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IN THE COURT OF APPEAL
CRIMINAL DIVISION
ON APPEAL FROM THE CROWN COURT
AT STAFFORD
HER HJ MONTGOMERY KC 21GS0782323



CASE NO: 2024 02188 A5

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 31 July 2024

Before:

LORD JUSTICE SINGH

MR JUSTICE JOHNSON

HIS HONOUR JUDGE TIMOTHY SPENCER KC

REFERENCE BY THE ATTORNEY GENERAL UNDER S.36 CRIMINAL JUSTICE ACT 1988
REX

v

BRANDON RENNIE

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MR FREDERICK HOOKWAY appeared on behalf of the Solicitor General
MR DARRON WHITEHEAD appeared on behalf of the Respondent Offender

J U D G M E N T
(Approved)

LORD JUSTICE SINGH:

Introduction

1. This is an application on behalf of His Majesty's Solicitor General for leave to refer sentences to this Court under s.36 Criminal Justice Act 1988 ("the 1988 Act") on the ground that they were unduly lenient.
2. The Respondent Offender was born on 31 December 2001. He was aged 21 at the time of the offences and 23 at the date of sentence.
3. On 5 January 2024, in the Crown Court at Stafford, the Offender (then aged 22) pleaded guilty to two offences.
4. On 16 May 2024 he was sentenced by Her Honour Judge Montgomery KC, but subsequently, on 13 June 2024, the sentence was amended pursuant to the slip rule. It is the sentence finally passed with which this Court is now concerned.
 - The sentence on count 1 (an offence of wounding with intent contrary to s.18 Offences Against the Person Act 1861) was 40 months' imprisonment, to be consecutive to the sentence that the Offender was already serving. As will become apparent, the offending took place in a prison setting.
 - On count 2, which was an offence of having an article with a blade or point in a prison without authorisation contrary to s.40CA of the Prison Act 1952 as amended, there was a concurrent sentence of 8 months' imprisonment.
 - Accordingly, the total sentence was 40 months' imprisonment, to be consecutive to the sentence already being served. Other appropriate orders were made.

The facts

5. The facts can be summarised for present purposes from the Reference on behalf of the Solicitor General. In summary, the Offender slashed a fellow inmate at HMP YOI Swinfen Hall during an exercise period. He used a home-made weapon comprised of two razor blades attached to a toothbrush handle. The attack left the victim with two deep cuts to his left jaw which required eighteen stitches and resulted in scarring. The Offender admitted

the attack, saying it was motivated by the assumption the victim was a serving paedophile or rapist. He admitted making the weapon for the express purpose of attacking the victim.

6. In more detail the facts are as follows. The victim, Jack Holder, was a serving prisoner on the Juliet Wing at the YOI. As of 17 March 2023 he had served 4 years' imprisonment of which 1-and-a-half years had been served there. The Offender was also a serving prisoner at the same institution on that date.
7. At around 08:30 hours the victim waited by the servery counter having been in the exercise yard. This was the longest the victim had spent in the yard around that time. Prior to that he had spent a period in self-isolation due to personal anxieties. As he waited at the servery counter he was approached by the Offender. The victim had not spoken with him before. The Offender asked the victim what he was "in for". The victim replied he was serving 9-and-a-half years for causing grievous bodily harm. The victim sensed the Offender had not believed him and so offered to share his sentencing paperwork which was located in his cell. The victim thought the Offender replied, "No, you're all right, you're gay". The victim then asked the Offender how he had injured his arm. The Offender had a broken arm in a cast at the time. The Offender told the victim that was none of his business.
8. Next the Offender went to walk away but turned and produced a hitherto concealed weapon, namely two razor blades which had been fixed to the end of a melted toothbrush handle. The handle was wrapped in fabric and Sellotape. Using this implement the Offender slashed the victim down the left of his jawline. The incident happened so quickly that initially the victim thought the Offender had only scratched him with his fingernails. He only realised the extent of his injury when he saw blood dripping on to his collar. The attack was captured on CCTV.
9. The Offender then went and sat on the snooker table and stared at the victim. Prison officers had seen what had happened and acted to isolate the Offender. They noticed he was looking at a bin. The bin was searched and the weapon used was found. As the Offender was taken away he said to one of the officers, "Was it a good one?" and then started laughing.

10. The victim was taken to the emergency department at the Royal Derby Hospital. He was diagnosed with two linear wounds down the left side of his face which were approximately 3 mm apart. Each was 7 to 8 cms long. The wounds were described as being of partial thickness. They had breached the skin and exposed the fatty tissue layer beneath. Dissolvable stitches internally and non-dissolvable externally were applied and a local anaesthetic after the wound was cleaned. Some eighteen stitches were required.
11. The Offender was interviewed under caution on 2 May 2023. He accepted having attacked the victim. He said he attacked the victim because he was a "nonce" - by which he meant the victim was a paedophile or rapist. He said he had made the weapon the day before using prison razor blades that he fixed to a melted toothbrush. When asked with what intention he had made the weapon he repeated the victim was a "nonce". He said the weapon was stashed in his cell. He retrieved it when he saw the victim. He denied having said the victim was gay or that any animosity towards the victim was based on the assumption he was homosexual. When it was explained that the victim was not in fact a sex offender the Offender disbelieved the officer. When asked if he would do this again to an inmate the Offender replied, "Never say never". When shown a photograph of the victim's injuries the Offender asked if he could keep it, seemingly as some form of trophy.

