IN THE COURT OF APPEAL

CRIMINAL DIVISION

NEUTRAL CITATION NUMBER: [2021] EWCA Crim 658

CASE NO 202002604/A2

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 21 April 2021

Before:

LADY JUSTICE CARR DBE
MR JUSTICE LAVENDER
THE RECORDER OF NEWCASTLE
HIS HONOUR JUDGE SLOAN QC
(Sitting as a Judge of the CACD)

REGINA
V
KERNEY GRANTHAM

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR J MANN appeared on behalf of the Appellant

J U D G M E N T

MR JUSTICE LAVENDER: This is an appeal against sentence brought with leave granted by the single judge. The appellant pleaded guilty on 10 September 2020 in the Crown Court at Birmingham to one count of wounding with intent to cause grievous bodily harm, contrary to section 18 of the Offences Against the Person Act 1861.

On 16 September 2020 in the same court the appellant was given an extended sentence, with a custodial term of 11 years and an extension period of five years. This sentence was consecutive to the sentence which the appellant was already serving.

On this appeal, the appellant challenges the length of the custodial term, but not the fact that an extended sentence was imposed, nor the length of the extension period.

The appellant was born in 1994. In 2014 he committed offences of assault occasioning actual bodily harm, possessing an air rifle in a public place, possessing a knife in a public place and two offences of unlawful wounding or inflicting grievous bodily harm. For the latter offences he was given an extended sentence, with a custodial term of four years and an extension period of five years. In December 2018 he committed offences of wounding with intent to do grievous bodily harm, possessing an offensive weapon in a public place and attempted robbery. He was given an extended sentence, with a custodial term of six years and an extension period of five years.

The appellant was therefore a serving prisoner when, on 17 September 2019 he stabbed a fellow inmate, Benjamin Heath, with a pair of scissors in an art class in HMP Birmingham. Mr Heath said in his witness statement that he thought that the appellant hit him two or three times, but he could not really remember because it happened so fast. Other witnesses described more blows. The judge said that the witnesses described between one and six blows and that he was satisfied that there were at least three blows with the scissors. He also said that the incident was short-lived. According to the witnesses, the assault

continued until the appellant and Mr Heath were separated.

The principal injury caused was described in Mr Heath's medical notes as a full thickness laceration to the left cheek and tongue, with a horizontal puncture wound through the tongue and associated bruising and swelling. These were treated with three stitches to his cheek and three stitches inside his mouth. The medical records also mention a small cut to his back. That description is consistent with the photograph which we have seen. There is no indication that this required any stitches. Mr Heath said in his witness statement that there was a cut to his left collarbone. It does not appear that he mentioned this when he was being treated at the hospital and we have seen no photograph of it.

In passing sentence, the judge said that he had considered the guidelines and found that the offence fell into category 1 with a starting point of 12 years' custody because it was a case of higher culpability, since the appellant had used a weapon, and it was a case of greater harm, since it had been a repeated assault. Although the judge did not mention this point, there was another factor present indicating higher culpability, namely an intention to commit more serious harm than actually resulted from the offence. This was apparent from the fact that the appellant and Mr Heath had to be separated. Had they not been, the appellant would no doubt have gone on to attack Mr Heath further.

According to the judge, the aggravating factors were the appellant's previous convictions and the fact that the offence had been committed upon a fellow inmate while the appellant had been serving a prison sentence. Those factors resulted in an uplift from the starting point to 15 years. The judge reduced that by 20 per cent, i.e. to 12 years, by reason of the appellant's guilty plea, and by a further year to reflect totality, making a custodial term of 11 years.

The grounds of appeal are as follows:

1. The judge selected too high a starting point after trial.
2. The judge failed to properly discount the sentence for the guilty plea indicated at the plea and trial preparation hearing.
3. The judge failed to give sufficient weight to the principle of totality.

