IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2022/01763/A2, 2022/01764/A3
NCN [2022] EWCA Crim 1821

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 12th October 2022

B e f o r e:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
(Lord Justice Holroyde)

MR JUSTICE DOVE

MR JUSTICE BOURNE

R E X

- v -

JOHN EDWARD BUTTERWORTH
RICHARD GRANT

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Mr L Harris appeared on behalf of both Appellants

Mr J Price KC appeared on behalf of the Crown

J U D G M E N T
(Approved)

Wednesday 12th October 2022

LORD JUSTICE HOLROYDE:

1. The Sentencing Council's 2011 guideline for offences contrary to section 18 of the Offences against the Person Act 1861, at Step 1, listed "sustained or repeated assault on the same victim" as one of the factors indicating greater harm. That guideline is no longer in force: it has been replaced by the Sentencing Council's 2021 guideline, in which "prolonged/ persistent assault" is listed as a Step 1 high culpability factor. John Butterworth and Richard Grant, who were sentenced in December 2019 and April 2017 respectively, complain that their sentences were manifestly excessive because the judge wrongly found that their offences involved a sustained or repeated assault on the victim. Their appeals against sentence, which come before this court by way of references by the Criminal Cases Review Commission ("CCRC"), raise common issues. For that reason, although otherwise unconnected, they have been listed for hearing together.

2. We begin by noting that under the 2011 guideline, the starting point for a category 1 offence, involving both greater harm and higher culpability, was 12 years' custody, with a range from nine to 16 years. For a category 2 offence, involving either greater harm and lower culpability or lesser harm and higher culpability, the starting point was six years' custody and the range from five to nine years.

3. The key facts in the case of each appellant can be summarised as follows.

4. Butterworth, then aged 55, pleaded guilty to criminal damage and, at a later hearing, to causing grievous bodily harm with intent. His victim was Dr Andrew Michie, a general medical practitioner. Butterworth suffered from mental health problems, and whilst under Dr Michie's care he had on a number of occasions been detained under the Mental Health Act. It

appears that he came to hold an irrational belief that Dr Michi was in some way obstructing and interfering with his work and his daily life. In March 2019 he sent Dr Michie a newspaper cutting concerning a man who had shot his doctor with a crossbow, accompanied by a message saying "beware the Ides of March". Dr Michie recognised that this had been sent by Butterworth and was anxious about the safety of himself and his family.

5. A few weeks later, in the early hours of the morning, Butterworth tried to break into Dr Michie's home, which is in a remote location. Dr Michie, his wife and their three children, the youngest of whom was about to take A levels, were asleep inside. Butterworth failed to gain entry, but inflicted damage on Dr Michie's car parked outside.

6. Dr Michie was woken by the noise and went to investigate. The judge, in his sentencing remarks at page 2A, described what then happened:

> "Once he saw you and you saw him, the scene became immediately violent. You started to swing a punch at him, striking his face and bruising his eye, and then, as the prosecution describe it, you want on to rain a number of blows on Dr Michie, striking him repeatedly to the head and chest. Even more significantly, you grabbed him and forced him to the ground. You got on top of him, straddling him, continuing to punch at his body and then you put your hands around his neck, gripping, squeezing and strangling him."

7. Dr Michie suffered cuts, swelling and bruising to his head and face, and soft tissue damage, bleeding and swelling to his voice box. As the judge noted, the physical injuries were less serious than they might have been; but the real harm to Dr Michie lay in the psychological effects, which the judge assessed as high. In doing so, he took into account the Victim Personal Statements of Dr Michie and his wife, which made clear that Dr Michie had believed that he would be strangled to death, feared for the safety of his family, and had been seriously affected by the incident, as had the family as a whole.

8. Butterworth had a number of previous convictions, the most relevant of which was an offence of possessing an offensive weapon in September 2011. On that occasion he had taken a baseball bat to the home of his psychiatrist, whom he felt should be punished for the perceived inadequacy of his treatment.

9. The judge placed the offence in category 1. At page 4C of his sentencing remarks, he said:

> "… as to whether this is a less serious injury in the context, that would be so if I confine my consideration of it purely to the physical symptoms, but I do not. I take into account the psychological symptoms and, in my judgment, they are high. This is indeed a sustained assault upon the victim and I am entirely satisfied it is properly categorised as a category 1 case."

The judge found a number of aggravating factors: the fact that the offence was committed against a GP, in the presence of his family who had also suffered ongoing harm; the earlier sending of the newspaper cutting as a threat; and the previous convictions. He accepted that there was some mitigation because Butterworth's behaviour had been affected by his mental health problems. However, the judge gave comparatively little weight to that, because the problems were increased, as Butterworth knew, by his voluntary drinking of alcohol and his deliberate reduction of his antipsychotic medication.

