IN THE COURT OF APPEAL

CRIMINAL DIVISION

Neutral Citation Number: [2021] EWCA Crim 207

CASE Nos 202003217/A4 & 202003218/A4

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 16 February 2021

LORD JUSTICE HOLROYDE
MR JUSTICE LAVENDER
MRS JUSTICE ELLENBOGEN DBE

ATTORNEY GENERAL'S REFERENCE
UNDER SECTION 36 CRIMINAL JUSTICE ACT 1988

REGINA
v
BRENNAN McGINLEY
CONNOR LEO MORRIS

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Lower Ground, 18-22 Furnival Street, London EC4A 1JS
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MR P JARVIS appeared on behalf of the Attorney General
MR R PARDOE appeared on behalf of the Offender McGinley
MR S ECKERSLEY appeared on behalf of the Offender Morris

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J U D G M E N T
(Approved)

1. LORD JUSTICE HOLROYDE: On the evening of 24 February 2020, Mr James Robinson was cycling with this 10-year-old son. They stopped and laid down their bicycles whilst Mr Robinson went to speak to an acquaintance. Brennan McGinley and Connor Morris chanced to be walking in that area. For convenience only, and meaning no disrespect, we shall refer to them by their surnames only. McGinley and Morris were in company with a third man who has never been identified. Mr Robinson suspected that they might be thinking of stealing the bicycles and so went to confront them. McGinley quickly produced a knife and stabbed Mr Robinson several times. The third man was also carrying a knife, and he too stabbed Mr Robinson. Morris joined in the attack, kicking and stamping Mr Robinson when he was on the ground. He then took the boy's bicycle and rode away, with the other two following him on foot.
2. Both McGinley and Morris were charged with a number of offences. At a plea and trial preparation hearing on 14 July 2020, McGinley pleaded guilty to wounding with intent, contrary to section 18 of the Offences Against the Person Act 1861, and having a bladed article, contrary to section 139 of the Criminal Justice Act 1988. On 16 September 2020 Morris was convicted by a jury of wounding with intent and robbery.
3. On 4 December 2020, in the Crown Court at Nottingham, they were sentenced by the trial judge, His Honour Judge Rafferty QC to custodial terms totalling nine years in McGinley's case and eight years in Morris's case. Her Majesty's Solicitor General believes those total sentences to be unduly lenient. Application is accordingly made, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer the cases to this court so that the sentencing may be reviewed.
4. McGinley had discarded his knife as he fled, but it was recovered. It was described by the judge as a knife which could have no legitimate purpose and was specifically designed for causing serious injury. A video recorded the previous evening at McGinley's mother's house showed McGinley waving a carving knife inches from the face of Morris, whose reaction was to point his fingers at McGinley and pretend to shoot him.
5. The attack on Mr Robinson caused him serious physical and psychological harm. He suffered a total of seven stab wounds, one of which perforated a kidney, which had to be removed surgically. By great good fortune no other organ was damaged. In a victim personal statement about six months after the attack, Mr Robinson described his continuing severe pain and his restricted movement. He had been unable to take up a new job which he had been about to start when he was attacked. He was also suffering from PTSD, depression and anxiety. He still found it difficult to sleep. So too did Mr Robinson's son, who was also badly affected by his witnessing the attack. He had understandably feared that his father would be killed, and indeed had shouted out to the attackers to stop because they were killing his father. At the time of the victim personal statement, he was receiving counselling. The terror experienced by the boy was inevitably a cause of great distress to his father.
6. Both McGinley and Morris were aged 20 at the time of the offences. As a child, McGinley had been convicted of an offence of robbery committed when he was only 10 years nine months old, and an offence of burglary committed a year later. His only other conviction was for possession of cannabis in 2018, when he was aged 18.
7. Morris had numerous previous convictions, the first of which was for possession of a bladed article when he was aged 15. His later convictions as a juvenile included a

further bladed article offence, again when he was 15, and three offences of robbery or attempted robbery. He had received a number of custodial sentences. In 2018 he was sentenced to 18 months' detention in a young offender institution for an offence of wounding committed when he was aged 18. Whilst serving that sentence he was convicted of unauthorised possession of a knife or offensive weapon in a prison. He was on licence from that sentence when he committed the present offences.