In relation to the first ground of appeal, Mr Mann submitted that this was a category 2 case rather than a category 1 case. He conceded, as he had to, that it was a case of higher culpability, but he submitted that it was not a case of greater harm. Specifically, he contended that the judge was wrong to find that it was a repeated assault for the purposes of the sentencing guideline, having regard in particular to what this court said in R v Smith (Grant Christopher) [2016] 1 Cr.App.R (S) 8 at paragraph 18 and in R v Xue [2020] 2 Cr.App.R (S) 49, [2020] EWCA Crim 587 at paragraph 32.

As for the second ground of appeal, Mr Mann relied on the unusual course of events at the plea and trial preparation hearing, which took place on 14 May 2020 with both the appellant and his counsel appearing remotely via CVP. At the outset of the hearing the appellant pleaded not guilty, but towards the end of the hearing he told the court that he had changed his mind and wanted to plead guilty. The judge told him not to do that, but to speak to his lawyers. Because of the pandemic, it took some time to arrange a conference with the appellant. When the conference did take place, he confirmed that he wanted to plead guilty. His guilty plea was then entered on 10 September 2020. Mr Mann submitted that, in those unusual circumstances, the appellant should have been treated as having indicated a guilty plea at the plea and trial preparation hearing and should have been given a discount of 25 per cent.

As for the third ground of appeal, Mr Mann accepted that it was appropriate for this sentence to be consecutive to the sentence which the appellant was already serving. By

16 September 2020 the appellant had served less than two years of the six-year custodial term of that sentence. The judge accepted that the totality principle obliged him to reduce the sentence which he would have imposed for the offence if it had stood alone, but Mr Mann submitted that a reduction of one out of 12 years was inadequate.

The first ground of appeal requires us to consider the third of the three factors indicating greater harm in step one of the offence-specific sentencing guideline. Those factors are as follows:

> "Injury (which includes disease transmission and/or psychological harm) which is serious in the context of the offence (must normally be present). Victim is particularly vulnerable because of personal circumstances.
>
> Sustained or repeated assault on the same victim."

The judge was not invited to, and did not, rely on the first two of these three factors. Unpleasant though it was, the injury to Mr Heath's cheek and tongue was not serious in the context of this offence. There was no suggestion that Mr Heath was particularly vulnerable.

As for the third factor, the meaning in this context of the phrase "sustained or repeated assault on the same victim" has received consideration by this court in a number of cases in recent years. These include, in addition to the cases cited by Mr Mann: R v Summerville [2020] EWCA Crim 944; R v Smith (Jordan Lee) [2020] EWCA Crim 1427; R v Healey [2021] EWCA Crim 181 (a case of assault occasioning actual bodily harm); and R v O'Neill [2021] EWCA Crim 489.

A number of points emerge from these decisions and from the guidelines:

1. It is important to bear in mind the context, namely that the starting point for a category 2 offence is six years' custody, whereas for a category 1 offence it is 12 years' custody.
2. It follows that, as stated in Smith (Grant Christopher) at paragraph 18, in order for a sentence to be compliant with the test of proportionality, the facts warranting the higher sentence

should reflect the difference in the guidelines.

3. We note that the context also includes the words "(must normally be present)" in the first of the factors indicating greater harm. It is unusual for a list of factors in a sentencing guideline to include such words. These words suggest that the second and third factors are the exception rather than the norm.

4. In the light of this context, it is appropriate to ask, as in Xue at paragraph 32, whether the assault in a particular case was a sustained or repeated assault that was so prolonged or persistent as to take it out of the norm for section 18 offences and therefore to constitute greater harm justifying a starting point of 12 years' rather than six years' custody.

5. Each case has to be assessed on its own facts: see again Smith (Grant Christopher) at paragraph 18. This will involve consideration of factors such as the number of blows, the number, seriousness and location of wounds or other injuries and the duration of any assault.

6. As stated in Smith (Grant Christopher) at paragraph 18, the phrases "sustained and repeated" may imply different things. An assault may be sustained because it continued over the course of a significant period of time, even though it did not necessarily involve a substantial number of blows. An assault may be repeated because it involves multiple blows over a short period of time.

