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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 22 February 2018

B e f o r e:

LORD JUSTICE HAMBLEN

MR JUSTICE SWEENEY

RECORDER OF GREENWICH
(HIS HONOUR JUDGE KINCH QC)
(Sitting as a Judge of the CACD)

R E G I N A
v
DANIEL JAMES GWILYM

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Mr G Mohabir appeared on behalf of the **Appellant**

J U D G M E N T (Approved)

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1. MR JUSTICE SWEENEY: This is an appeal against sentence by leave of the single judge.

2. On 27 June 2016, in the Crown Court at Bristol, the appellant pleaded guilty on re-arraignment to an offence of racially aggravated common assault (Count 1). On 10 August 2016, at the conclusion of his trial before Mr Recorder Towler in the same court, the appellant was convicted of an offence of assault occasioning actual bodily harm (Count 3).

3. The Recorder sentenced the appellant on 26 August 2016, when he found the appellant to be a dangerous offender. He imposed a 5-year extended sentence on Count 3, comprised of a custodial term of 4 years' imprisonment and a period of extended licence of 1 year; six months imprisonment consecutive on Count 1; and the activation in full of a 17-week suspended sentence concurrent – all less 155 days (which represented half the time that the appellant had spent on qualifying curfew).

4. At a further hearing on 1 September 2016, the Recorder reduced the sentence on Count 1 to one of 13 weeks' imprisonment consecutive, explaining that the 4-year custodial term on Count 3 already reflected part of the appellant's culpability on Count 1.

5. We observe, at the outset, that the Recorder's approach was clearly unorthodox, not least because, as cases such as R v Brown [2007] 1 Cr App R(S) 77 and R v Pinnell and Joyce [2011] 2 Cr App R(S) 30, have long made clear, it is generally not appropriate to make a determinate sentence consecutive to an extended sentence.

6. At all events, the grounds of appeal are that (i) the Recorder erred in imposing an extended sentence since the aggregation of the two offences did not properly reach the 4-year threshold required by section 226A of the Criminal Justice Act 2003, which led to the imposition of a sentence that was manifestly excessive and (ii) the Recorder was wrong to impose a consecutive determinate sentence on Count 1 instead of a concurrent term, which contributed to the sentence being manifestly excessive.

7. The facts, in short, are these.

8. The appellant, a former professional boxer, was born in January 1975 and so is now aged 43. He had a number of previous convictions, including assault occasioning actual bodily harm in 1998; causing grievous bodily harm in 1999 (the circumstances of which were that the appellant grabbed a person's throat in a wine bar and was headbutted by that person, after which the appellant, with others, pulled the victim to

the ground and bit his ear off); convictions for false imprisonment and assault occasioning actual bodily harm also in 1999 (the facts of which were that the appellant was at a friend's flat and hit the friend with an ashtray, a telephone and a brass knob and then stabbed him in the head and leg with a pair of scissors – and such was the violence of the attack that the victim jumped from a second storey window in order to escape, suffering cuts, bruising and injury to his back in the process); two offences of assaulting a constable in 2004; and offences of assaulting a constable, using threatening words or behaviour, resisting or obstructing a constable, assault with intent to resist arrest, and battery – for which, on 1 July 2015, the appellant was sentenced in total to the 17 week suspended sentence to which we have already made reference, which was suspended for 18 months. Those five offences arose when the appellant was on holiday with his family. There was a row and the police were called. The appellant then became aggressive and kicked and punched the officers who attended – knocking one of them unconscious in the process.

9. The instant offences occurred on the night of Friday 4 September 2015, and thus only some 2 months after the imposition of the suspended sentences. By that time the appellant had separated from his wife, and had formed a relationship with a woman called Zoe Walker.

10. The appellant went out drinking with work colleagues and then met up with Ms Walker and a friend of hers. They went to two clubs – in each of which the appellant was drinking vodka. In the second club the appellant proposed marriage to Ms Walker in front of everyone.

