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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 12th November 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE WARBY

and

HER HONOUR JUDGE MUNRO QC
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v -

JOHN THOMAS SMITH

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Mr M Watson appeared on behalf of the Appellant

J U D G M E N T
(Approved)

Tuesday 12th November 2019

LORD JUSTICE HOLROYDE:

1. The appellant appeals by leave of the single judge against a sentence of eight months' imprisonment for an offence of affray. He contends that the sentence should have been suspended.

2. The offence was committed in busy licensed premises on the evening of 11th November 2017. It was captured on CCTV. The footage was seen by His Honour Judge Taylor in the court below and has been seen by this court. The appellant appears to have been part of an extended family group, which included at least one child. He was clearly intoxicated.

3. Some of the customers were dancing near the bar. The appellant went to the bar and appeared to be amused by the manner in which one of those customers, Mr Osbourne, was dancing. He parodied Mr Osbourne's movements and then took hold of him behind. Others intervened to pull the appellant away. He began to shadow-box. There followed a confrontation between the appellant and others at the bar who were in Mr Osbourne's group. A physical maul developed. The appellant's father tried to intervene, but then the appellant threw Stuart Wade onto a pool table. The appellant was pulled away by others, but then punched Victoria Wade in the face. She fell against the pool table and then onto her knees on the floor. The appellant engaged with Larry Smith and punched him, causing him to fall to the floor unconscious, although he did not support the prosecution. The appellant left the building, but then re-entered and punched Mr Osbourne to the floor. This ugly scene was witnessed by other customers, including children.

4. Mr and Mrs Wade were taken to hospital. Mr Wade had a small, superficial laceration over his right temple, which was cleaned and dressed. Mrs Wade had significant tenderness over the back of her neck, along her spine and over the bridge of her nose. She was given pain medication. Both were discharged.

5. In a Victim Personal Statement made about six months later, Mrs Wade said that she remained anxious as a result of this incident. She had initially been medicated for about two weeks and had experienced panic attacks. She still felt unable to go out and socialise. She had not returned to the scene of the incident, even though she had previously been a customer there for about twelve years. She became upset if she thought about what had happened.

6. The appellant was aged 22 at the time of the offence. He is now 24, a married man with three young children. He was employed in a roofing business which he had established. His only previous convictions were for two offences of assaulting a constable, committed when he was aged 20, for which he had been fined. As a 17 year old, he had received a formal reprimand for using disorderly behaviour.

7. The judge had the assistance of a pre-sentence report which assessed the appellant as posing a low risk of re-offending and a low risk of causing serious harm to others. The judge also had a character reference from a teacher who knows the appellant well. She referred to his hard work, his devotion to his family, and his efforts to raise funds for a charity.

8. The case had, unfortunately, taken a long time to come before the court. It had twice been listed for trial, but not reached. The appellant asked to be re-arraigned and entered a guilty plea at a hearing on 29th August 2019 in advance of the trial which was due to begin on 2nd September 2019.

9. There is at present no definitive guideline for sentencing in cases of affray, although one will come into effect in the near future.

10. In his sentencing remarks, the judge said that he had no doubt, having watched the CCTV, that the appellant used sustained violence and was the cause of this incident. He said that it was conceded that the offence crossed the custody threshold and that the question he had to decide was whether he could suspend the sentence. Despite the very strong mitigation, he said, what he had seen on the CCTV meant that he could not do so. He took a sentence after trial of ten months' imprisonment, which he reduced by two months by way of credit for the guilty plea. Thus, he imposed the sentence of eight months' imprisonment.

11. On behalf of the appellant, Mr Watson, who represents him today as he did in the court below, submits that the judge failed properly to follow the Sentencing Council's definitive guideline on the imposition of custodial sentences and was in error in his decision not to suspend the sentence. Mr Watson draws attention to the four-step process which the guideline requires sentencers to follow when imposing a custodial sentence:

(a) Has the custody threshold been passed?

(b) Is it unavoidable that a sentence of imprisonment be imposed?

(c) What is the shortest term commensurate with the seriousness of the offence?

(d) Can the sentence be suspended?

12. In his very helpful oral submissions, Mr Watson has indicated that he takes no issue about the first three of those stages. He accepts that it could indeed be said that the length of the custodial term was on the lenient side. He does, however, focus his submissions on the fourth stage of the process. He draws attention to the requirement in the guideline that at that stage the sentencer should weigh a number of factors. Mr Watson submits that the judge should have given much greater weight than he did to the presence in this case of all three of the factors which are listed as indicating that it may be appropriate to suspend a sentence: first, a realistic prospect of rehabilitation, particularly bearing in mind that the appellant had been on bail for almost two years without further incident; secondly, strong personal mitigation; and thirdly, the fact that immediate custody would result in a significant harmful impact upon others, in particular because the appellant would lose his employment and would thus deprive the family of its income.

13. In pointing out that the judge did not explicitly refer to the imposition guideline in his sentencing remarks, Mr Watson acknowledges that no submissions were made expressly drawing the judge's attention to it. We, nevertheless, think it clear from the transcript as a whole that the judge correctly considered the four steps which the guideline indicates. It is rightly conceded – and was in the court below – that the offence passed the custody threshold. As we have said, no complaint is made about the length of the sentence imposed. The credit given for the guilty plea may be said to have been generous, given that the appellant had had more than one opportunity to enter that plea much sooner than he did. Thus, the real issue in this appeal is the same issue as was the focus of the judge's attention, namely, whether the sentence must take effect immediately.

14. We accept the submission that the factors listed in the guideline as favouring suspension were present. That, however, does not conclude the issue in favour of the appellant, because the guideline also requires consideration of factors indicating that it would not be appropriate to

suspend the sentence, one of which is that appropriate punishment can only be achieved by immediate custody.

15. The appellant is plainly a hard-working man with many good qualities and, in the ordinary way, he lives a law-abiding life. On this occasion, however, he committed a serious offence. He used violence against more than one victim; he caused harm to one of those victims which still affected her months later; and he returned to the scene after the incident had apparently ended in order to strike a final, powerful blow before leaving. His previous convictions, though few in number, were an aggravating factor. His own intoxication and the fact that he started a violent incident in licensed premises were further aggravating factors.

16. There was strong mitigation available but, with respect to Mr Watson's submissions - which have made the relevant points on the appellant's behalf as well as they could be made - we do not think that the matters of mitigation carry as much weight as is suggested. This is not a case in which a suspended sentence would afford a prospect of rehabilitation which an immediate sentence would obstruct or prevent. The passage of time since the commission of the offence must be seen in the context of the appellant's maintaining of his not guilty plea until almost the end of that long period. The impact upon the appellant's family is, of course, regrettable, but must be balanced against the seriousness of the offence.

17. Having reflected upon the submissions, we have come to the conclusion that the judge was in all the circumstances entitled to find that appropriate punishment could only be achieved by immediate imprisonment. We are, therefore, unable to say that the sentence was either wrong in principle or manifestly excessive in length.

18. Grateful as we are to Mr Watson for his submissions, the appeal accordingly fails and is dismissed.

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