7. As in Smith (Grant Christopher) at paragraph 19 and in Smith (Jordan Lee) at paragraphs 30 to 31, the nature of an assault, if it does not elevate an offence from category 2 to category 1, may contribute to a conclusion that the offence falls in the top end of category 2 or on the borderline between categories 1 and 2.

8. Indeed, the guideline states in the introduction to step two that:

> "A case of particular gravity, reflected by multiple features of culpability in step one,

could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features".

9. The guideline also states at step two, in relation to the aggravating and mitigating factors, that:

"In some cases, having considered these factors, it may be appropriate to move outside the identified category range."

Looking at the facts of this case, the judge was only sure that the appellant delivered three blows in a short-lived incident. One of them caused the principal injury to Mr Heath's cheek and tongue, one caused what was in the context of this offence a minor injury to Mr Heath's back and the third may have caused another minor injury to Mr Heath's collarbone, although that is unclear.

In our judgment, asking the question posed in Xue, this was not a sustained or repeated assault that was so prolonged or persistent as to take it out of the norm for section 18 offences and therefore to constitute greater harm justifying a starting point of 12 years' rather than six years' custody. The judge ought therefore to have found that this was a category 2 offence.

Having said that, we consider that this was, in the words of the guideline, a case of particular gravity reflected by multiple features of culpability in step one, namely both the use of a weapon and an intention to commit more serious harm than actually resulted from the offence. That would merit upward adjustment from the starting point before further adjustment for aggravating or mitigating factors.

Moreover, the aggravating factors in this case were sufficiently serious to justify moving well outside the category range. The offence was committed in prison by one inmate on another and in front of other inmates. We need not dwell on the importance of maintaining order in prisons. Moreover, and importantly, this was the appellant's third

conviction for offences involving wounding or inflicting grievous bodily harm and his second offence in two years of wounding or inflicting grievous bodily harm with intent to do grievous bodily harm.

As to the second ground of appeal, paragraph D2 of the guideline on reduction in sentence for guilty plea makes clear that:

> "For the purpose of determining the level of reduction in sentence, it is the time when the guilty plea was first indicated to the court which matters."

In this case, that was at the plea and trial preparation hearing. It was unusual, to say the least, that the indication was given at the same hearing at which the appellant had just pleaded not guilty, but the indication was given. Accordingly, we accept Mr Mann's submission that the appellant should have received a one-quarter discount for indicating his intention to plead guilty at that stage. Defendants often change their pleas and the express purpose of the guideline is to encourage those who are going to plead guilty to do so as early in the court process as possible. It is consistent with that purpose to give the appellant the benefit which normally accrues to someone who indicates a guilty plea at a plea and trial preparation hearing, despite the fact that that indication followed shortly after a not guilty plea.

We are reinforced in this conclusion by the following considerations. Were it not for the circumstances created by the pandemic, the appellant and his lawyers would have been at court. There could no doubt have been a short adjournment in which a conference could have been held, following which the appellant could have been re-arraigned and would have pleaded guilty. Because the hearing was taking place remotely, it was not practical for a conference to be held on the day of the hearing. Moreover, the judge discouraged the appellant from entering a guilty plea until after he had had a conference with his

lawyers, which in the circumstances meant that he could not plead guilty at the hearing. In so far as the appellant did not plead guilty at the hearing because of the pandemic, that was not his fault. In so far as the appellant did not plead guilty at the hearing because the judge discouraged him from doing so, that also was not his fault.

We are not persuaded by the third ground of appeal. Prisoners who commit offences in prison can expect consecutive sentences with little reduction for totality.

In all the circumstances, we quash the sentence imposed by the judge. We consider that this was a category 2 offence, but we also consider that the multiple features of culpability merited an upward adjustment from the starting point and that, in addition, the aggravating features took it well outside the category range to 12 years' custody had the appellant not pleaded guilty. We reduce that by one-quarter, to nine years, by reason of the indication of the guilty plea and by a further year on account of totality. We substitute an extended sentence with a custodial term of eight years and an extension period of five years. To that extent this appeal is allowed.

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk