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[2022] EWCA Crim 1784

IN THE COURT OF APPEAL

CRIMINAL DIVISION



Nos. 202103987

202200239 B5

Royal Courts of Justice

Tuesday, 13 December 2022

Before:

LADY JUSTICE CARR
MR JUSTICE GOOSE
HIS HONOUR JUDGE JEREMY RICHARDSON KC
(Recorder of Sheffield)

REX
V
WAYNE ANTHONY A'HEARNE

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MR R LITTLER KC appeared on behalf of the Appellant.

J U D G M E N T

Introduction

1. This is a renewed application for leave to appeal against conviction and, if that application is refused, against sentence.
2. We indicated at the outset of the hearing that we refused the application for leave to appeal conviction and would give our reasons later. These are those reasons, followed by our judgment on the sentence application. For the purpose of that latter application, the applicant has had the benefit of *pro bono* representation by Mr Littler KC, to whom we express our gratitude for his assistance.
3. On 19 December 2021 the applicant, who is now 56 years old, was convicted following trial of attempted murder contrary to section 1(1) of the Criminal Attempts Act 1981. On 23 December 2021 the trial Judge, HHJ Alan Conrad KC ("the Judge"), sentenced him to an extended determinate sentence of 33 years, pursuant to section 279 of the Sentencing Act 2020, comprised of a custodial term of 30 years and an extended licence period of three.

The facts

4. On 13 March 2021 Miss Morgan Jones, also known as Vikki, ("Miss Jones") was found in her bungalow with serious, extensive and life threatening injuries. She had been subjected to a savage and prolonged attack from which she was fortunate to have survived. The most serious injury was to her head: an axe had been embedded into her skull causing an extensive and deep front scalp laceration running across the whole of her forehead in which her skull was exposed. Her other physical injuries included a collapsed lung, five fractured ribs to her side, two to her back, a fractured sternum, lumbar fractures to her spine, a displaced fractured left nasal bone, and multiple fractures to her face and eye sockets. There was also near complete amputation of her left middle finger.
5. The applicant denied responsibility for the serious injuries, saying that they had been caused accidentally. To the extent that he had caused any injury, he had not intended to kill (or intended to cause grievous bodily harm for the purpose of an alternative count under section 18 of the Offences Against the Persons Act 1861).
6. Miss Jones, aged 45, had been in a relationship with the applicant for some months prior to the final assault. She had been receiving support for drug and mental health problems, including anxiety and depression, and was considered to be vulnerable. Her health noticeably declined during her relationship with the applicant, as did her appearance. She was also struggling financially at the time.

The prosecution and defence cases

7. The prosecution case was that between 10 and 13 March 2021 the applicant had attacked her both in her own home and at his address, intending to kill her, the attack culminating in the use of an axe. The offending had taken place against a background of domestic violence and drugs. He was violent and controlling towards her, forcing her to take drugs by kneeling on her, and threatening violence if she did not do as she was told. When violent, he was under the influence of "Spice" and when he wrongly believed that she had stolen his drugs he was again violent. There was a previous incident shortly before the final assault when he had tried

to strangle her, resulting in her passing out and redness to her throat. On a separate occasion he had stamped on one of her left-hand fingers causing a near partial amputation.

