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IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2023] EWCA Crim 163

Case No: 2022/03393/A3

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 3rd February 2023

B e f o r e:

LORD JUSTICE COULSON

MRS JUSTICE CUTTS DBE

HER HONOUR JUDGE MUNRO KC
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E X

- v -

KEISHA OLIVIA HARTY

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 T Challinor appeared on behalf of the Applicant

J U D G M E N T

Friday 3rd February 2023

LORD JUSTICE COULSON:

Introduction

1. The appellant is now aged 26. On 11th November 2022, in the Crown Court at Liverpool, she was sentenced by His Honour Judge Woodhall to a total of five years and six months' imprisonment, made up of five years and four months in respect of one count of wounding with intent, contrary to section 18 of the Offences against the Person Act 1861, and a consecutive term of two months for a failure to surrender, contrary to section 6 of the Bail Act 1976.

2. Her appeal in respect of the sentence for the Bail Act offence does not require leave: see section 13 of the Administration of Justice Act 1960. There was originally no appeal against that sentence. However, following the intervention of the Criminal Appeal Office, a point emerged about the credit to which the appellant may have been entitled. We will address that point in greater detail later in this judgment. Because the appellant does not require leave to raise that point with the full court, the Registrar has, for convenience, referred the application for leave to appeal against the sentence for the section 18 offence to the full court in order that they can be heard together.

The Section 18 Offence

3. On New Year's Eve 2019 Anna Rudolf was at her home address in Tudor Road, Birkenhead with her two young children. At around 8 pm the appellant and Tracy Morgan arrived at her address to celebrate the New Year with her. They brought some alcohol with them. Ms Morgan had her four year old child with her. The children were put to bed and the adults celebrated the New Year. The appellant and Ms Morgan were drinking alcohol. They appeared to have been drinking prior to arriving at Ms Rudolf's address. They were being

very loud, and earlier that evening the appellant and Ms Morgan had been loud and aggressive towards another neighbour.

4. At around 11 pm Robert Murray arrived at the address. He left briefly before returning with the complainant, Nicola Hilton. The complainant, an adult, had recently been made homeless by her father. She explained that to Ms Rudolf who invited her into her home. Up until around 3 am everyone appeared to be getting on well. Everyone, except Ms Rudolf, had drunk a considerable amount of alcohol. Ms Rudolf and the appellant were sitting at the dining table. The complainant and Mr Murray were standing near them. The appellant started to argue with the complainant. The appellant shouted and swore at her. The complainant did not respond but just told her to be quiet.

5. Without warning, the appellant flipped the dining table over, stood up and attacked the complainant by grabbing her hair. Ms Rudolf stood up and tried to pull the appellant away. The complainant was shouting at the appellant to stop but the appellant continued to attack her. Ms Rudolf could see clumps of the complainant's hair being pulled from her head. Ms Morgan and Mr Murray assisted in separating the appellant from the complainant. The complainant went to stand in the kitchen to recover from the assault. The appellant picked up a broken wine glass that had smashed on the floor when the table was flipped over, and followed the complainant into the kitchen. There she lunged towards the complainant whilst holding the broken wine glass and struck the complainant in the face, causing a large cut. The complainant ended up on the floor in the kitchen. Ms Rudolf went to assist, but Ms Morgan climbed over her, grabbed the complainant by the hair and pulled her out of the kitchen whilst punching her on the head three times. Then the appellant, Ms Morgan and Murray all fled from the property. An ambulance was called at 3.07 am.

6. Police officers arrived at 3.20 am. One officer observed that the complainant had

sustained a deep laceration to the right side of her face which was bleeding profusely. She was shouting and in distress. Another officer saw that there was lots of broken glass and blood on the floor of the back room next to the kitchen. The complainant was taken to hospital by ambulance. She had sustained multiple deep lacerations to the right side of her face, had swelling to the right temple area, right cheek and jaw, and had three full-thickness lacerations to the right temple region, including a semi-circular laceration on her right cheek. She was treated with stitches under anaesthetic and discharged, having been prescribed oral antibiotics, anaesthesia and cream.