10. The judge found Butterworth to be a dangerous offender. He concluded that the appropriate sentence before any reduction for the plea was 11 years' imprisonment. Giving ten per cent credit for the late guilty plea, he imposed an extended sentence of 14 years 11 weeks, comprising a custodial term of nine years 11 weeks and an extended licence period of five years.

11. In 2017 Grant, then aged 46 and a former soldier, was in a relationship with Ms Jones. She was engaged in Family Court proceedings against her former partner, Alexander Pierce, the father of one of her children. Ms Jones had made serious allegations against Mr Pierce, which were subsequently rejected by the Family Court, and a fact-finding hearing was soon to take place. Grant became obsessed with Mr Pierce. He covertly installed a tracking device in Mr Pierce's car and tracked his movements. On a night in January 2017 he lay in wait outside Mr Pierce's house, hooded and armed with a knife. He was following the movements of Mr Pierce's car in which Mr Pierce and a Ms Watkiss were returning to the house. In his sentencing remarks, at page 2H, the judge said this:

> "As soon as the car arrived you, I am quite sure on the evidence, helped force open the door and knifed Mr Pierce. You stabbed him to the side of his chest, you stabbed him in the upper thigh, you stabbed him on the bicep, and he suffered a severe defensive wound [to] his hand. And, as I say, the jury have convicted you of wounding with intent. So far as it is material to note, I do not accept Ms Watkiss' evidence that this was some 50 to 100 blows. That was plainly her honest belief but not evidenced by the evidence of the wounds. Mr Pierce put it at some five to 15, which seems about right in terms of blows, but I am sure that this was a sustained and repeated assault and that there were punches in order to ensure that you could not wound Mr Pierce."

We would add to that brief summary of the assault the feature that it ended only as a result of the intervention of others and not by any free choice of Grant himself.

12. Mr Pierce suffered wounds to his chest, left arm and right thigh, and a defensive wound to his left hand, as the judge had mentioned. It does not appear that those injuries were serious in the context of the offence.

13. The judge placed the offence in category 1, on the basis that it was a sustained and

repeated assault. The aggravating factors which he found were the significant amount of premeditation and the ongoing effect of the attack on Mr Pierce. Mitigating factors were that Grant had no relevant previous convictions, had a good record of military service, had suffered Post Traumatic Stress Disorder following his service in Northern Ireland, and was doing well in prison.

14. The judge did not find Grant to be a dangerous offender. He concluded that the aggravating features merited an uplift from the guideline starting point to 14 years' custody, but that the mitigating features then merited a reduction of 18 months. In those circumstances, he imposed a sentence of 12½ years' imprisonment.

15. With those brief summaries, we turn to the argument on appeal.

16. Each of the offenders had applied for leave to appeal against his sentence. Each application had been refused by the single judge. Neither was renewed to the full court. The CCRC referred each of the cases on the ground that it considered that there was a real possibility that this court would reduce the sentence on the basis that, in light of the clarification of what was meant by the greater harm factors in the 2011 guideline, each of these assaults should have been dealt with as a category 2 offence.

17. In his very helpful submissions on behalf of both appellants, Mr Harris suggests that the ground of appeal referred by the CCRC gives rise to two issues: whether the sentence imposed on each appellant was manifestly excessive in light of guidance given by this court subsequent to the sentence being imposed and leave to appeal being refused; and whether, in considering that submission, this court is entitled to consider documents produced by the Sentencing Council in connection with the guideline as an aid to interpretation.

18. In relation to the first of the issues which he identifies, Mr Harris relies on the decisions of this court in *R v Xue* [2020] EWCA Crim 587, [2020] 2 Cr App R(S) 49 and *R v Summerville* [2020] EWCA Crim 944. Each of those cases followed and applied the earlier decision in *R v Smith (Grant Christopher)* [2015] EWCA Crim 1482, [2016] 1 Cr App R(S) 8, in which, giving the judgment of the court, Green J said at [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. In one sense, the present case involves a repeated offence in that there were two blows, though only one of them was charged under section 18. We have doubts whether a difference between one blow and two blows could justify moving the starting point from a category 2 (6-year) level to a category 1 (12-year) level. If this were so, there would be very few attacks that were not category 1. The concept of sustained or repeated, in our view, imports some degree of persistent repetition. These concepts must be read in the light of the major difference in starting point between the two categories. 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. In our judgment, two blows, one of which is not said to amount to a section 18 offence, would not at least normally amount to a sustained or repeated assault. We do not wish to be more specific or precise than this because we acknowledge that each case will entail a very fact-specific assessment."

20. Applying that approach, the court in *R v Xue* concluded at [32] that on the facts of that case the assault, although nasty, 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". In *R v Summerville*, the court stated at [14]:

> "… To achieve proportionality, it was important that facts warranting the highest sentencing category 1 should reflect the difference between that and a sentence in category 2."