8. In addition to medical evidence, and evidence of the 999 calls and from the attending paramedics, the prosecution relied on evidence from Gary Marsh, a friend of Miss Jones, and two of her neighbours, Mark O'Donaghue and Jan Modrak. Gary Marsh had attended her address on 13 March at the request of Kelly Nabbs, and had found Miss Jones there injured. Kelly Nabbs was also a friend of Miss Jones, and had been concerned about her welfare. Mark O'Donaghue, amongst other things, said that he had been threatened by the applicant with an axe in the early hours of 11 March. Jan Modrak said that he had heard a female crying, and also banging noises from Miss Jones' house during the nights leading up to 13 March.
9. The Judge allowed the admission of hearsay evidence from DC Williams in relation to evidence from DC Oliver and Miss Nabbs as to a confession made by the applicant to the assault. DC Williams had been present with DC Oliver when they had attended on Miss Nabbs on 13 March. At that stage he disclosed that the applicant had been at her address earlier that afternoon and told her that he had "battered a girl". He had admitted to Miss Nabbs that he had assaulted Miss Jones over the space of a couple of days punching her to the face, strangling her and hitting her head against the radiator. Miss Nabbs, however, refused to sign the police notebook or to provide a witness statement. DC Oliver was unable to attend court through illness. Reliance was also placed on a letter of apology written by the applicant, dated 18 March 2021 sent to Miss Nabbs.
10. The Judge also permitted the prosecution to rely on the applicant's previous convictions for offences of violence. In 1986 he had been convicted of causing grievous bodily harm with intent. In 1994 he had been convicted of wounding with intent. In 1990, 1996, 1998 and 2001 he received convictions for assault occasioning actual bodily harm. He had a conviction for assault in 1998, assault with intent to rob. These convictions for violence were said to be relevant to whether the injuries sustained by Miss Jones were caused accidentally or had been caused by the applicant, and whether the applicant had a propensity to use violence.
11. The prosecution also relied on the applicant's numerous convictions for offences of dishonesty, and for interfering with the course of justice, relevant to his credibility and demonstrating a propensity to be untruthful. The applicant's convictions relating to drug supply in 2011 and 2014 were admitted as relevant context to the accounts given by Miss Jones and witnesses in describing the events leading up to 13 March, and to correct a false impression that the applicant had attempted to create, namely that he was a user rather than a supplier of drugs. Finally, the prosecution relied on inconsistencies in the applicant's police interviews.
12. The defence case was that the applicant was not responsible for the really serious injuries. They had been caused rather by a bicycle accident and a heavy fall into furniture. He had not intended to kill or cause serious bodily harm. He and Miss Jones were both drug users. There had been no use of or possession of an axe or weapon of any kind. Miss Jones had a history of mental illness and had suffered visual hallucinations, including seeing weapons coming towards her. She had no meaningful recollection of the index events. The evidence of Mr O'Donaghue was fabricated to help an old friend and neighbour, and the evidence from others was unclear.
13. The applicant gave evidence in support of his defence. In the course of doing so he accepted that he had gone to Miss Nabbs' address on 13 March, but denied making any apology or confession of any sort. As for the letter of apology he had written, that was a letter of apology not for causing injuries to Miss Jones, but rather for an assault leading to a raid on Miss Nabbs' house where drugs were found and Miss Nabbs' partner was arrested as a result.

Renewed application for leave to appeal against conviction

14. The applicant seeks leave to pursue challenges to the Judge's decisions to admit the hearsay evidence of the alleged confession to Miss Nabbs and to admit, by way of bad character evidence, two old previous convictions for wounding with intent (for offences committed in 1986 and 1993). It is said that their prejudicial effect outweighed any probative value.
15. We have read the Judge's rulings on these matters and the parties' respective submissions at the time, alongside the written advice on appeal.
16. The admissions made by the applicant to Miss Nabbs on 13 March were a confession that he had attacked her, including details of how he had done so. Miss Nabbs' evidence about the confession could be admitted as hearsay because she refused to attend court due to fear of the applicant (see section 116(1)(a) of the Criminal Justice Act 2003 ("the 2003 Act")). The evidence of DC Oliver, who recorded what Miss Nabbs had told him in his notebook, and in a statement, could also be admitted as hearsay because he was too ill to attend trial (see section 116(1)(b) of the 2003 Act).
17. Recognising that the evidence from DC Oliver would arguably be multiple hearsay, the Judge applied the test in section 121(1)(c) of the 2003 Act, and he did so correctly, using the factors identified in section 114(2) as a guide. It is not properly arguable that the Judge applied the test or the law to the facts incorrectly, in particular as he noted it was unlikely that someone afraid of the applicant, such as Miss Nabbs, would fabricate evidence against him, and there was good evidence from the police officers as to what Miss Nabbs had told them not long after the admissions in question. Further, the applicant was able to make submissions about other aspects of Miss Nabbs' reliability, and the jury was able to assess those submissions. The Judge's direction to the jury, including the need to exercise caution in relation to the hearsay evidence, has rightly not been impugned. In short, there is no arguable error of law such as to justify appellate interference with the Judge's decision to admit the hearsay evidence.
18. The Judge's decision to admit the applicant's previous convictions for wounding with intent pursuant to section 101(1)(d) of the 2003 Act equally reveals no arguable error of law. He considered the age of the offences in terms, and was entitled to take the view that they were indicative of a lifetime of violence, the record showing violent offences being committed regularly. He went on to consider his powers to exclude under section 101(3) and (4) of the 2003 Act, the applicant's long history of violence, including these two earlier incidents, had substantial probative value, and the Judge was not arguably wrong to admit it.
19. Finally, the applicant suggests that the Judge erred in refusing to discharge the jury in the light of late disclosure from the prosecution during the trial. The new information related to the discovery of drugs at Miss Nabbs' address, and the consequent arrest of her partner, alongside communications between her partner, Mr Marsh, and Miss Nabbs. The information was said to corroborate the applicant's evidence as to the target of the letter of apology that he wrote, and further to call into question the reliability and independence of Miss Nabbs as a witness.
20. Again, there is in our judgment no real prospect of appellate interference with the Judge's decision to refuse to discharge the jury. The new information did not undermine the Judge's central reasoning for allowing in the hearsay evidence, and the applicant was able to use the new material in submissions to the jury on the question of Miss Nabbs' reliability. The applicant's case had been put to each prosecution witness in the presence of the jury in terms of fairness, as the Judge pointed out, the timing and circumstances of the late disclosure could be said positively to have assisted the defence. There was no need to discharge the jury.