7. The appellant was arrested at 9 pm on 1st January 2020. She was interviewed the following day. She stated that she had had a fight with Ms Morgan and had then left at 2 am and did not witness any assault on the complainant. That was, of course, a blatant lie. CCTV enquiries showed that she had left Ms Rudolf's property at 3.06 am (one minute before the 999 call). Forensic enquiries of her clothing revealed blood splattering indicating that she had been in close proximity to the complainant. When interviewed again on 5th March 2020, the appellant accepted that she had been present at Ms Rudolf's property in the early hours of the morning of New Year's Day. She said that everyone had been fighting, and it was at that point that she had left the property. She continued to deny assaulting the complainant or causing her injury and could not explain the presence of the complainant's blood on her leggings.

The Failure to Surrender

8. The appellant was due to attend her trial in the Crown Court at Liverpool on 15th July 2021, but she did not attend. A warrant for her arrest was issued. Two subsequent trial dates on 26th July 2021 and 28th July 2021 were fixed and also missed. The appellant fled the jurisdiction and went to Ireland.

9. On 11th April 2022, the appellant was remanded in an Irish prison. That total period of imprisonment lasted until 10th October 2022, when she was extradited back to the United Kingdom. However, whilst in Ireland the appellant had committed shoplifting offences for which she was sentenced to a term of imprisonment there. Thus, for the period between 3rd May 2022 to 8th September 2022 the appellant was serving her sentence in Ireland for those unrelated offences.

10. It is agreed that there was a period of 55 days during which the appellant was remanded in an Irish prison prior to her extradition back to the UK, and which did not relate to the Irish shoplifting offences. We will return to that period of 55 days later in this judgment. That gives rise to the credit point that is the subject of ground 2 of the appeal.

The Sentencing Hearing

11. The sentencing hearing took place before Judge Woodhall on 11th November 2022. In his sentencing remarks the judge rightly focused on "the very serious injury" inflicted on the complainant, Ms Hilton. The judge said:

> "Ms Hilton was taken to hospital. She had sustained what are described as multiple deep lacerations to the right side of her face, one which was 4 centimetres along the hairline, one which was 3½ centimetres in the right temple and a 4 centimetre semi-circular cut to her right cheek. There was associated swelling. I have seen the photograph … This was on any view a traumatic injury. Ms Hilton had to be treated with [what] I am told were 21 stitches to her face and she was then discharged with medication. In essence, the injuries can be summarised this way, serious cuts to almost the whole of the side of her face, the right side of her face….
>
> Ms Hilton has declined to make a victim personal statement indicating that to do so would cause her further trauma because it would cause her to have to relive the events of this night. She has, however, told the officer how she has been left feeling traumatised to the extent that she cannot walk down the street without fearing being attacked and that her visible scarring to her face causes her concern about what others may think. In her application for compensation she has described the injuries as having left a severe and permanent scar to the

> right side of her face – given what I have seen in the photograph that is no surprise – how her saliva gland was damaged, it required draining and injections, and she described the process involving skin grafts."

12. The judge then turned to the relevant sentencing guidelines. He was concerned that the prosecution had agreed with the defence that this was a medium culpability case, category B, notwithstanding that a broken glass had been used to lunge into the complainant's face. He wondered if this was not a category A (high culpability) offence because of the use of the broken glass, which might be properly categorised as the use of a highly dangerous weapon. However, the judge ultimately accepted that for the purposes of the guidelines, this was a case of medium culpability. He considered that harm could have been categorised as category 1, but in the end categorised it as category 2 harm.

13. For an offence within category B2, the guideline identifies a starting point of five years' custody, and a range of four to seven years. The judge said that the offence was aggravated by a number of features. He said this:

> "Firstly, having drawn back from concluding that the weapon was highly dangerous at stage 1, I do conclude that the nature of the weapon and where it was deployed or used, in other words to your victim's face, elevates the seriousness of this offending up within the range. Put another way, use of this particular weapon in the way it was falls only a little short perhaps of being classified as a highly dangerous weapon. Secondly, it is further aggravated because the offence was committed when you were under the influence of alcohol. Thirdly, it is aggravated because there were others present and fourthly, it is aggravated because you were subject to a community order at the relevant time. Those features combined undoubtedly elevate the sentence up to at least the top of the range identified."

14. The mitigating factors found by the judge included the following: the offence was out of character; the appellant's vulnerabilities and trauma flowing from her own abusive relationships; and the steps that she had taken to address some of the underlying causes.

