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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2022/03018/A2, 2022/03020/A2
2022/03022/A2



Neutral citation number: [2022] EWCA Crim 1835

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 25th November 2022

B e f o r e:

LORD JUSTICE BEAN

MRS JUSTICE FARBEY DBE

HIS HONOUR JUDGE FORSTER KC
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E X

- v -

THOMAS SMITH
ROBERT SMITH
JEFFREY SMITH

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Mr J Keating appeared on behalf of the three Appellants

J U D G M E N T

MRS JUSTICE FARBEY:

1. The applicants are a father and two sons. Jeffrey Smith is aged 65; Thomas Smith is aged 29; and Robert Smith is aged 32. On 13th July 2022, having pleaded guilty before magistrates, the applicants were committed for sentence pursuant to section 14 of the Sentencing Act 2020 in respect of one offence of violent disorder.
2. On 14th September 2022, in the Crown Court at Birmingham, each of the applicants was sentenced by HHJ Henderson to two years' imprisonment.
3. The applicants' applications for leave to appeal against sentence have been referred to the full court by the Registrar.
4. The facts are that at around 3 am on 19th December 2020 the three applicants attended Kyle Osbourne's address. Mr Osbourne was at home with his friends, Craig Anderton and Penny Woodall. Earlier that night, at a party at a different address, there had been an argument between Mr Osbourne and Thomas Smith concerning Mr Osbourne's girlfriend. Mr Osbourne said that punches were thrown and that the matter then ended. The defence documents suggested that Thomas Smith was beaten up. When the applicants attended Mr Osbourne's address they were armed with bats or sticks. The CCTV footage clearly shows a prolonged and violent attack by all three applicants in Mr Osbourne's garden.
5. Jeffrey Smith approached Craig Anderton armed with a bat, and struck him to the head. Thomas Smith then attempted to strike Mr Anderton with a glass bottle whilst Robert Smith assaulted Kyle Osbourne, who was curled up in a ball on the ground. The disorder continued for some time, with the bats being swung around. Ms Woodall, who was plainly distressed, was also struck on the head with a bat.
6. A neighbour saw the disturbance and called 999. She said that she thought the group were going to kill Mr Osbourne.
7. In terms of injuries sustained, Ms Woodall suffered a bruise to the back. Mr Osbourne suffered a broken hand which, he said, was from covering his head when he was on the ground. He required internal stitches to his scalp, seven external stitches to the back of the head, seven to the left side of the head and two to his ear. His face was badly swollen. He had bruising to the neck and a black eye. Mr Anderton suffered a cut head which required ten stitches.
8. In his brief sentencing remarks, the judge dealt with the facts of the offence. He emphasised the mitigating factors, including the applicants' very great remorse and their previous good character as decent, hard-working, respectable men. He was satisfied that the offending of all three of the applicants was entirely out of character. He indicated that, despite these factors, an immediate custodial sentence was required. He continued:

"I treat you all in the same way because you were all in it together, whatever you individually did with your individual weapon. This was at the top of the relevant section, in my judgment, of the guidelines, and so it would have been a starting point of three years. I reduce it by a third because, of course, being the decent men you are, you faced up to it from the first opportunity."

He then explained the effect of the sentence and dealt with ancillary matters.

9. In his well presented written and oral submissions on behalf of the applicants, Mr Keating submits that the terms of imprisonment should have been suspended, and that the imposition of immediate terms of imprisonment was excessive. He emphasises in particular the very strong personal mitigation of all three men.

10. As the Registrar observed when she referred the matter to this court, the judge made no reference to the guideline on the Imposition of Community and Custodial Sentences (“the Imposition guideline”). We observe that the judge did not refer in his sentencing remarks to the relevant offence guideline; nor did he state the offence category within the guideline. We infer – and it has been confirmed by Mr Keating – that the judge sentenced the applicants at the top of the category 2B range.

11. As to the level of harm, the offending fell within at least category 2 as the incident had resulted in a serious injury to Mr Osbourne. As to culpability, the offending involved serious acts of violence, which is a level B factor. The starting point for a category 2B offence is two years' custody, with a range of one to three years.

12. We cannot, however, ignore the additional factor that all three applicants, acting as a group, targeted at least Mr Osbourne. A targeted group attack is a level A culpability factor and would, in our judgment, have entitled the judge to elevate the applicant's offending to level A culpability. The starting point for a category 2A offence is three years' custody. In addition, the use of weapons was a serious aggravating factor and, as we have said, the attack was prolonged.

13. We have taken into account the mitigation outlined by the judge and in particular, as emphasised to us today, the lengthy period between the offending and the date of the sentence during which the applicants remained in the community and committed no further offences. That point loses some, but not all, force in circumstances where the applicants made no comment in their interviews. In our judgment, weighing the undoubtedly strong mitigation against the nature and seriousness of the offence, the judge was entitled to sentence all three applicants to three years' imprisonment, before the one third discount for their guilty pleas.

14. The judge was entitled to conclude that immediate custody was necessary. Mr Keating emphasises the realistic prospects of rehabilitation and the strong mitigation as factors in the Imposition guideline indicating that it may be appropriate to suspend a custodial sentence. Although the judge did not refer to the guideline, it is plain that he had those factors in mind when he indicated that the sentence would have to be an immediate custodial sentence. In our judgment, in light of the persistence and violence of this group attack, the judge was entitled to conclude that appropriate punishment could only be achieved by immediate custody.

15. We should add that, like the judge, we see no reason to distinguish between any of the three applicants.

16. Accordingly, it is not arguable that the sentences should have been suspended in relation to any of the applicants. It is not arguable that any of the sentences was excessive or wrong in principle. We therefore refuse the application for leave to appeal against sentence in the case of all three offenders.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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