8. The judge was assisted by a pre-sentence report in relation to each of the offenders, prepared at the judge's direction with specific reference to the issue of dangerousness. He was also assisted by a psychiatric report in relation to Morris, which the judge had directed again with particular regard to the issue of dangerousness. There was also a letter from McGinley's mother describing the very unsettled childhood which McGinley had experienced as a result of her partner's domestic violence.
9. In relation to McGinley, the author of the pre-sentence report noted that he had had a difficult childhood, had used cannabis from a very young age, had been street homeless for a time at 17 and was sofa surfing at the time of these offences. He had taken full responsibility for these offences and had shown remorse for them. He was assessed as having a low level of maturity for his age. By reference to one scale he was assessed as posing a medium risk of offending, but a low risk of causing serious harm to others. Overall, however, the author of the report assessed him as posing a high risk of serious harm to members of the public. That risk was reduced if McGinley was motivated to change his behaviour and lifestyle, and he would benefit from engagement with education and training. We note from an updating report provided to this court that McGinley has shown generally good behaviour and positive compliance with the regime in prison, though he has been reported to the police for unauthorised possession of a mobile phone.
10. The reports relating to Morris show that he suffers from autistic spectrum disorder, attention deficit hyperactivity disorder (presently asymptomatic), and PTSD following a serious car crash in 2017. In the opinion of the consultant forensic psychiatrist, Morris's mental health conditions contributed at the time of the offences to an inability to exercise appropriate judgement, to make rational choices or fully to appreciate the nature and consequences of his actions. Thus there was "some correlation" between the mental health conditions and these offences. The psychiatrist did not recommend any medical disposal.
11. The pre-sentence report described an unsettled childhood, including a period in care. Morris had been assessed as having special educational needs. The author of the report assessed Morris as having a low level of maturity and as having difficulty in understanding the impact of his behaviour on others. He did however show remorse for these offences. The author assessed him as posing a very high risk of re-offending and a high risk of doing so in a manner which could cause serious harm to others. The updating report in his case refers to an adverse adjudication and a number of negative entries in his prison record.
12. Prosecution counsel submitted to the judge that the offence of wounding with intent fell into Category 1 of the Sentencing Council's Definitive Guideline with a starting point of 12 years' custody and a range from nine to 16 years. In the course of defence submissions as to the appropriate form of sentence, the judge made clear that he had had regard to the statutory provisions as to dangerousness. At page 11F of the transcript he

said:

> "In light of the sentences that I am bound to pass on these young men, it seems to me that that is a consideration that I need not take into account."

13. In his sentencing remarks, the judge rightly said that this case illustrates why the carrying of knives is so serious. A chance meeting and a brief confrontation very quickly became a knife attack in which the victim could easily have been killed. The judge stressed the harm caused to the son, as well as to the father. He declined to make any reduction in sentence because of the particular difficulties faced by those serving custodial sentences during the Covid-19 pandemic.
14. In McGinley's case he took the guideline starting point of 12 years, which was reduced by one-quarter for the guilty plea. Thus the sentence for the offence of wounding with intent was nine years' custody, with a sentence of two years concurrent for the other offence. By reason of McGinley's age when convicted, the appropriate sentences were of detention in a young offender institution. The Crown Court record unfortunately refers incorrectly to imprisonment.
15. In Morris's case the judge noted that his involvement was less than that of the other two and that he had not carried or used any weapon. He had nevertheless joined in the attack when he knew that knives were being used. His criminal record was far more serious than McGinley's. The judge concluded that Morris's mental health difficulties did not significantly reduce his culpability, but could be taken into account as mitigation. He reduced the guideline starting point to nine years' detention in a young offender institution and then reduced it further to eight years to reflect the mental health problems. He imposed a concurrent sentence of three years' detention for the offence of robbery.
16. On behalf of the Solicitor General, Mr Jarvis submits that these sentences were unduly lenient. He points to the circumstances of the offending involving the almost instantaneous use of a knife by McGinley, in what was a potentially fatal attack, and Morris joining the attack knowing that the two other offenders were using knives on Mr Robinson. Mr Jarvis submits that the judge was bound to conclude that both offenders were dangerous offenders and was further bound to conclude that only an extended determinate sentence would offer sufficient protection to the public. Mr Jarvis acknowledges that under the current release provisions applicable to sentences of this length, both offenders will in any event serve two-thirds of the custodial term. He submits however that it is an important factor promoting public safety that under an extended sentence they would not be entitled to release at that stage and a determination would have to be made by the Parole Board as to whether it was safe to release them.
17. Further, and in any event, Mr Jarvis submits that the custodial terms were insufficient to reflect the seriousness of the offending. In particular, he argues that the wounding with intent offence involved more than one of the factors identified as indicating greater harm, as well as one factor indicating higher culpability. McGinley was armed with a knife and the video recorded the previous night shows a familiarity with the handling of knives. Morris knew that his companion was armed. Although Morris became involved in the attack later than did McGinley, his was not a subordinate role. The fact that their victim's young son was present and witnessed the attack was a seriously aggravating

feature, as was the ignoring by the offenders of the son's pleas that his father would be killed if the attackers did not stop. Morris's mental health difficulties did not significantly reduce his culpability. He had previous convictions for violence and was on licence at the time of these offences. His record of previous convictions shows that short determinate custodial sentences have not prevented him from becoming involved in this attack. Finally, submits Mr Jarvis, it was necessary for the judge in Morris's case to reflect the overall seriousness of offending which included the offence of robbery.

18. For McGinley, Mr Pardoe submits that the judge considered all relevant factors, made no error of principle on the issue of dangerousness and imposed a sentence which was within the range reasonably open to him. Whilst not seeking to challenge the judge's decision that no reduction should be made on account of the particular difficulties facing those serving prison sentences at present, Mr Pardoe points out that McGinley has not in fact been able to receive any visits from any member of his family or friends since his sentence, and that, although keen to take up courses which would normally be open to him in prison, he has been unable to do so as a result of the pandemic. Nonetheless, submits Mr Pardoe, it is an encouraging sign that McGinley is trying to use his time in custody in a constructive manner.
19. For Morris, Mr Eckersley similarly submits that the sentence was within the range which the judge could reasonably consider appropriate. He points to the fact that the offenders will have to serve two-thirds of their custodial terms before being released on licence. He submits that the circumstances of Morris's convictions as a juvenile, when considered in detail, show that that offending was not as serious as it might seem at first glance. He emphasises in particular that Morris's trial lasted six days, thus giving the judge an ample opportunity to observe and assess Morris, including almost one day when Morris was in the witness box. In those circumstances, submits Mr Eckersley, the judge was perfectly placed to assess the issue of dangerousness and was entitled to reach the conclusion he did.
20. We are grateful to all counsel for their helpful submissions.
21. The judge was faced with a difficult sentencing process. Offences involving the carrying and use of knives are very serious and are a matter of considerable public concern. As the judge rightly observed, this case shows how, if knives are carried, a trivial incident can turn within moments to an attack which causes serious injury. Although comparatively short in duration, the attack on Mr Robinson was ferocious: he was repeatedly stabbed with two knives, and kicked and stamped when he was defenceless on the ground. We accept Mr Jarvis's submissions as to there being a number of aggravating features, in particular in relation to the presence of Mr Robinson's young son, and Morris's relevant previous convictions and commission of these offences whilst on licence.
22. However, the judge also had to take into account the comparatively young ages and low level of maturity of both offenders. Both had experienced very unsettled childhoods and lacked direction in their lives. Although McGinley was carrying a vicious weapon, and very quickly produced and used it when confronted, his only previous conviction involving violence was for an offence committed when he was ten, and he had never previously received a custodial sentence. Morris had much the worse criminal record, but he had not carried or used any weapon. Moreover, the evidence at trial showed that he had been the last to join the attack and had left it whilst the other two were still

continuing.

23. It is clear that the judge carefully considered all relevant factors, including the issue of dangerousness, which he had taken particular care to have addressed in the reports prepared for the assistance of the court. When sentencing McGinley, he took the guideline starting point, which in his sentencing remarks he reduced only to reflect the guilty pleas. Although the judge did not spell it out in these terms, he must have concluded that the aggravating features of the offences were balanced out by the personal mitigation available to McGinley. Given McGinley's young age and immaturity, and the fact that he had so few previous convictions despite a troubled childhood and adolescence, we see no error of principle in that approach. In our judgment, the total term of nine years' custody was well within the range properly open to the judge in all the circumstances of the case.
24. In Morris's case the judge again started at 12 years, but moved down to the bottom of the relevant category range to reflect the lesser role played by Morris in the attack and the fact that Morris had no weapon. The judge must again have treated the aggravating features as being balanced out by the mitigating factors, and he then reduced the sentence by one year to reflect Morris's undoubted mental health difficulties. Again, we see no error of principle. There is force in Mr Jarvis's submissions, and Morris could not have complained if the judge had concluded that the aggravating features, and the need to reflect the seriousness of the offence of robbery, outweighed the mitigation and made it necessary to take a sentence nearer to the starting point of 12 years before any reduction by reference to mental health difficulties. The total sentence of eight years was not however outside the range properly open to the judge in all the circumstances. Moreover, we bear very much in mind that the judge, having presided over Morris's trial, was in the best position to assess his overall criminality and the significance of his mental health difficulties.
25. The judge did not expressly state whether or not he found either offender to be dangerous. We agree with Mr Jarvis that the pre-sentence report in each case provided support for such a finding, although we think less clearly so in McGinley's case than in Morris's case. However, even if the judge had found either or both to be dangerous, he would not then have been obliged to impose an extended determinate sentence. He had a power to do so, but would have first to consider whether a standard determinate sentence of significant length would provide sufficient protection for the public. We have quoted the observation which the judge made to counsel in the course of submissions. We interpret that as a shorthand expression indicating that the judge had decided that in each case, a sentence of the length which he intended to impose would provide sufficient protection. In our judgment, that was a conclusion to which he was entitled to come in relation to these young, immature offenders. It is important to remember that in McGinley's case it was his first experience of a custodial sentence, and in Morris's case it is significantly longer than any sentence he has previously served. In both cases, there will be a significant period of supervision on licence when the offenders are released.
26. For those reasons, grateful though we are for Mr Jarvis's submissions, we are unable to accept that the sentencing was unduly lenient in either case. The judge considered all relevant factors, followed the applicable guideline and imposed sentences which were properly open to him.

27. We therefore refuse leave to refer. The sentences of detention in a young offender institution remain as before: that is to say, in McGinley's case nine years and two years concurrent, and in Morris's case eight years and three years concurrent. In McGinley's case we direct that the record of the Crown Court be amended to show sentences of detention in a young offender institution rather than imprisonment.