Taking all those factors into account, the judge said that the appropriate sentence after trial would have been six years' imprisonment, which was reduced by ten per cent to reflect the late guilty plea. That resulted in a term of five years and four months' imprisonment.

15. The judge said that the Bail Act offence was culpability A and category 1 harm. That gave a starting point of six weeks' custody, and a range of 28 days to 26 weeks. The judge said that he would reduce the sentence on that count to reflect the time that the appellant had spent in custody in Ireland, before and after she had served her shoplifting sentence, when she was only in custody because of the arrest warrant for the s.18 offence. Taking into account that period in custody, which the judge said that he understood to be "about one month", he said that the relevant sentence would have been one of three months' imprisonment after trial, which was reduced to two months as a result of the guilty plea.

The 'Slip Rule' Hearing

16. A week later, on 18th November 2022, there was a slip rule hearing before the judge. This was because, although nobody had informed the judge a week earlier, there had been a period earlier on in the proceedings in the UK when the appellant had been subject to an electronically monitored curfew. That gave rise to an agreed credit, namely a period of 83 days, which would count towards the appellant's sentence.

17. At the end of the slip rule hearing there was an exchange between the judge and Mr Challinor, who represented the appellant. Mr Challinor expressly raised with the judge the question of the time which the appellant had spent on remand awaiting extradition. Mr Challinor asked the judge if that time had been credited in the appellant's case. The judge said that he had taken it into account; he had not formally made a discount from the sentence, but he had borne it in mind in assessing the total sentence that he had imposed. He brought up his notes and confirmed that he took into account the period once the Irish sentence had

expired, and she was in custody awaiting extradition for this offence. He said:

> "I took that into account as a feature in determining what the overall sentence was."

Mr Challinor replied that he was grateful for that confirmation. That appeared to be the end of the point.

The Appeal in respect of the Bail Act Offence

18. However, the Criminal Appeal Office raised with the appellant's representatives the fact that, pursuant to section 327 of the Sentencing Act 2020, the judge was required to specify in open court the number of days for which the appellant had been kept in custody whilst awaiting extradition. That had not happened in this case. That point was therefore added to Mr Challinor's amended Advice and Grounds of Appeal.

19. At the hearing today, we asked Mr Challinor what the effect of this omission was. He originally indicated that he sought credit for the 55 days. However, in our view, the position is not as simple as that. First, the period of 55 days had never been identified to the judge, either at the sentencing hearing or at the slip rule hearing, where the point was raised as a mater of principle.

20. Secondly, the judge had been clear in his sentencing remarks on 11th November that he was aware that the appellant had spent time in custody in Ireland awaiting extradition and that that was a period that should be taken into account, and that he had taken it into account. He repeated that at the slip rule hearing.

21. Thirdly, it is plain that the information made available to the judge at the sentencing

hearing was that the period in question was "about one month in custody". That was never corrected, as it ought to have been, so that the judge could take the full period into account.

22. Accordingly, in this somewhat muddled situation, it seems to us that the obvious solution is this. We will state in open court that the time spent on remand in Ireland awaiting extradition was 55 days. We note that the judge endeavoured to give credit for this, although he thought that the period was about one month (or 30 days). The sensible solution is for the appellant's sentence in respect of the Bail Act offence to be reduced, but reduced by a further period of 25 days, calculated by taking the overall period of 55 days and taking off the 30 days which have already been credited to the appellant. That reduces the sentence in relation to the Bail Act offence by a further period of 25 days. That is the appropriate reduction. When during the course of argument we put that alternative to Mr Challinor, he very properly accepted that, in the circumstances that have arisen, that was the most pragmatic solution.

<u>The Application for Permission to Appeal the Sentence for the Section 18 Offence</u>

23. We turn to the application for permission to appeal against the sentence imposed for the section 18 offence. In his Advice, Mr Challinor accepts that the judge was right to categorise the offence as category B2. He complains, however, that the judge's starting point of six years' custody (having taken into account the aggravating and mitigating factors), prior to the discount for the guilty plea, was (as he put it) "the top of the range for a B2 offence, which is the same as the starting point for an A2 offence (seven years)". His principal criticism was that, in the passage we have quoted, "the judge came close to categorising the weapon as highly dangerous". He said that the glass was not broken intentionally, and that the appellant's decision to pick it up and use it in the way that she did was a 'spur of the moment' reaction. He said that the glass was not an offensive weapon *per se*. He also said that the judge failed to give sufficient weight to the appellant's personal mitigation.

