all the information that we now have, including the post-appeal or launch of the appeal sentencing report that Mr Da Silva is making strong progress with the probation services. The second factor is strong personal mitigation; this is present and we will not repeat the

other matters. The third factor is that immediate custody will result in significant harmful impact upon others; this is not applicable.

31. We have thought long and hard about the submissions about whether this sentence could be suspended. We have also taken into account the fact that Mr Da Silva had served the equivalent of a three-month sentence of imprisonment before he had been sentenced and that he has, as is apparent from the material before us, complied with the sentencing requirements. There is always on a Reference an element of “we are where we are” in the sense that things have moved on from the sentencing.

32. In all these circumstances, we do consider that reflecting on: the three months' imprisonment that Mr Da Silva has served; his positive engagement with probation; and all the other relevant factors; this sentence can be suspended.

33. We will therefore quash the sentence of 18 months community order with requirements and impose a sentence of custody of 22 months' imprisonment, suspended for two years, with all the previous requirements attached on each of the five counts, concurrent with each other. That is an alcohol abstinence and monitoring requirement for 30 days, a rehabilitation activity requirement for 30 days and an unpaid work requirement for 120 hours. Mr Da Silva should understand that if he commits any offence within the period of the suspended sentence of whatever type he will be brought back to court and sentenced for that separate offence and the suspended sentence may be activated in full or in part.

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

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