Neutral Citation Number: [2021] EWCA Crim 417

Case No: **2020003195 A2**

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM NORWICH CROWN COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/03/2021

Before :

LORD JUSTICE SINGH
and
MR JUSTICE WILLIAM DAVIS
and
MRS JUSTICE FOSTER

- -

Between :

KARA BALDWIN — **Appellant**

- and -

REGINA — **Respondent**

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- -

MS LYNNE SHIRLEY (instructed by Metcalfe Copeman Pettefar LLP) for the Appellant

Hearing dates : 16th March 2021

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Approved Judgment

Mr Justice William Davis:

1. Kara Baldwin was born on 14 August 2001. She is now aged 19. Prior to the matter with which we are concerned she had never been convicted of any offence. On 20 August 2020 before the King's Lynn Magistrates' Court she pleaded guilty to an offence of making threats to kill contrary to Section 16 of the Offences against the Person Act 1861. She was committed to the Crown Court for sentence pursuant to Section 3 of the Powers of Criminal Courts (Sentencing) Act 2000. On 27 November 2020 in the Crown Court at Norwich she was sentenced to a period of 16 months' detention in a Young Offender Institution. Ancillary orders were made which do not concern us. She appeals against that sentence by leave of the single judge.

2. From late 2019 the appellant was in a relationship with a man named Trey Harwood. From early 2020 they lived together at his flat in Fakenham. At around 9.30 p.m. on 1 April 2020 Mr Harwood was in the living room at the flat. He received a text message from the appellant. She was next door in the bedroom. Mr Harwood went to the bedroom to speak to the appellant. She told him to go away. He did so. He went back to the living room.

3. A few minutes later the appellant came into the living room. She asked who Sarah was. She said that someone had messaged her to say that Mr Harwood had got Sarah pregnant. Mr Harwood said that he had no knowledge of anyone called Sarah. The appellant then walked to the kitchen area adjoining the living room. She took up a substantial kitchen knife. She went back into the living room where Mr Harwood was sitting on a sofa. She leant over him from the back of the sofa and held him round the throat with one arm. With her other hand she pointed the knife so that it was touching Mr Harwood's chest. She said "I hope you're fucking happy with what you have done. I want to kill you and then I will kill myself". This was repeated several times. Mr Harwood's evidence was that he was on the sofa with the knife at his chest for around 10 minutes. Whatever the accuracy of that estimate, the incident was more than fleeting. In due course the appellant let go of Mr Harwood and sat on the floor.

4. Mr Harwood called the police straightaway. As he waited for the police to arrive, he told the appellant to put the knife down onto the floor. She did so. He returned the knife to the kitchen area. When the police arrested the appellant she said "Trey isn't going to want me after what I've done tonight" and "I tried to strangle him and I got a knife out".

5. Mr Harwood made a victim personal statement on 8 June 2020. The relevant parts of the statement were as follows:

> *"….For the first three weeks or so I could not sit in the living room where it happened. I kept getting flashbacks of her holding the knife at my chest & threatening to kill me….Even now if I walk through my living room I sometimes get flashbacks.*
> *Still in this time period I visited the Doctor as I was having trouble sleeping. I was prescribed some medication to help with sleeping however it has not really been helping…I have deleted all the photos of Kara off of my phone & removed anything from my flat that remind me of her however I still struggle daily with the memories of what took place & what she did to me."*

This was the most up to date information available to the judge at the sentencing hearing.

6. The pre-sentence report dated 30 September 2020 provided a detailed assessment of the appellant and her maturity. The author said that the appellant "presented as younger than her biological age, and very childlike in her conversation, so it is likely that there are issues in her developmental maturity. The current offence may also be a sign of poor impulse control…" The appellant was assessed as "a vulnerable young adult" with "some deficits in her thinking and understanding about what she has done and why". At the time of the report the appellant was living with her mother though this was seen as a temporary arrangement. The appellant was someone who had been exploited by others in the past and she remained at risk of exploitation. The author of the report identified rehabilitation activities which would assist the appellant in coping with her difficulties and in the maturation process. A community order including a Rehabilitation Activity Requirement of 30 days was offered as an alternative to custody.

7. The court had a psychiatric report dated 8 November 2020 from Dr Emma Went. Her diagnosis was that the appellant suffered from autism spectrum disorder together with ADHD. Dr Went concluded that the appellant was of "borderline intelligence". The appellant's medical records disclosed a significant psychiatric history involving anxiety and depression. She also was subject to developmental delay and learning difficulties. On 6 March 2020 (which was less than a month before the offence) the appellant had seen her general practitioner. She then had had "very low mood and negative thoughts". She was awaiting an appointment with the community mental health service. She was taking prescribed anti-depressant medication. Dr Went concluded that the appellant's psychiatric and mental issues "would have contributed to her impulsive behaviour" which was the reason the offence was committed.

8. In sentencing the judge began by saying that this was "a very sad case. You are a young woman who has never been in trouble with the police before and who has experienced more trauma in your life than anyone ought to have done. I also bear in mind the psychiatric report prepared about you by Dr Went, telling me that she puts you on the autistic spectrum and that you have some learning difficulties." But he went on to say that the appellant was incapable of controlling her anger "for reasons which are not really clear to me".