24. We have considered the measured submissions in support of these arguments made by Mr Challinor, both in writing and orally this morning, but we cannot accept them for a number of reasons.

25. First, contrary to Mr Challinor's submission, the judge's notional term of six years, prior to the discount for the guilty plea, was a year less than the top of the recommended range. That obviously took into account both the aggravating and the mitigating factors. There were numerous aggravating factors, as the judge himself identified in the passage that we have cited.

26. Secondly, we do not consider that it is fair to criticise the judge for wrongly categorising the broken glass. He considered that it fell within category B, having given careful thought to whether it could be put into category A. In the circumstances of this case, we think that the judge was right to place the offending into category B, and therefore no criticism can attach to that decision.

27. Thirdly, we do not accept the criticism that, having placed the offence in category B, the judge was wrong to conclude on the facts in this case that the nature of the weapon and its use elevated the seriousness of the offending within category B. In our view, that submission is contrary to common sense. To thrust a broken wine glass into somebody's face clearly elevates the seriousness of the offending within category B.

28. On this last point, Mr Challinor's related submission was that the offence was not as serious as those cases where a weapon is taken to the scene, or where a glass is broken intentionally in order to make it more dangerous. We agree with that submission in so far as it goes, although, ultimately, we think it is besides the point. The submission comes close to saying that there may be other cases in which the culpability may be higher. So there are.

But that does not reduce the appellant's culpability in the present case, which we consider properly reflected the facts of her offending. In any event, we are bound to note that the appellant picked up the broken wine glass from the wreckage of the dining table that she had overturned, and she took that broken glass into the kitchen where the complainant was sheltering from the appellant's earlier violence. The appellant there lunged with it into the complainant's face. Accordingly, to that extent, the appellant *did* take the broken glass from one place to another to continue her assault on the complainant. In all the circumstances, the attack with the glass was nothing like as spontaneous as Mr Challinor sought to suggest.

29. Finally, we turn to the question of the appellant's mitigation. The judge dealt carefully with that. He expressly identified those factors in his sentencing remarks, and they obviously reduced the term he would have otherwise imposed. Questions of weight were, of course, a matter for the judge. However, in our view, Mr Challinor overstated the mitigation available to the appellant.

30. We accept that there is some personal mitigation. There can be no doubt about that. But the pre-sentence report paints an unpromising picture of the appellant. Amongst other things, it assesses her as posing a high risk of serious harm to the public. It concludes that she has not accepted responsibility for her actions in the attack on the complainant. It notes that her response to her past supervision was "very poor". Accordingly, we are not persuaded that the appellant's personal mitigation was particularly significant or that, in the round, the judge did not fully take it into account.

31. For those reasons, we conclude that the sentence of five years and four months' imprisonment imposed for the section 18 offence (namely, six years, less the discount for the guilty plea) was neither wrong in principle, nor manifestly excessive. For those reasons, the application for leave to appeal against that sentence, which has been referred to the full court

in the circumstances we have described, is refused.

32. Thus, the only effect on the appellant's ultimate sentence is the credit for 25 days to which we have previously referred.

33. Finally, we should say something about the restraining order that was imposed. It was imposed pursuant to section 360 of the Sentencing Act 2020. However, the record sheet and the restraining order itself state that it was made pursuant to section 5 of the Protection from Harassment Act 1997. That provision was repealed on 1st December 2020.

34. The incorrect entry in the record sheet and in the restraining order itself is the result of the Crown Court IT system not having been updated by HMCTS to reflect the changes brought about by the Sentencing Code. That misrecording does not affect the lawfulness of the order, because the transitional provisions in paragraph 4 of Schedule 27 to the Act provide that references in documents to repealed provisions are deemed to be references to the corresponding provisions in the Sentencing Code. However, we repeat what we said in another appeal earlier this week. In our judgment, there is no excuse for this ongoing failure on the part of HMCTS.

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

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

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk