IN THE COURT OF APPEAL

CRIMINAL DIVISION

Neutral Citation Number: [2021] EWCA Crim 166

CASE NO 202003237/A1

Royal Courts of Justice

Strand

London

WC2A 2LL

Tuesday 2 February 2021

LORD JUSTICE HOLROYDE

MR JUSTICE LAVENDER

HIS HONOUR JUDGE LODDER QC

(Sitting as a Judge of the CACD)

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

REGINA

V

"VT"

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MR J SMITH appeared on behalf of the Attorney General.

MR J HARRISON appeared on behalf of the Offender.

J U D G M E N T

1. LORD JUSTICE HOLROYDE: This case relates to a youth who was aged 15 at the time of his offence, and is now aged 17. The provisions of section 45 of the Youth Justice and Criminal Evidence Act 1999 are engaged and we are satisfied that his welfare outweighs the strong public interest in open justice. We make an order pursuant to that section that whilst he remains under the age of 18, no information may be included in any publication which is likely to lead members of the public to identify him as a person concerned in these proceedings. We shall refer to him as "VT".
2. VT was convicted of an offence of wounding with intent, contrary to section 18 of the Offences Against the Person Act 1861. He was sentenced to a youth rehabilitation order, with requirements of supervision, an activity requirement and a programme requirement.
3. Her Majesty's Solicitor General believes that sentence to be unduly lenient. Application is accordingly made, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer the case to this court so that the sentencing may be reviewed.
4. VT and his victim knew one another from school. They had, at one stage, been on friendly terms but had fallen out in the summer of 2018.
5. The offence was committed on 9 February 2019 when VT was aged 15 years 9 months and his victim a few months older. VT and three others approached the victim in the street. After an exchange of words, VT punched him. So too did one of the other youths. The victim tried to fight back. VT then stabbed him in the back with what the victim described as a pocket knife with a blade 3 or 4 inches in length. The wound bled heavily. He was assisted by passers-by and taken to hospital.
6. A report provided by the hospital described the a centimetre incision, with the wound penetrating into muscle to a depth of 10 centimetres. By good fortune, it appears that the injury was less serious than it might have been.
7. VT was arrested that evening on suspicion of attempted murder. In interview under caution he denied that allegation but otherwise made no comment. He was released on bail.
8. Months then passed. Enquiries were being made into the identity of the other three youths, though ultimately no one else was charged. Scientific examination of VT's clothing (which in the event found no bloodstaining or other incriminating feature) was not completed for several months. It was not until late October 2019 that the medical report was provided by the hospital. The consequence was that VT remained under suspicion of attempted murder, on bail for about 3 months and thereafter released under investigation until 23 December 2019, when he was charged. At that stage the charge was one of inflicting grievous bodily harm with intent. At a later stage, which has not been identified with precision, it was changed to the charge of which VT was ultimately convicted.
9. On 23 January 2020 VT made his first appearance before the Youth Court. The prosecution submitted that the case was suitable for trial before the Youth Court and that the likely sentence, if convicted, was no more than 2 years' custody. The court accepted that submission.
10. At trial in June 2019, before the Deputy Chief Magistrate, VT's case was that he had not been present at, or involved, in the incident. He did not give evidence. He was convicted and was committed for sentence to the Crown Court pursuant to section 3B of

Powers of Criminal Courts (Sentencing) Act 2000.

11. VT then appealed against his conviction. The appeal was heard by HHJ Denniss and two magistrates sitting in the Crown Court at Isleworth. VT gave evidence, claiming that he had not been present or involved and putting forward an explanation for the cell siting of his phone in the relevant area. The court accepted the evidence of the victim, disbelieved VT and dismissed the appeal.
12. The learned judge then adjourned sentence so that a full report could be prepared by the Youth Offending Team. He gave no indication as to the likely sentence but observed:

> "The primary aim of the court in these circumstances is rehabilitation, not punishment, although this was a serious case."

13. After a short delay, because VT was required to self-isolate, the sentencing hearing took place on 30 November 2020. No up-to-date medical information about the victim and no victim personal statement was provided to the court. VT, who was aged 17 years 6 months by the time of the sentencing hearing, had no previous convictions, cautions reprimands or warnings. In the period which had elapsed since the commission of the offence, he had taken five GCSE examinations, passing all of them with good grades. He had not committed any further offence. His family had planned to relocate to a different area, so that a fresh start could be made, and VT had been offered an apprenticeship in the area where they hoped to live. Unfortunately that plan had not come to fruition, so arrangements had instead been made for VT to commence, in December 2020, a 2-year extended BTEC, course treated as equivalent to three A Levels.
14. The judge was assisted at the sentencing hearing by what he rightly described as "an extremely good report, insightful and helpful" by a member of the Youth Offending Team. VT had admitted the stabbing to the author of the report, saying that he had used a compass which he had in his rucksack, and had acted because he feared he would be seriously hurt by his victim.
15. The author of the report referred to the support which VT received from his close-knit, stable and law-abiding family. He assessed VT as understanding the seriousness of his conduct and being genuinely remorseful. He assessed the offence as being an isolated incident, out of character. He expressed concern that custody, of which VT was frightened, would expose VT to others more entrenched in criminal behaviour and would limit his future opportunities. He concluded that VT would benefit more from community intervention, with which he was motivated to engage fully. Having discussed various possible options he recommended a youth referral order with the package of requirements which the judge later imposed.
16. The judge was also provided with letters speaking of VT's good qualities, including his diligence as a student and his voluntary work at his Hindu temple.
17. Mr Harrison, then as now representing VT, made submissions in mitigation. The judge raised a question as to whether he should sentence on the basis that VT had used a knife or a compass, commenting that the latter "seems to be more consistent with the description of the injury". He said that: "It makes a considerable difference to the gravity of the offence." Having considered reasons why witnesses might have thought that a compass was a knife, the judge decided that he would sentence on the basis that a compass had been used.

18. In his sentencing remarks the judge observed that an adult offender would receive a prison sentence of quite some length. But, he said:

> "... you were only 15 at the time and the law is that the court should try and seek rehabilitation, if at all possible, for children who get involved with the law."

19. The judge went on to say that he was confident that VT would not get involved in any further offences of violence. He referred to VT's family and to VT's charitable work at the temple, which was a strong point in his favour. He accepted that VT was genuinely remorseful. He noted that VT had no previous convictions and had not been in any trouble since the offence. He concluded that the appropriate sentence was that to which we have referred.
20. The prosecution subsequently applied under the slip rule for the judge to reconsider the factual basis of his sentence. At a hearing of 21 December 2020 the judge accepted that he had almost certainly been in error in accepting without question that VT had used a compass. He accepted that it was almost certainly a pocket knife, which was a more probable instrument to have inflicted the injury. He said however that that error had made no difference to his sentence. At the end of the appeal hearing, and before the preparation of the report, he had in any event had a youth rehabilitation order in mind. He considered that rehabilitation was paramount in this case and that the elapse of almost 2 years since the offence was very significant. It was also important that VT had no previous convictions, and had an exemplary record which was reflected in the documents put before him. The judge emphasised that he had not accepted that it was a case of excessive self-defence. In those circumstances he declined to vary his sentence.
21. For the purposes of this hearing the court is assisted by an updating report from the Youth Justice Service as to VT's progress during the time he has been subject to the youth rehabilitation order. This updating report confirms that VT has complied with all requirements made of him, has attended all sessions and engaged extremely well. The author of the report assesses that the imposition of a custodial sentence, whilst sending a strong message that behaviour of this kind will not be tolerated, will do little by way of rehabilitation for VT and would likely limit his future opportunities with regard to his eventual release back into the community. The author added that VT is engaged with education, and a custodial sentence would constrain his completion of the current BTEC course.
22. On behalf of Her Majesty's Solicitor General, Mr Smith submits that the finding that VT had inflicted the injury with a compass rather than a knife was not one which was reasonably open to the judge. At the appeal hearing the court had accepted the evidence of the victim and had rejected that of VT. The judge should not have accepted for sentencing purposes a version of events which was put forward only to the author of the pre-sentence report, was inconsistent with the victim's evidence and had never been tested. In those circumstances Mr Smith submits that, on the authority of R v Cairns [2013] EWCA Crim 467; [2013] 2 Cr App R(S) 73, this Court is entitled to, and should, sentence on the correct factual basis.
23. Alternatively, and in any event, the sentence did not adequately reflect the seriousness of the offence. In terms of the guideline applicable to an adult offender it was a category 2

offence, with a starting point of 6 years' custody and a range from 5 to 9 years. Mr Smith submits that two higher culpability factors were present, namely the use of a knife and the fact that VT played the leading role in a group of attackers. The offence was further aggravated by the fact that another of the youths present had filmed the attack.

24. In those circumstances, submits Mr Smith, the judge would have been entitled to move upwards from the guideline starting point for an adult before considering matters of mitigation and then addressing an appropriate reduction for youth.
25. As to matters of mitigation, Mr Smith accepts that at least some of the passage of time, namely the initial period before charge, was in no way due to the actions and decisions of VT. He further accepts that good character was a matter properly to be taken into account, as of course was VT's youth. But, he submits, the judge's acceptance of genuine remorse is more problematic, given that the remorse was expressed to the author of the pre-sentence report in the course of an untruthful account of the circumstances in which the wound had been inflicted.
26. Mr Smith recognises the principles set out by the Sentencing Council in its Definitive Guideline giving Overarching Principles for Sentencing Children and Young People, but says that the starting point for an adult offender would be a significant period of custody. Even making every allowance for VT's youth and mitigation, it was not open to the judge to come down to a non-custodial sentence. Alternatively, if the youth rehabilitation order was appropriate on the basis that VT had used a compass as a weapon, a substantially more severe sentence was necessary given that he in fact used a knife. In sum, Mr Smith argues that nothing less than a detention and training order was appropriate.
27. Mr Harrison reiterates the mitigating factors which he persuasively argued before the judge. In relation to the long passage of time between the commission of the offence and sentencing, he points to R v Woodhouse [2020] EWCA Crim 970, as an example of the court taking such delay into account. He invites the attention of the court to the principles stated in the Children guideline, and suggests that the submissions of the Solicitor General somewhat tended to treat this young offender as if he were an adult offender whose sentence fell to be reduced on grounds of youth. That, submits Mr Harrison, is not the correct approach. The correct approach is that which the judge accepted and adopted. He recognises that the judge had initially made an observation about the nature of the weapon making a significant difference, but points out that the judge did not either then, or at any other time, suggest that the difference would be determinative of the appropriate type of sentence.
28. As to the doubt cast by Mr Smith on VT's remorse, Mr Harrison submits that the court should recognise the realities of the position of a young offender, finding it difficult to face up to the full extent of his guilt. The important point, submits Mr Harrison, is that in the end VT has accepted his guilt and his responsibility for the injury which he inflicted. The updating report from the youth offending team confirms the view which the judge had formed of VT. In all the circumstances, submits Mr Harrison, there was an accumulation of factors which justified the judge in taking the course he did. Had VT been older at the time of the offence the position would no doubt have been different. But given that he was only 15 at that time, Mr Harrison urges us to treat the sentence as one which was within the range properly open to the judge.
29. We are grateful to both counsel. Having considered their helpful written and oral

submissions, we have reached the following conclusions.

30. As the judge himself acknowledged, he fell into error in his initial decision that he should sentence on the basis that the weapon used by VT was a compass. There must, we think, have been a complete misunderstanding of the dimensions of the wound, which were clearly not consistent with the use of a compass. We accept that the judge's initial finding was not one which he could reasonably have made. It was a significant error in two respects: first, because it underestimated the nature and dangerousness of the weapon which was used; and secondly, because VT was able to put forward a reasonable explanation why he was carrying a compass, but he could not have justified his carrying a pocket knife. The judge made clear that it was not an error which affected his decision as to sentence. We must however consider whether, on a correct understanding of the weapon used and the injury inflicted, the sentence was unduly lenient.

31. The judge rightly followed the Children guideline. That guideline begins by emphasising, in paragraph 1.1, that those sentencing offenders aged under 18 must have regard to the principal aim of the youth justice system, namely to prevent offending by children and young people, and to the welfare of the offender. It goes on to state the following principles, amongst others. First:

> "While the seriousness of the offence will be the starting point, the approach to sentencing should be individualistic and focused on the child or young person, as opposed to offence focused. For a child or young person the sentence should focus on rehabilitation where possible. A court should also consider the effect the sentence is likely to have on the child or young person (both positive and negative) ..."

(paragraph 1.2)

Secondly:

> "... a custodial sentence should always be a measure of last resort for children and young people and statute provides that a custodial sentence may only be imposed when the offence is so serious that no other sanction is appropriate ... "

(paragraph 1.3).

Thirdly, it is important to avoid:

> "…'criminalising' children and young people unnecessarily; the primary purpose of the youth justice system is to encourage children and young people to take responsibility for their own actions and promote re-integration into society rather than to punish."

(paragraph 1.4)

Fourthly:

> "... children and young people are likely to benefit from being given an opportunity to address their behaviour and may be receptive to changing their conduct. They should, if possible, be given the opportunity to learn from their mistakes without undue

> penalisation or stigma, especially as a court sanction might have a significant effect on the prospects and opportunities of the child or young person. …"

(paragraph 1.6).

32. Those principles make clear, in our view, that those sentencing children and young persons should not regard the young offender as, so to speak, a 'cut down' version of the adult offender, or approach the case as if the offender were a mature adult and then merely make an adjustment of sentence to reflect youth.
33. Where a custodial sentence is unavoidable, then paragraph 6.45 of the guideline indicates that the court *may* as a preliminary consideration consult the equivalent adult guideline in order to decide upon the appropriate length of sentence.
34. The judge, in our view, clearly had those principles well in mind and applied them to the circumstances of this case. This was undoubtedly a serious offence. VT was the leader of a group which attacked the victim, outnumbering him four to one. He was carrying a knife which he used to inflict a serious wound. The court was satisfied that he did so with intent to cause really serious injury. The filming of the attack was a further aggravating feature.
35. There was however powerful mitigation. The offence was committed when VT was only 15. He had never been in trouble with the police before and has not been in trouble since. Almost a year passed before he was charged - a long period in the life of one so young. Although he denied the offence and put forward an untruthful account, he has now come to accept his responsibility and the judge accepted that VT was genuinely remorseful. Given that the judge had not only the pre-sentence report to assist him, but also his own observations of VT, that was a conclusion to which he was entitled to come. The testimonials, to which the judge rightly gave weight, show that VT is intelligent and generally polite and well behaved. The judge, in our view, had an ample basis for his confidence that VT would not offend again and for taking the view that VT would be willing and able to engage with support and rehabilitation. As the updating report shows, events have proved the judge right in that regard. Whilst awaiting his trial and his subsequent appeal VT had done well in his exams and, with the support of his parents, was going on to further education. A custodial sentence would have had lasting repercussions for that education and for his future prospects.
36. VT could not have complained if the judge had imposed a custodial sentence. Knife crime is a matter of serious concern, and even a young offender will often have to be given a custodial sentence for an offence such as this. In this case, however, there were important factors in favour of a non-custodial sentence, which collectively carried considerable weight. The issue for us is whether, on the correct factual basis which the judge accepted at the later hearing, a non-custodial sentence was within the range of sentences properly open to him. We have concluded, albeit by a narrow margin, that it was. The judge's approach was consistent with the principles stated in the guideline and was justified in the particular circumstances of this case.
37. For those reasons the application for leave to refer is refused. The sentence remains as before.

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