9. Having set out the facts of the offence and referred to Mr Harwood's victim personal statement, the judge referred to "published sentencing guidelines". It is apparent from what followed that this was principally a reference to the guideline in relation to the offence of making threats to kill. The judge concluded that the case was one of higher culpability because there was a visible weapon. He determined that harm fell into Category 2. Although the harm and distress caused to Mr Harwood were significant, those factors fell just short of Category 1.

10. The judge identified the starting point for Category 2A as 2 years' detention. He said that the offence was aggravated by the attack having occurred in the victim's own home. He described the offence as one of domestic violence saying "I've had to remind myself of the Sentencing Council's guideline on domestic violence. He also cited "the ongoing effect" on Mr Harwood. The mitigating factors were the lack of previous convictions, the appellant's age and lack of maturity and the appellant's

personality disorder and learning difficulties. The outcome was that the appropriate sentence after trial was said to be 2 years, the aggravating and mitigating factors balancing each other out. The appellant was entitled to a full discount for her plea of guilty which had been tendered at the first opportunity in the magistrates' court. This resulted in a period of detention of 16 months.

11. The judge had been referred to the Sentencing Council guideline on the imposition of custodial sentences. Submissions were made to him that there were multiple factors in favour of suspending any sentence of custody. The judge did not agree with the proposition that the balance fell in favour of suspension. He concluded that appropriate punishment could only be achieved by immediate custody. He described the offence as "very very serious".

12. The grounds of appeal were developed orally before us by Ms Shirley. She had represented the appellant in the Crown Court. The grounds are twofold. First, insufficient weight was given the mitigating factors of age, immaturity and mental health. Second, the judge was wrong to conclude that immediate custody was the only option. Ms Shirley's submission was that the custody threshold had been crossed but that the sentence could and should have been suspended.

13. We are satisfied that the sentence imposed was wrong in principle and manifestly excessive. There are several factors which lead us to that conclusion.

14. First, the judge was right to observe that a visible weapon was involved and that this was a factor indicating higher culpability. What the judge did not do thereafter was to consider whether any other factor demonstrated lesser culpability. The psychiatric evidence should have led the judge to conclude that the appellant's responsibility for the offence was substantially reduced by mental disorder and learning disability. In the offence specific guideline that is a factor indicating lesser culpability. As the guideline states, where there are competing characteristics, the guideline requires a balancing exercise to reach a fair overall assessment of culpability. That balancing exercise did not occur. Had it been carried out, the judge inevitably would have concluded that culpability overall did not fall into the higher culpability band. At the very least the conclusion would have been that culpability was medium. The starting point for a Category 2B offence is 1 year's custody rather than 2 years.

15. Second, the judge made no reference to the Sentencing Council Guideline on Sentencing Offenders with Mental Disorders, Developmental Disorders or Neurological Impairments. It is unfortunate that he was not referred to this Guideline by either counsel. It came into force on 1 October 2020 i.e. some 8 weeks before the imposition of this sentence. The Guideline traverses in some detail the impact of mental illness on culpability. We note in particular the passages at paragraphs 13 and 14 of the Guideline:

> *"….Where relevant expert evidence is put forward, it must always be considered and will often be very valuable. However, it is the duty of the sentencer to make their own decision, and the court is not bound to follow expert opinion if there are compelling reasons to set it aside.*
> *The sentencer must state clearly their assessment of whether the offender's culpability was reduced and, if it was, the reasons for and extent of that*

reduction. The sentencer must also state, where appropriate, their reasons for not following an expert opinion."

Here the judge made no more than passing reference to the evidence of Dr Went. He made no assessment of whether the appellant's mental issues reduced culpability. Had he made such an assessment, he inevitably would have concluded that culpability was reduced. There were no reasons, compelling or otherwise, for the judge not to have followed the opinion of Dr Went.

16. Third, the judge said that he had reminded himself of the Sentencing Council Overarching Principles in relation to Domestic Violence. The Sentencing Council noted that domestic abuse offences were regarded as particularly serious within the criminal justice system. But the seriousness is not to be considered in a vacuum. Paragraph 9 in the Overarching Principles sets out the aggravating factors of particular relevance to offences committed in a domestic context. It is by reference to those factors that a judge will assess the enhanced seriousness of the offence. The judge did not identify any of them as being applicable to the circumstances of this case. It is not necessary for us to set out those factors since we are satisfied that none applied. In sentencing the judge remarked that, if the appellant had been a man and his victim a woman, there would be an outcry were he not to impose a sentence of immediate custody. We accept that, in the context of domestic violence, there is no reason for a female defendant to be treated differently to a male defendant simply by reference to her gender. But the judge's remark was not helpful in the sentencing process. What is required in any case is application of the factors in the Overarching Principles. Factors such as abuse of power and particular vulnerability of the victim are more likely to arise when the offender is a man committing the offence against a woman.