21. For these reasons we concluded that it was not arguable that the applicant's conviction is unsafe. In the absence of any merit in the application, we also decline to grant the necessary seven day extension of time.

Renewed application for leave to appeal against sentence

22. We turn then to the renewed application for leave to appeal against sentence.

Pre-sentence materials

23. The Judge had before him the following material for sentencing purposes: the applicant's antecedents, some of which have already been outlined above. The applicant had 52 convictions for 143 offences spanning from 1977 to 2016. The relevant convictions included: causing grievous bodily harm with intent and wounding with intent in 1986 and 1994, assault occasioning actual bodily harm in 1990, 1993, 1996, 1998 and 2000. One offence of battery in 2016 was committed on a previous partner.
24. The Judge had the benefit of a pre-sentence report in which the applicant continued to deny committing the offence and indicated his intention to appeal conviction. He was assessed as presenting a high risk of causing serious harm by his offending behaviour, in particular posing a high risk of serious harm to his partner.
25. In terms of Miss Jones' medical position, the court received a letter from a General Practitioner, Dr Catherine Hart, dated 24 November 2021. In that letter Dr Hart detailed Miss Jones' past injuries and ongoing treatment. Miss Jones had post-traumatic stress disorder ("PTSD") directly relating to the attack, as well as generalised anxiety, depression and panic attacks. She remained under the care of her mental health team, and was engaging with her support worker and the complex dependency team. She had undergone repair and reconstruction work to her left medial orbital wall fracture in July 2021, with exploration and repair of the wall with a full follow-up for facial injuries in six months' time. She was suffering back pain which continued, and for which she was waiting further MRI imaging.
26. Miss Jones submitted a victim personal statement. She described herself as feeling awful psychologically, traumatised, with trouble sleeping at night, with night terrors and screaming. She had a breakdown in September 2021; she had just had enough. She had felt that she was worthless and could not carry on anymore. She stated that she was making a slow recovery. She was on stronger medication than that which she had been taking before. She was terrified to be outside on her own. Her mental health team was worried that if she went back to normal life too quickly this could set her back. She had problems with her back which were still very painful, and her legs kept giving way. She had a permanent scar on her forehead, it had healed "nicely", but she was still self-conscious about it. Her eye operation had been "incredibly painful". Her left pupil remained smaller than her right. Her other facial fractures had healed. Her middle finger, the one that was nearly amputated, would take 12 to 18 months to fully heal. Towards the end of her statement she said this:

"In essence, physically I am doing a lot better, however, psychologically I am still feeling at rock bottom and this is going to be a very slow, long healing process. This assault will take me years, if not a lifetime, to get over . . . It is going to take me years and years but I am going to slowly try to rebuild my life after it was destroyed by [the applicant]."

The sentence

27. The Judge commented that this was the worst case of domestic violence that he had ever seen. The injuries were terrible and resulted from a savage and prolonged attack. It was fortunate

that Miss Jones had survived. He recognised that prior to her relationship Miss Jones was a vulnerable person, small in stature compared to the applicant, and suffering from mental health problems, and drug abuse. Her relationship with the applicant had caused a decline in her health, and her confidence had been undermined. Over a period of time she had been attacked by the applicant in her own home. She had suffered numerous injuries at his hands, the attacks culminating in an axe being embedded in her skull resulting in an extensive scalp laceration across the whole head.

28. The effects of the assaults on Miss Jones were considered by the Judge particularly in the context of categorisation of harm. She was noted to have been diagnosed with post-traumatic stress disorder and generalised anxiety, depression and panic attacks. She remained under the care of her mental health team. The Judge considered her victim personal statement and noted the continuing treatment being undertaken and the effect and impact of the assault on her and members of her family. The Judge considered the applicant to be a violent bully who intimidated people, some of whom had given evidence at the trial but some of whom had been too frightened to do so. He was a man with a long and prolific history of violence, who had shown no signs of rehabilitation or remorse. The Judge determined the applicant to be dangerous on the facts of the case and his record. He presented a continuing risk of serious harm to the public from the further commission of violent offences. The Judge assessed culpability as Category C and harm as Category 1 for the purpose of the Sentencing Council Guideline for Attempted Murder ("the Guideline"). In terms of harm, he said that he was satisfied that the offence had:

". . . resulted in a psychological condition with a substantial and long term effect on the complainant's ability to carry out her normal day to day activities."

29. The Judge then identified the aggravating factors to be the applicant's record of violence and weapons offences; the domestic context of the offence and its location in Miss Jones' home; his use of the axe as a weapon and the fact that he was under the influence of drugs at the time. He had attempted to take money from Miss Jones' account whilst she was injured and to dispose of evidence. There were in the Judge's view no mitigating factors to be found.
30. He was satisfied that an extended sentence was necessary, and that the aggravating factors raised the custodial term to the top of the range to 30 years, with an extension period of three years.

Grounds of appeal

31. Mr Littler submits, as his first and central ground of appeal, that the Judge erred in determining that the offending fell within Category 1 for the purpose of the Guideline. The Judge applied the wrong test and, in particular, ignored the requirement of permanency and irreversibility for Category 1 harm. Category 1 harm does not simply deal with cases where: "serious physical or psychological harm" exists - that is Category 2 harm. Category 1 harm requires the injury or psychological condition to be "permanent", "irreversible", resulting in "lifelong dependency". It is said that the only medical evidence before the court was that of Dr Hart, which was limited, and certainly could not form a safe basis for a finding of permanent or irreversible serious physical or psychological harm. Mr Littler emphasises that cogent and clear evidence must exist in order for a mental health condition to be found to be permanent, irreversible, and incapable of improvement over time with help from professionals and medication. There was no such evidence before the Judge. There was then the added complication of Miss Jones having pre-existing mental health problems.

32. Secondly, and separately, Mr Littler submits that the Judge double-counted the aggravating features in relation to the use of a weapon in particular, which factor had played a part in fixing culpability in Category 1.

Discussion

33. This was not an easy sentencing exercise. The culpability factors in the Guideline in particular do not fit readily with the facts of this particular case. The Judge was quite right to consider whether or not he was obliged to impose a life sentence; some Judges would have felt so obliged.
34. As set out above, the central challenge to the sentence is based on the submission that the Judge misapplied the Guideline in wrongly applying the definition of Category 1 harm. There is no criticism of his assessment that this was medium culpability offending.
35. Category 1 harm is identified in the Guideline as follows:
- "• Injury results in physical or psychological harm resulting in lifelong dependency on third party care or medical treatment.
 - Offence results in a permanent, irreversible injury or psychological condition which has a substantial and long term effect on the victim's ability to carry out their normal day to day activities or on their ability to work."
36. The second bullet point echoes the definition of disability in section 6 of the Equality Act 2010.
37. Category 2 harm is identified in the Guideline as follows:
- "• Serious physical or psychological harm not in category 1."
38. The starting point for Category C1 harm in the Guideline is 25 years' imprisonment with a range of 20 to 30 years. For Category C2 harm, the starting point is 20 years' imprisonment with a range of 15 to 25 years.
39. We accept that in order for there to be Category 1 harm there must be a lifelong dependency on medical treatment, or permanent irreversible injury or psychological condition that has a substantial and long term effect on the victim's ability to carry out normal day to day activities or work. The question here is whether or not the Judge was entitled to find the necessary degree of permanence and irreversibility. We see force in the submission made by Mr Littler that the evidence available did not substantiate the necessary permanence or irreversibility of relevant injury or psychological condition. The sentencing exercise was carried out only seven months on from the attack. Whilst there were ongoing issues so far as Miss Jones' physical injuries were concerned, there was no medical evidence as to the long term prognosis for them. She stated that, physically, she was doing a lot better. As for her psychological injuries there was clear evidence of PTSD directly relating to the attack, but Miss Jones stated, to her credit, that she will be working with her mental health team for a considerable amount of time. There was, on the material available, clearly the possibility of improvement in the long term even in her psychological condition.
40. We are therefore persuaded that it is at least arguable that there was an insufficient evidential platform for any outright finding of permanence and irreversibility of injury or condition of relevant severity. We therefore grant leave. We emphasise, as the courts have done on many occasions, that it is wrong and can be dangerous to make assumptions as to long term prognoses without a secure and satisfactory evidential basis for doing so (see, for example, *R*

v Jones [2021] EWCA Crim 1139, [2021] Cr App R 36 at [14], and *R v Yasin Sati* [2021] EWCA Crim 85 at [21]).

41. That, however, does not necessarily dispose of the outcome of this appeal.
42. Whatever the state of the medical evidence before the Judge, the situation was, on any view, unpredictable, and there was every reason to believe that Miss Jones' psychological condition in particular would carry on for a very considerable length of time in the future, and potentially have lifelong and carry life-inhibiting consequences. Even if the harm in question fell to be placed in Category 2 for the purpose of the Guideline, it fell right at the upper end, as Mr Littler fairly conceded. These were life-threatening injuries at the outset. Miss Jones suffered very significant physical and psychological difficulties that on any sensible view, as we have indicated, were going to last a very long time before improvement. She suffered PTSD directly related to the attack, as well as generalised anxiety, depression and panic attacks. These are problems having a substantial effect on her ability to work or to carry out normal day to day activities such that the Judge would have been fully entitled in any event to adopt a term of at least at, or around, 25 years' custody before considering what uplift for aggravating features. We would add that, in terms of culpability, there were elements of high (as well as medium) culpability, such as planning. On this basis, and considering the aggravating features in play, we consider that the Judge would have been justified in going well outside the range for category C2 offending.
43. As for the suggestion that there was any double-counting in relation to aggravating factors, apart from the question of use of an axe, which should not have played a part additionally as an aggravating factor, there was, nevertheless, a host of aggravating factors to take into account. We refer, in particular, to the applicant's extreme record of violence and weapons offences, the domestic context of what was sustained abuse in Miss Jones' home, the fact that the appellant was under the influence of drugs at the time of the offending and that he attempted to take money from her account when she was injured and to dispose of evidence. There were, as the Judge commented, no mitigating factors.
44. Standing back then, this was a deeply disturbing case of domestic violence involving a traumatic and horrific sustained attack, including the use of an axe. The Judge had to, and did, consider carefully whether or not a sentence of life imprisonment was justified. He had presided over the full trial and was entitled to pass an overall sentence that was, in his view, just and proportionate in all the circumstances of the case. An overall term of 30 years' custody was undoubtedly severe. However, we have not been persuaded in the end result that it can be said to be manifestly excessive.
45. For these reasons, we grant leave to pursue the application for leave to appeal against sentence, but we dismiss the appeal.

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