11. When they left the club Ms Walker and her friend went to get a taxi, whereas the appellant set off on foot for Ms Walker's house, where he was intending to spend the rest of the night. In the meanwhile, Ms Walker and her friend hired a taxi which was driven by Mr Afsar. Ms Walker paid him £10 upfront and agreed with him that they would pick up the appellant en route and go to a cashpoint, which would enable the appellant to withdraw money to pay the remainder of the fare. The appellant was duly picked up, but before they got to the cashpoint he became aggressive towards Mr Afsar, asking him: "Do you know who I am? I run Bristol". He then called Mr Afsar "a fucking Paki".

12. The taxi arrived at a service station where there was a cashpoint, and the appellant got out. He then opened the driver's door and again shouted at Mr Afsar, bending down to look at him and getting closer and closer. He then told Mr Afsar to give back the £10 that Ms Walker had given to him for the fare. Then, without warning, he punched Mr Afsar in the face with his right fist, and then kneed him in the ribs four or five times. Mr Afsar, somewhat trapped in the driver's seat, tried to move across to the passenger seat. The appellant said: "I've got a knife on me. Don't make me stab you, you don't know who I am". The appellant also said: "I'm going to kill you".

13. Mr Afsar managed to get out of the taxi, and for a period of about 10 minutes thereafter the appellant followed him around the forecourt of the service station sparring with him, not actually hitting him but squaring up as if to hit him – though on one occasion he did hit him again by way of a punch to the right eye. Mr Afsar then punched the

appellant back, and the appellant fell to the ground. Other members of the public tried to restrain the appellant and eventually he walked away. There was CCTV footage of part of the incident.

14. Mr Afsar suffered a black eye and a bruised fist for which he was treated that night at the Bristol Royal Infirmary. In his victim personal statement, he made clear that a month after the racially aggravated common assault upon him he had been too scared to return to work. In consequence, he was struggling financially. He said that the assault upon him had changed his life. He had been a confident individual, but now found it difficult to trust new people, though he had eventually been able to return to work.

15. Later that night Ms Walker was returning home in another taxi, when it passed the appellant walking in the road. Concerned that he might be injured from the earlier incident, she stopped and picked him up, and they returned to her house. They went upstairs to the bedroom and it was there that the appellant committed the offence in Count 3. He punched Ms Walker to the back of the head around five to seven times, saying as he did so in a calm voice: "Let's just do another one to make sure and we'll make sure the next one is harder so it does the job". Eventually, as was clearly intended, the force of the blows rendered Ms Walker unconscious.

16. As a result of the assault Ms Walker sustained around nine lumps to the back of her head. She went to hospital later that morning and her neck was put in a brace. She was in a lot of pain and was kept in overnight. The police were notified, but she was released the following day as, contrary to initial fears, she had not suffered more serious injury than the lumps to which we have already referred.

17. The impact of the offence on Ms Walker was nevertheless very significant. In her victim personal statement, she described how she had almost daily flashbacks and nightmares in consequence. She would burst into tears, she had become nervous of strangers, of if unknown vehicles were nearby. She had to sell her house, where she had lived for some 16 years, because she was concerned that the appellant might return there. She thought that on his release she might be trapped if she had continued to live there. In consequence of her worries she had lost over a stone in weight, indeed a few days after the trial she was weighed at only 7 stone and 8lbs. She was mentally low and taking antidepressants. Her children had noticed that she was upset, but she was not able to tell them the details of what had happened. She said that she genuinely believed, whilst under attack by the appellant, that she was going to die and that he was going to kill her.

18. The Recorder, who of course had the advantage of seeing Ms Walker give evidence at the trial, said that the offence clearly had had a very, very significant effect upon her.

19. There was a pre-sentence report before the Recorder in which the author recorded that the appellant had accepted full responsibility for the offence of racially aggravated assault - as to which he did not dispute the victim's account and presented himself as being ashamed. However, he did not present any acceptable attitude or understandable reason for his offending, other than his intoxication and arrogance. He had little to say about his motivation for assaulting Ms Walker and struggled to accept full

responsibility in relation to it. The author opined that he used his alcoholic intoxication to minimise his acceptance of the incident. He had a history of using aggression to solve even the most minor conflicts and his motivation for offending, the author opined, appeared to be a desire to gain control over others and to assert his dominance. There was, the author said, an established pattern of serious domestic abuse.

20. The appellant had admitted that he had a problem with alcohol for most of his adult life and was of the view that if he had not consumed alcohol on the night of the offences he would not have committed them. The author, however, concluded that, whilst alcohol might be a trigger for his violence, it was not to blame for his aggressive and controlling behaviour. The author indicated that it was concerning that the index offences involved serious and repeated violence against his female partner and a violent and unprovoked racist attack.

21. In the result, the appellant was assessed as posing a high risk of harm to the public and to female partners with an associated risk to children through witnessing his domestic abuse.

22. In passing sentence, the Recorder rehearsed the facts of the instant offences and the fact that the appellant had pleaded guilty to Count 1. As to Count 3, he concluded that the offence fell into category 1 of the relevant Guideline as it involved both greater harm (because the injury was serious in the context of the offence) and higher culpability (because, as a former professional boxer, the appellant's fists were the equivalent of a weapon).

23. There were also, said the Recorder, a number of statutory and other aggravating features which made the offence even more serious. The appellant had been drinking; the assault was in a domestic context, in breach of trust, indeed in the victim's own bedroom; the appellant's previous convictions for violence and the nature of them; and the fact that he was in breach of the suspended sentences.

24. In contrast, said the Recorder, there was not a single mitigating feature.

25. The appellant's record, which included previous specified offences, the circumstances of the instant offences, and the content of the pre-sentence report all led the Recorder to conclude that the appellant was a dangerous offender. Given the number of aggravating features and the absence of any mitigating features in respect of Count 3, the sentence after trial, which the Recorder identified for that offence, was one of three-and-a-half years' imprisonment.

26. As to Count 1, the Recorder said that the offence had involved a prolonged, sustained incident. The victim was a taxi-driver, conducting a public service. It had happened late at night, and hence, the appropriate sentence would be 26 weeks' imprisonment – rising to 39 weeks, when the racial aggravation was taken into account. Hence, he said, the combination of sentences for Counts 1 and 3 would exceed 4 years.

27. It was against that background that the Recorder first imposed, and later varied, the sentences to which we have already referred. In the process it seems that he divided the

appellant's criminality on Count 1, taking part of it into account in the sentence that he imposed on Count 3 and ordering the remainder to be served consecutively on Count 1.

28. On the appellant's behalf, Mr Mohabir does not dispute the finding of dangerousness. Nor, in relation to Count 3, does he question the finding of greater harm – no doubt because of the combined physical and psychological effect on Ms Walker. He questions, however, whether the offence was one involving higher culpability. He also points out that the Recorder made no specific reference to the Guideline in relation to racially aggravated common assault – as to which he underlines that, even for an offence at the top of the rage, the longest sentence envisaged is one of 26 weeks (albeit that the statutory maximum is 2 years).

29. Mr Mohabir submits that here was nothing in the offence in Count 3 which should have taken it outside the range indicated for a category 1 offence, if category 1 offence it was. The Recorder, he submits, did not explain why it was a case which required sentence outside the range indicated in the Guideline – which, he points out, should have been the case if that was the view that the Recorder took. He submits that the sentence in relation to Count 1 was also outside the range, without clear explanation from the Recorder as to why that should be the case. He further submits, in so far as Count 3 is concerned, that comparison with the Guideline for the more serious offence of causing grievous bodily harm further demonstrates that the sentence on that Count was too long. He also submits that the Recorder failed to take into account the principle of totality, and may well also have failed to make an appropriate deduction for the appellant's early plea to Count 1.

30. In the result, Mr Mohabir submits, the appropriate sentence in relation to Count 3 should have been one of no more than 3 years' imprisonment, and any consecutive term in relation to Count 1 should have been no more than 3 - 4 months' imprisonment. He adds that, to the extent that it was necessary to implement the suspended sentence, that should have been for a period of less than 17 weeks – given that 2 months had passed between the imposition of the sentence and its breach. In the result, he submits, this was not a case in which it was appropriate to pass an extended sentence and, in any event, it was clearly inappropriate to partially apportion culpability in relation to Count 1 in the way that the Recorder did, and to impose a consecutive determinate sentence.

31. We agree that it was wrong to partially apportion culpability in the way that the Recorder did. Indeed, given the undoubted errors that the Recorder made during the course of this sentencing exercise, it seems to us that we must begin to decide the outcome of the appeal by considering afresh what the appropriate sentence should have been.

32. We do so against the background that it is not disputed that the appellant is a dangerous offender.

33. The custodial threshold is clearly crossed in respect of both offences. The principal offence, for the purpose of sentence, is plainly that in Count 3. In assessing the appropriate custodial term for that offence, it is open to the court, with the principal of totality in mind, to take into account one or more associated offences, that is, offences

for which the offender falls to be sentenced at the same time as the principal offence. That, in the circumstances of this case, plainly brings into potential consideration sentence in respect of both Count 1 and the offences for which the suspended sentences were imposed.

34. The assault on Ms Walker, committed in a domestic context was, in our view, a very serious offence of its type. It plainly involved both greater harm and higher culpability and there were, in addition to that, numerous significant aggravating features and not a single mitigating feature. Clearly, a very substantial increase from the starting point was required. In our view, the gravity of the aggravating features was such as to justify a sentence beyond the normal range. We find ourselves in agreement with the Recorder that, in the particular circumstances of that offence, a sentence, after trial, of three-and-a-half years' custody was entirely appropriate.

35. The offence in Count 1 was also, in our view, a very serious one of its type, also involving both greater harm and higher culpability, with numerous aggravating features, and only some remorse and the plea as mitigating features. Mr Afsar was a taxi-driver, performing a public service, who was considerably affected by his ordeal. Whilst it is submitted that he was only subjected to one racial taunt, that would have been of very little consolation to him. Again, given the gravity of the aggravating features, it seems to us that a sentence beyond the top of the normal range was called for. We conclude that the appropriate notional sentence after trial for that offence, taking into account the principle of totality, was a consecutive one of 9 months' imprisonment, reduced to 6 months to reflect the appellant's plea.

36. In our view it is entirely appropriate to take that additional 6 months into account when considering the appropriate custodial term on Count 3. Therefore, without considering the suspended sentences, it seems to us that the appropriate sentence in relation to Count 3 was clearly one of at least 4 years' imprisonment.

37. Having taken the appropriate sentence on Count 1 into account in assessing the length of the term on Count 3, the sentence on Count 1 must be concurrent and (given that this is an appeal and that we are not reducing the term on Count 3) can be no longer than the term imposed by the Recorder.

38. If this court was passing sentence, we would have been minded to order the 17-week suspended sentence to be served in full, and to order the extended sentence to run consecutively to it. But that would involve an impermissible increase in the appellant's sentence.

39. Having thus calculated the sentence which should have been imposed, it is clear that there is no merit in the complaint in relation to the extended sentence, and that will remain as passed. However, for the reasons that we have explained, we order that the sentence imposed by the Recorder on Count 1 is to run concurrently rather than consecutively to the term on Count 3. The order in relation to the suspended sentence will remain as before.

40. In the result, the total sentence that the appellant will now serve is the 5-year extended sentence imposed on Count 3 – made up of a custodial term of 4 years' imprisonment, and an extended period of licence of 1 year.

41. To that very limited extent, this appeal is allowed.