17. Fourth, the appellant was 18 at the time of the offence. The judge applied the offence guideline as if she were a mature adult. Effect was given to her age and immaturity in terms of mitigating factors. The effect of those factors was limited. That was in part because the judge considered that the offence being one of domestic violence and Mr Harwood suffering ongoing effects aggravated the offence. We have already explained why the former factor was not relevant on the facts of the case. Mr Harwood's ongoing issues were taken into account in the assessment of harm. To treat them as an aggravating factor constituted double counting.

18. The approach taken by the judge did not properly reflect what was said by Lord Burnett of Maldon CJ in *Clarke and others* [2018] EWCA Crim 185 at [5]:

"Reaching the age of 18 has many legal consequences, but it does not present a cliff edge for the purposes of sentencing. So much has long been clear. The discussion in R v Peters [2005] EWCA Crim 605, [2005] 2 Cr App R(S) 101 is an example of its application: See paras [10]-[12]. Full maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthdays. Experience of life reflected in scientific research (e.g. The Age of Adolescence: thelancet.com/child-adolescent; 17 January 2018) is that young people continue to mature, albeit at different rates, for some time beyond their 18th birthdays. The youth and maturity of an offender will be factors that inform any sentencing decision, even if an offender has passed his or her 18th birthday."

We understand from Ms Shirley that the judge was not referred to *Clarke* which again is unfortunate. The principle set out in the judgment of the Lord Chief Justice has been applied in many cases since 2018.

19. The evidence in this case is that the appellant was childlike, younger than her chronological age and immature. Had the judge taken those matters into account, he at the very least would have discounted the starting point to a significant degree. In the light of the available evidence, we consider that the judge should have given consideration to the principles set out in the Sentencing Council Guideline on Sentencing Children and Young People. Again he was not referred to that Guideline. The general principle that custody should be a last resort when a defendant is under the age of 18 will carry over to an 18 year old who is particularly immature. That should have applied to the appellant.

20. The consequence of these matters taken together is that the sentence of 16 months' detention which represents a sentence of 2 years' detention before credit for plea is unsustainable.

21. Taking into account the appellant's mental problems, her age and her immaturity, we are satisfied that an immediate custodial sentence was wrong in principle. The length of the sentence was manifestly excessive. It was a sentence appropriate for an adult offender rather than someone of the appellant's age and lack of maturity.

22. The question for us now is what sentence should be substituted for the period of 16 months' detention. The appellant has been in custody since 27 November 2020. She has served the equivalent of a sentence of around 7 months' detention. It might be said that the pragmatic approach would be to impose a sentence which would allow her immediate release. She then would be able to be assisted in her rehabilitation under the auspices of post sentence supervision. Such pragmatism would fail to take account of the fact that an immediate custodial sentence was wrong in principle. An alternative approach would be to reduce the sentence, to suspend it and to attach a relevant requirement to the sentence. That would avoid imposing a sentence that was wrong in principle. However, a suspended sentence of detention is still a custodial sentence which in our view should have been the sentence of last resort in the circumstances of this case. Therefore, we shall quash the sentence of 16 months' detention and impose in its place an 12 month community order with a single requirement, namely a Rehabilitation Activity Requirement for up to 15 days. Section 177(2A) of the Criminal Justice Act 2003 requires a punitive requirement to be part of any community order. This requirement does not apply if there are exceptional circumstances that would make it unjust to do so: Section 177(2B) of the 2003 Act. Here the appellant has already served a significant custodial sentence. The circumstances are exceptional. We appreciate that even so this sentence will be an imposition on the appellant since she has already been punished for the offence. However, if she had been released on licence, she would have been subject to post-sentence supervision similar to that which will be applied under the community order had we taken the pragmatic option. Had we suspended any sentence of detention, we would have attached a RAR to that sentence because it is quite clear that the appellant needs the advice and guidance of skilled professionals. In real terms the community order will not involve additional punishment.

23. This was an appeal brought with the leave of the single judge. The burden of the appeal was that the appellant should be released from her sentence whether by suspending the sentence or by reducing its length. It should have been apparent to anyone concerned with the appellant's interests that arrangements would have to be put in place to ensure that she could be released to safe and suitable accommodation. To release someone as vulnerable as this appellant without proper investigation into her position would be to do her an injustice. We have been assisted considerably by the National Probation Service officers attached to this court, in particular Cheryl Innis, in relation to the arrangements for this appellant's release. This assistance was given at the instigation of the court when the issues in the appeal became apparent. Had the NPS been asked to engage in this work more in advance of the hearing by those representing the appellant, we are sure that it would have been given. We make this observation for future reference. Where leave to appeal has been granted in a case where there is some prospect that success in the appeal will result in the release of the appellant and where it is apparent that the appellant has vulnerabilities which mean that their position on release will require investigation by the NPS, those representing the appellant must contact the NPS at this court with a view to appropriate investigations being made in good time before the hearing. It may be that the NPS will wish to consult with the court before taking substantive steps and we would not discourage that approach in the appropriate case. What is important is that issues consequent upon release are not left to the day of the hearing.