21. In relation to the second of the issues he identified, Mr Harris refers to papers published by the Sentencing Council in connection with its work of revising the 2011 guideline and developing the 2021 guideline which replaced it: a report in October 2015 as to the Council's findings from discussions with sentencers and practitioners; an assessment, also in October 2015, of the impact and implementation of the 2011 guideline; a consultation paper in April 2020; and a response to consultation in May 2021. Mr Harris submits that the 2015 papers show that the Council felt that further consideration was needed of what constituted a "sustained or repeated assault", and that some guideline users regarded that factor as open to differing interpretations. The potential for differing interpretations was identified in the consultation paper as an issue to be addressed in the revised guideline, and the result of the consultation process was, as we have indicated, that "prolonged/persistent assault" is listed as a high culpability factor in the 2021 guideline.

22. Mr Harris, relying on a passage at [5] of the judgment of the court given by Sir Brian Leveson, President of the Queen's Bench Division, in *R v Dyer* [2013] EWCA Crim 2114, [2014] 2 Cr App R(S) 11, submits that those documents can properly be considered by this court. He draws an analogy with the use of Parliamentary material as an aid to the interpretation of a statute.

23. Mr Harris goes on to submit that the subsequent guidance shows that the 2011 guideline was being followed in a way which gave rise at least to a risk of manifestly excessive sentences. On that basis, he argues that whilst a sentence may not have appeared to be excessive "on the guidance at the time", subsequent decisions of this court show that the guideline was being misapplied.

24. On the facts of the individual appeals, Mr Harris submits that in each of the cases the

judge should have placed the offence into category 2 and imposed a sentence within the category 2 range; or, in the alternative, if the offence was correctly placed in category 1, that the judge should have imposed a sentence at the lower end of the category 1 range. He relies on the published materials of the Sentencing Council, to which we have referred, as supporting his core argument that there was ambiguity in the 2011 guideline, which was ultimately resolved by its replacement with the 2021 guideline, and that the ambiguity lends support to his submission that the judges in these individual cases categorised the offence incorrectly.

25. Mr Price KC, in his submissions on behalf of the respondent, contends that the 2011 guideline must be interpreted only by reference to its own language and relevant case law of this court. Application of the guideline involves a fact-sensitive assessment, and in each of these cases the judge, to put it at the lowest, was entitled to find that the case was one of greater harm. In the alternative, he submits that the facts and circumstances of each case were such that, even if the judge had placed the offence into category 2, he would have been justified in passing a sentence in the category 1 range because of the very high level of culpability and the aggravating factors. In support of this alternative submission, Mr Price points to the wording which preceded the non-exhaustive lists of aggravating and mitigating factors at Step 2 of the guideline, which indicated that:

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

26. We are grateful to both counsel for their submissions, which have been of considerable assistance to the court.

27. It is important to remember that a sentencing guideline is not a statute. Guidelines aim to

promote consistency and transparency in sentencing whilst maintaining the independence of the judiciary. They give guidance, in very succinct form, as to sentencing across the wide range of culpability and harm which may be involved in an offence of a particular kind. They use terminology which reflects the fact that the circumstances of offences vary infinitely, and which requires a judicial assessment of whether a particular guideline factor is present in a particular case. An offender who is aggrieved by the way in which a court has applied a particular guideline to the circumstances of his offence has an avenue of appeal against sentence to this court. Where necessary, the decisions of this court may give guidance as to the approach to be taken to the application of a guideline, as was indeed done in *R v Smith*. Neither the guideline for section 18 offences, nor any decision of this court, attempts to specify the precise number of distinct blows, or the precise duration of an attack, which may be required before an assault can be regarded as sustained or repeated. It is a matter for the judgment of the sentencer as to whether that factor is present.

28. The case of *Dyer*, on which Mr Harris relies, does not in our view assist his submission that this court – or lower courts – can and should have regard to various Sentencing Council publications in considering the factor "sustained or repeated assault" in the 2011 guideline. The appeals in that case were against a judge's application, in September 2012, of drugs guidelines which had come into force only seven months earlier, in circumstances where there had been no previous sentencing guideline for such offences. The President referred briefly to the Council's consultation when explaining why the new guideline sentences for "street dealing" applied to sales to undercover police officers. That limited and specific reference to the history of the then current guideline does not in our view support a broad proposition permitting, still less requiring, a sentencer, when applying a guideline, to consider other materials published by the Sentencing Council.

29. Nor are we persuaded by the suggested analogy with Parliamentary materials, not least

because a guideline is not a statute and is not to be applied by reference to the canons of statutory interpretation.

30. Sentencers are required by statute to follow any "relevant sentencing guidelines which are relevant to the offender's case": see section 125(1)(a) of the Coroners and Justice Act 2009, now replaced by section 59(1)(a) of the Sentencing Code. A research paper, consultation or draft guidance is not a relevant guideline. Where there is a relevant offence-specific guideline which describes categories of case, the general statutory duty of the sentencer includes "a duty to decide which of the categories most resembles [the offender's] case in order to identify the sentencing starting point in the offence range": see section 125(3)(b) of the 2009 Act, now replaced by section 59(3)(b) of the Code. Performance of these statutory duties of course requires the sentencer to follow any relevant guidance given by this court, but it does not require him or her to review external materials in order to ascertain the meaning of ordinary English words.

31. It must also be remembered that transparency in sentencing is assisted by the guidelines being publicly available in digital form on the Council's website. It is appropriate in that regard to refer to the words used by Treacy LJ, then the Chair of the Sentencing Council, when commenting on section 125 of the 2009 Act in [2014] Crim LR at page 299:

> "The guidelines replace the need for judges to comb through volumes of case law in search of guidance. This enables judges, advocates and the public to consult documents designed for clarity and intended to encourage consistency of approach – an obvious pre-requisite of doing justice in any case."

32. Even if external principles might in principle be considered, neither research indicating that some sentencers found it difficult to apply once aspect of a guideline, nor a decision by the Sentencing Council to revise a guideline in order to increase consistency of approach,

provides a reason to suppose that every sentencer applying the relevant aspect of the earlier guideline fell into error. An impugned sentence must be considered on its merits, not on the basis of material suggesting that difficulties may have been encountered in other cases on different facts.

33. It is unnecessary for us to consider whether there are any circumstances in which a sentencer may or must consider other materials published by the Sentencing Council. In these appeals, the important point is that at the time when the appellants were sentenced, this court had already given the guidance in *R v Smith* to which we have referred. The subsequent cases of *Xue* and *Summerville* followed that guidance and applied it to the facts and circumstances of the individual cases; they did not alter or add to the existing guidance.

34. With all respect to the CCRC, we struggle to identify the "clarification" of the guideline which is said to constitute a "new argument on a point of law" which gives rise to a real possibility that this court will not uphold the sentence. It is not suggested that the law has changed. Nor has the guidance given by this court in *Smith*. The remedy for an alleged incorrect application of the guideline or of this court's guidance, giving rise to a manifestly excessive sentence, lay in an application for leave to appeal against sentence.

35. Each of the appellants sought such a remedy but was unsuccessful. Neither sought to renew his application for leave to the full court, following refusal by the single judge. Their appeals accordingly lapsed. In the absence of any new argument on a point of law, these appeals represent in our view an attempt to re-argue grounds of appeal already considered and rejected by this court.

36. In any event, we can see no basis on which the application of the guideline in either case could be challenged. We have reflected on Mr Harris' careful submissions about the

circumstances of each of the two appeals. Nonetheless, like the respective single judges, each of whom "ticked the box" to emphasise the hopelessness of the grounds of appeal, we are satisfied that the sentencing judge was entitled to find that the assault was "sustained or repeated".

37. In Butterworth's case, as we have said, the assault involved repeated punching to Dr Michie's face, head and chest whilst he was upright; pushing him to the ground; getting on top of him and striking further blows; throttling Dr Michie, obstructing his breathing to the point where he was convinced he would die; maintaining his grip on Dr Michie's neck; and finally, dragging him to his feet and pushing him against a wall. That attack as a whole caused grievous bodily harm. Whatever its precise duration, and whatever the precise number of blows, it could properly be regarded as sustained or repeated.

38. We would add that in the sentencing remarks, to which we have referred, the judge assessed the harm caused, both physical and psychological, as being at a high level. That was a factor which he was entitled to take into account in bringing the offence within the category 1 sentencing range.

39. In Grant's case, the assault involved multiple blows, including at least three, and more probably four, stabs with a knife. We reject the submission that the judge was bound to sentence on the basis of the minimum number of five blows; the judge reached his decision on the basis that the evidence of Ms Watkiss, who reported 50 to 100 blows, was not supported by the evidence of the wounds, but that Mr Pierce's reference to five to 15 blows was "about right". Both witnesses were clearly describing an assault which was sustained or repeated, even if it was of comparatively short duration. Its duration, as we have said, was ended by the intervention of others, not the choice of Grant. The judge was accordingly entitled to categorise the offence as falling within category 1.

40. Each offence having been correctly categorised, and the appropriate starting point having been selected, we see no basis on which to challenge either of the final sentences imposed after considering aggravating and mitigating factors. In each case, again like the respective single judges, we are satisfied that the sentence was not even arguably manifestly excessive.

41. For those reasons, grateful though we are to Mr Harris for his submissions, each of these appeal fails and is dismissed.
