IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT IPSWICH
MR RECORDER MICHAEL POOLES T20107169

CASE NO 202304129/A1

[2024] EWCA Crim 1279

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 10 October 2024

Before:

LORD JUSTICE POPPLEWELL

MR JUSTICE BENNATHAN

RECORDER OF LEEDS
(HIS HONOUR JUDGE KEARL KC)
(Sitting as a Judge of the CACD)

REX
V
DARREN HILLING

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 46 Chancery Lane, London WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MS H DOUGLAS appeared on behalf of the Appellant.
MS M MILLER appeared on behalf of the Crown.

J U D G M E N T

LORD JUSTICE POPPLEWELL:

1. Having pleaded guilty to an offence of wounding with intent to cause grievous bodily harm contrary to section 18 of the Offences Against the Person Act 1861, the appellant was sentenced in the Crown Court at Ipswich by Mr Recorder Michael Pooles QC on 21 January 2011, to a sentence of imprisonment for public protection ("IPP") with a minimum term of 4 years less 27 days spent on remand.

2. He appeals against sentence with leave of the full court on the sole ground that an extended sentence ought to have been imposed rather than a sentence of IPP. The full court granted a representation order and Ms Douglas provided written advice and grounds which she has developed orally before us. In both respects the arguments have been ably and attractively presented.

The offence

3. The offence occurred in the early hours of the morning of 25 March 2010, when the appellant, who had just turned 21, was with his friend and co-defendant, Mutton. They broke into the ground floor flat of Mr Woods, who was in bed watching a film. They confronted Mr Woods in his bed and Mutton demanded money. Mutton grabbed a full bottle of wine from the windowsill and hit Mr Woods on the head with it, causing a cut to his eyebrow and bruising to his head. Mr Woods tried to get out of bed but they tipped the bed up on its side causing him to fall out. They went into the lounge to search his possessions and returned with Mutton holding his bank card. The appellant demanded to know the PIN number. Mutton then produced a knife and stabbed Mr Woods twice. One wound was to the left ribcage area, causing a shallow wound which penetrated the skin but hit the ribs. The other was a deeper wound into the kidneys. Mutton kicked him in the

testicles. The appellant then shouted, "Go on, finish him off." Mutton made homophobic comments. Mutton told the appellant to take Mr Woods to the bathroom and to tie him up. He did so and they both tied his hands and feet in the bathroom and poured shampoo and washing liquid over him. Having been given his PIN number, the appellant and Mutton left the flat, leaving Mr Woods tied up. They returned about 15 minutes later, during which time Mr Woods had managed to untie himself. They demanded the PIN again as they had not been able to use it successfully to withdraw any money. They used some twine to tie him up again in order to make good their escape. They left the flat with the card, telling Mr Woods, who was bleeding heavily, not to call the police or an ambulance for half an hour, otherwise he and his family would be "done".

4. Mr Woods required hospital treatment for his wounds, and displayed signs of PTSD.

Antecedents and pre-sentence report

5. The appellant was aged 21 at the date of sentence and had 30 convictions for 69 offences. Many were for theft and kindred offences. There were five which involved violence:

   A battery committed when he was aged 14, for which he was sentenced to a compensation and reparation order.

   An assault on a police officer, committed when he was 15, for which he was sentenced to a supervision order with a 3-month curfew.

An assault occasioning actual bodily harm, committed when he was 16, which led to a sentence, for that offence and an offence of handling stolen goods, of a 4-month detention and training order.

A robbery and attempted robbery committed when he was just 17, for which he was sentenced to a 2-year detention and training order. This involved approaching a 14-year-old, demanding his phone and threatening him with a knife before grabbing him by the hair and throat.

An assault on a police officer when he was 18, for which he was sentenced, in conjunction with an offence of taking a motor vehicle and possession of drugs, to a suspended sentence of 6 weeks in a young offender institution.

6. The longest custodial sentence to which he had been subject prior to the index offence, was one of 14 months in a young offender institution for a non-dwelling burglary.

Sentencing

8. The Recorder recited the facts of what he correctly described as a vicious and unprovoked attack involving torture. He treated the appellant and Mutton as equally culpable on a joint enterprise basis. He recorded that the submissions before him had addressed, at considerable length and in detail, whether there should be a determinate sentence, an extended sentence or a sentence of IPP. He concluded that by reference to the facts of this offence alone, and in conjunction with the prior offences of violence, the appellant satisfied the criterion of dangerousness set out in section 225 of the Criminal

Justice Act 2003, that is to say that there was a significant risk of his causing serious harm to members of the public by the commission of further offences. That conclusion was undoubtedly justified by the facts of the instant offence, and it has not been suggested otherwise. The Recorder said that a life sentence was not appropriate, and that despite the submissions in mitigation, there was very little to be said personally in favour of the appellant or Mutton. He continued:

> "I do take into account that they remain relatively young. They have appalling records including, as I have already made clear, occasions of violence and threatening behaviour. They have caused fear to members of the community in the past.
>
> In those circumstances, I am entirely satisfied that this is a matter in which imprisonment for public protection may be passed and in each case will be passed."

9. The Recorder then determined that, had he been imposing a determinate sentence, the appropriate length of the sentence would have been 10 years, after a trial, reduced to 8 years for the appellant's guilty plea. He accordingly set the minimum term as half of that period, namely 4 years, less 27 days to reflect time spent on remand awaiting trial. No criticism is advanced as to the length of that sentence. As we have said, the only ground of appeal is that an extended sentence ought to have been imposed rather than a sentence of IPP.

Subsequent events

10. Although not relevant to the issue we have to decide, we should record what has happened to the appellant since the sentence was imposed. In September 2015, after the expiry of the minimum term of the IPP, and by now in an open prison, the appellant sent

a threatening communication by text to his then partner and left the prison for two days before voluntarily returning. He was sentenced for that behaviour to 4 months' imprisonment to run concurrently.

11. He was released from custody on 30 August 2018, having been in prison for some 7½ years. His licence conditions included residence at approved premises for a period of 8 weeks. Shortly before the expiry of that period, he left the premises after curfew hours and returned two hours later. The police had been called and he assaulted a police officer with intent to resist arrest. For that conduct he was sentenced to a £40 fine and ordered to pay compensation of £100. More significantly, as a result, he was recalled to prison on 15 October 2018, where he has remained for the last 6 years. During that period, on 29 January 2021, he committed an offence of battery against a prison officer, for which he was sentenced to 28 days' imprisonment to run concurrently. He has been refused parole on the last two occasions on which the Parole Board have considered his position as a result of an allegation of assault against a fellow prisoner, which has in fact been dropped and the police have indicated that no further action will be taken in relation to it. He has been told that the Parole Board will not consider his case again until September 2015. By that time he will have spent over 14 years in custody and will be aged 36.

Discussion

12. In 2012, Parliament abolished sentences of lPP by the Legal Aid and Sentencing and Punishment of Offenders Act 2012, for all offenders convicted after 3 December 2012, but that did not affect those, like this appellant, convicted and sentenced to IPP before that date. In *R v Roberts* [2016] EWCA Crim 71; [2016] 2 Cr App R (S) 14, this Court

made clear that a change in penal policy of this nature does not entitle this Court to reduce sentences in the light of the subsequent regime, and that where it was properly open to a judge to pass an IPP sentence in accordance with the law then in force, this Court would not revisit the sentence.

13. At the time when this appellant was sentenced, the relevant provisions of the Criminal Justice Act 2003 had already been amended from those which applied when the Act was first introduced in 2005; those amendments were made by the Criminal Justice and Immigration Act 2008. Originally, in qualifying cases, a finding of dangerousness in a qualifying case left the court with no option other than to impose either a discretionary life sentence or IPP. An extended determinate sentence was not available. By the time this appellant was sentenced and the amending provisions had come into force, a finding of dangerousness in a qualifying case allowed the court to adopt one of four options, namely a discretionary life sentence, a sentence of IPP (pursuant to section 225 of the Act), an extended determinate sentence (pursuant to section 227 of the Act), or a simple determinate sentence. In *Attorney-General's Reference (No 55 of 2008)* [2008] EWCA Crim 2790; [2008] 2 Cr App R (S) 22, Lord Judge CJ said at [14] that in the exercise of the court's discretion, or more accurately, in exercise of its judgement, as to whether a sentence of imprisonment for public protection should be passed when the necessary criteria are established, the court is entitled to, and indeed should, have in mind all the alternative and cumulative methods of providing the necessary public protection against the risk posed by the individual offender. He described IPP as the most draconian sentence available to the court after a discretionary life sentence. At [16] Lord Judge referred to an IPP as "a sentence of last resort" apart from a discretionary life sentence.

At [20] he said this:

> "As we have emphasised, imprisonment for public protection is the last but one resort when dealing with a dangerous offender and, subject to the discretionary life sentence, is the most onerous of the protective provisions. In short, therefore if an extended sentence, with if required the additional support of other orders, can achieve appropriate public protection against the risk posed by the individual offender, the extended sentence rather than imprisonment for public protection should be ordered. That is a fact specific decision."

14. In this case, the Recorder did not refer to that authority or the principles which it set out, and it may not have been drawn to his attention. Whilst he was clearly aware of the possibility of imposing an extended sentence, there is nothing in his sentencing remarks to show that he had those principles in mind and that he needed to conclude that an extended sentence could not provide the appropriate degree of protection for the public if he were to require an IPP as the draconian remedy of last resort. He certainly gave no reasons for reaching such a conclusion.

15. We do not think that such a conclusion could be properly justified in the appellant's case. The index offence was committed when he had just turned 21. It is now well-recognised that turning 18 does not represent a hard-edged boundary in the development from the immaturity of childhood into full adult maturity, a process which continues when offenders are in their twenties. At that age he was going to serve a lengthy period in custody as an adult which was of an entirely different order from any previous custodial sentence which he had served. There was in his case no entrenched pattern of offences involving serious harm to the public prior to this offence, albeit that this offence was

indeed a very nasty one: his previous offending, although extensive, had not involved serious violence and almost all the previous offences which involved any degree of violence had been committed as a juvenile. It was the view of the author of the pre-sentence report that what justified an IPP was the ability of the appellant to undertake programmes whilst in custody followed by stringent release conditions including MAPPA referral. These would all have been available under an extended sentence comprising a custodial period of custody of 8 years and an extended licence period of 4 years, under which he would remain under the licence condition until 12 years after the sentence was being imposed, when he would have reached the age of 33. In truth, the difference between the IPP sentence passed, and a life sentence with the same minimum term, which the Recorder correctly identified was not justified, is not in practice a very significant one (see *R v Wilkinson* [2009] EWCA Crim 1925 per Lord Judge CJ at [16]).

16. Accordingly, we will quash the sentence of IPP and substitute an extended sentence of 12 years' imprisonment less 27 days, comprising a custodial term of 8 years less 27 days, and an extended licence period of 4 years. The result is that the appellant will be entitled to immediate release. To that extent the appeal is allowed.

17. Having made some inquiries we understand that although he will not be subject to formal Probation supervision, there are various aspects of the circumstances on his release which means he will have some support in the community.

Lower Ground, 46 Chancery Lane, London WC2A 1JE

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk