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No: 201903620/A1

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Wednesday, 20 November 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE WILLIAM DAVIS

HIS HONOUR JUDGE LODDER QC

(Sitting as a Judge of the CACD)

R E G I N A

v

SEAN MCNULTY

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Mr D McCreddie appeared on behalf of the **Appellant**

J U D G M E N T

(Approved)

1. LORD JUSTICE HOLROYDE: This appellant pleaded guilty before a Magistrates' Court to two offences of ill-treatment or neglect by a care worker, contrary to section 20 of the Criminal Justice and Courts Act 2015. He was committed for sentence to the Crown Court at Teesside where, on 6 September 2019 he was sentenced to a total of two years eight months' imprisonment. He now appeals against that sentence by leave of the single judge.
2. The appellant, now aged 36 and a man of previous good character, had for about 14 years been employed as a support worker in a hospital which cared for adults with Down's Syndrome, autism and other learning difficulties. There had been no complaints about his behaviour towards the patients for whom he cared. In early 2019, however, colleagues reported to the manager concerns about his treatment of some patients. The manager reviewed the footage from CCTV cameras which, as it happened, had been installed in the premises at a time when the appellant was on holiday and of which he was therefore unaware.
3. The recordings showed that the appellant had ill-treated two of his patients: Mr Marriner, a man in his thirties who suffers from Down's syndrome, and Mr Ripley, a man in his mid-forties who suffers from autism and learning difficulties and has complex needs.
4. Over a period of about a month, there had been 19 incidents in which the appellant had assaulted Mr Marriner. The most serious of these were occasions when the appellant had struck full punches to Mr Marriner's head. Other incidents involved lesser punches, slaps, hitting Mr Marriner with a file of papers, rubbing the appellant's knuckles into Mr Marriner's head and kicking Mr Marriner's leg, albeit not hard. It should be observed that the appellant is a man of heavy build and therefore capable of striking with considerable force.
5. On one day during the period covered by the incidents involving Mr Marriner, the appellant assaulted Mr Ripley twice: first by striking a back-hand blow to his face, followed by lesser taps on the face; and later by deliberately pressing a key into Mr Ripley's thigh as the appellant placed his weight through the hand holding the key in order to rise from a seated position.
6. When first interviewed under caution the appellant made no comment. However, he was then shown the CCTV footage. He said he could not remember the incidents but was shocked by seeing what he had done. He told the police that he had had mental health problems for a number of years during his late wife's long illness and had been suffering from low mood since her recent death.
7. The appellant pleaded guilty at the first opportunity. He was entitled to and in due

course received full credit for his guilty pleas.

8. A victim personal statement was before the court from the cousin and next of kin of one of the victims of the offences. As one would expect, she expressed her shock at finding out what had happened in an environment where she had thought her cousin would be safe. She observed that her cousin is not able to voice his concerns or any issues and was reliant on others to look after him. She said that her trust had been broken, she felt let down by the hospital and was upset by what had happened.
9. At the sentencing hearing, the judge was assisted by a pre-sentence report. This recorded that in the course of his work with patients, some of whom could be challenging and aggressive on occasions, the appellant had himself been assaulted a number of times but had previously managed such incidents appropriately. The appellant had expressed remorse for what he had done, acknowledging that his victims were unable to communicate the fact that he was abusing them. He said that the episodes shown on the CCTV footage were completely out of character for him. He explained that his wife had become very ill soon after their marriage and had for several years been in a care home, whilst the appellant worked and cared for her children (his step-children). He had accrued debts during that period and had had to borrow a substantial sum to pay the funeral expenses when his wife sadly died in 2018. Having now inevitably lost his employment the appellant had substantial debts and was dependent on the support of his mother.
10. The judge also had a report from Dr James Todd, a consultant forensic psychiatrist, which concluded that over a number of years the appellant had suffered with a relapsing depressive illness, with episodes reaching the threshold for moderate severity at times. His depressive illness resulted in low mood, loss of motivation and drive, pessimistic thoughts, hopelessness regarding the future, reduced tolerance to frustration, poor concentration and irritability. The appellant had been treated by his GP for these problems over a number of years. He had on occasions been off work, but Dr Todd noted that treatment and resolution of significant life stressors had resolved the various episodes which the appellant had suffered. Dr Todd commented on the demanding nature of the appellant's work and said that the medical records provided evidence that at times during episodes of depression the appellant had struggled to meet the demands of work in terms of managing his own emotions and frustrations. Dr Todd had no doubt that the appellant was suffering some degree of depressive disorder at the time of the offences, although it may have been of a relatively mild level. He said that the appellant continued to demonstrate some features of mild to moderate depressive illness, although likely now to be related to the ongoing criminal proceedings. He thought it likely that a custodial sentence would to some degree exacerbate the appellant's depressive disorder. He expressed the clear conclusion that the impact of the appellant's depressive disorder over a significant period of time was a factor in the offences in terms of reducing the appellant's tolerance to frustration, his capacity for managing stress and in increasing his irritability.

11. In his sentencing remarks, the judge rightly emphasised the vulnerability of the two victims and the appalling abuse of trust by the appellant. The judge observed that anyone watching the CCTV footage would be horrified by the cruelty which the appellant had shown. The judge took into account the appellant's own mental health problems, the profound effect on him of his wife's illness and death, his previous good character and his years of good service. But, he said, the offences were prolonged and sustained, and they involved the use of force, albeit there was no evidence of serious physical injury. There is no sentencing guideline directly applicable to offences of this nature. The judge in the absence of a specific guideline considered culpability, which in his view was high because of the number and nature of the incidents, and he considered harm, which could not be assessed by asking the victims but which the judge felt could be described as "approaching serious". The judge was satisfied that appropriate punishment could only be achieved by immediate custody and must take into account the element of a need to deter others from abusing vulnerable persons in their care.

12. For the offence relating to Mr Marriner, the judge took a sentence after trial of three years' imprisonment and for the offence against Mr Ripley he took a sentence after trial of one year's imprisonment. Giving credit for the pleas, he imposed consecutive sentences of two years and eight months.

13. Mr McCreddie, representing the appellant in this court, as he did below, submits that the sentence was manifestly excessive. In his helpful submissions he argues that the judge gave insufficient weight to the matters of mitigation, in particular the appellant's previous good character and years of good work, and insufficient weight to the very difficult personal circumstances which the appellant faced around the time of the offending. Mr McCreddie accepts that a custodial sentence was appropriate but submits that it should have been shorter and should have been suspended.

14. The Sentencing Council has recently published a definitive general guideline which sets out over-arching principles for sentencing where there is no offence-specific guideline. That guideline was not in force as at the date of sentence. However, the approach which the judge took was consistent with the principles subsequently set out in the guideline. The judge took into account the statutory maximum sentence, which was five years' imprisonment for each of these offences. He considered whether guidance could be derived from the guideline dealing with offences of neglect of children and he considered, with an appropriate degree of caution, cases cited to him in which sentences had been passed for different but roughly analogous types of offence. In addition, it seems to us clear from the terms in which the judge expressed himself that he had well in mind the Imposition guideline and had followed that guideline in reaching his conclusion that immediate imprisonment was unavoidable. There can therefore be no criticism of the judge's approach. The issue for this court is whether in all the circumstances of the case the total sentence was manifestly excessive in length.

15. Offences of this type are inherently serious. They involve a breach of the trust which should exist between the patient and the carer, and of the wider trust which should exist between those who entrust their loved ones to care and those who provide it. The appellant, whose late wife spent so long in a care home, must have been acutely aware of the need for the families of patients to be able to feel confidence in the care their loved ones will receive.
16. Offences of this type also involve harm being caused to a vulnerable victim. In the present case, the seriousness of the offending was increased by the number of separate incidents of ill-treatment and by the fact that the ill-treatment took the form of physical assaults, some of which involved the application of significant force against victims who were unable to articulate what was happening to them. The CCTV shows them to have been distressed and fearful and although there was no evidence of any significant physical injury, they must surely have experienced not only pain but also great distress. It is further clear from the CCTV footage that whilst the assaults were acts of temper on the part of the appellant, visibly frustrated by the behaviour of the patient with whom he was engaged, they were nonetheless entirely deliberate acts. In relation to at least some of the incidents, the CCTV footage appears clearly to show the appellant taking the precaution of checking that the coast was clear and that no one was likely to enter the room before committing the assault. One of the more serious assaults, indeed, was preceded by his closing the door, before crossing the room and punching Mr Marriner to the head. For all of those reasons, the judge was correct to take a serious view of the offending.
17. As against that, there was undoubtedly significant personal mitigation. There is no reason to doubt that until these offences the appellant had been a diligent and caring worker. He had given many years' good service. He has a history of mental health issues and the long illness and death of his wife have clearly taken a heavy toll. By his actions the appellant has brought about the loss of his employment and he faces a difficult future when released. He is plainly remorseful and, as we have said, pleaded guilty at the earliest opportunity. There were two victims, but only one was the victim of offences on many days over a period of about one month. The circumstances of the offending were such that either concurrent or consecutive sentences could be justified, provided of course that the total sentence properly reflected the overall seriousness of the offending. Finally, it must be borne in mind that the maximum sentence of five years' imprisonment for each of these offences has to cater for all offending of this type, including offences which are yet more serious examples of their kind and those committed by offenders with relevant previous convictions.
18. Balancing those considerations, we conclude that the total sentence imposed by the judge, based as it was on a notional total sentence of four years after trial, was outside the range properly open to him and so was manifestly excessive. In our judgment the appropriate total sentence after trial would have been three years' imprisonment. Giving appropriate credit for the pleas reduces that total to two years. We are however in no doubt that the

learned judge was correct to say that appropriate punishment could only be achieved by immediate imprisonment.

19. We therefore allow the appeal to this extent: we quash the consecutive sentence of eight months' imprisonment imposed below for the offence against Mr Ripley and we substitute for it a concurrent sentence of eight months' imprisonment. Thus the total sentence becomes one of two years' imprisonment.

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