The sentencing process

12. The maximum sentence for an offence under s.18 of the 1861 Act is life imprisonment.
13. The Offender has 24 convictions for 53 offences. Within these convictions are numerous offences for burglary, theft and criminal damage, but of particular relevance now is that they include offences of violence or possession of a weapon. In respect of the most recent offence the Offender was sentenced to a total of 5 years 3 months' imprisonment, with an extended licence period of 18 months. That was the sentence he was serving at the time of the present offending.
14. The sentencing Judge, like this Court, had before it a pre-sentence report for the purposes of the previous sentence. The report noted the following. The Offender described his

motivation for robbing two people and attempting a third as being caused by boredom and that he had been drinking. The author noted the Offender had pro-criminal attitudes and relied on illegal earnings as a source of income. He had an entrenched pattern of violent acquisitive offending and the use of weapons. The Offender had ADHD for which he was refusing any medication. He also appeared to have attitudes that condoned the use of weapons. The Offender had a traumatic childhood, with a lack of parental control and guidance. He also alleged being the victim of physical abuse, had witnessed domestic abuse and experienced emotional abuse. He and his siblings had been the subject of child protection plans in 2009 to 2010. Before this court Mr Whitehead on his behalf has informed this Court that he started committing criminal offences from the age of 11 and indeed had been recruited into criminality by his own father.

15. Returning to the pre-sentence report in relation to the previous offence, the author noted that the Offender lacked a stable home. A full Care Order was granted to the local authority in 2016. He had unsuccessfully been placed in a variety of settings since then. The Offender's paternal grandfather is serving a custodial sentence for rape of a female under the age of 16. The Offender knew of this but had no inclination to contact his father. The Offender had a long history of substance misuse. The author concluded that the Offender posed a high risk of serious harm to the public. He posed a medium risk to other prisoners. It was noted within the report that the Offender had assaulted other inmates in the past. It was also noted that in November 2020 he received an adjudication after an improvised weapon had been found in his cell.
16. The victim produced a victim personal statement for the sentencing hearing. He described the profound impact of the attack. He said the Offender had robbed him of confidence and pride. He said he almost wished the Offender had stabbed him in the neck so at least he would not feel the way he did. He would not be able to feel the scar, even without touching it. Despite moving wings in the prison the victim described feelings of ongoing vulnerability.

17. The Sentencing Council has issued a Definitive Guideline in relation to offences of wounding with intent to cause grievous bodily harm.
18. The prosecution submitted to the Judge that this was a high culpability case on account of the following factors: significant degree of planning or premeditation and use of a highly dangerous weapon or equivalent. The Defence conceded this was a highly dangerous weapon, but the judge took a different view and concluded that the case fell between high and medium culpability.
19. So far as harm is concerned, the Prosecution submitted that this should be category 2 harm, on the basis of the victim being left with permanent irreversible injury or condition not falling within category 1, namely a scar on his face and associated psychological harm. The Defence made no positive submission about this. We have been informed by Mr Whitehead that he was not invited to address the sentencing Judge on the categorisation of harm.
20. The guideline makes the following recommendations as to appropriate sentencing starting point and ranges.
 - If an offence falls within category 2A the starting point is 7 years' custody, with a range of 6 to 10 years' custody.
 - If a case falls within category 2B the starting point is 5 years' custody, with a range of 4 to 7 years' custody.
 - If an offence falls within category 3A, the starting point is 5 years' custody, with a range of 4 to 7 years' custody.
 - If an offence falls within category 3B the starting point is 4 years' custody, with a range of 3 to 6 years.
21. In fact in this case, having considered all the factors, the judge indicated that the starting point after trial would have been 6 years' imprisonment. She then reduced that by 1 year to account for mitigation so that the adjusted starting point was 5 years' imprisonment. The Offender was entitled to full credit since he had indicated a guilty plea at the first appearance. No complaint has been made about that approach. That led to the sentence which we have mentioned earlier of 3 years 4 months' imprisonment for the lead offence. Again no complaint has been made about the fact that the sentence on the other matter was

made concurrent.

Submissions on behalf of the Solicitor General

22. On behalf of the Solicitor General Mr Hookway submits that the total sentence imposed in this case was unduly lenient for two essential reasons.

- First, the categorisation of count 1, which he describes to us as being a miscategorisation. He submits that it should have fallen squarely within category 2A, both because there was high culpability and because of the degree of harm.
- Secondly, he submits that the adjustment to the starting point for aggravating and mitigating factors was wrong.

23. In respect of categorisation, he submits that the offence should have been treated as one of high culpability.

- First, there was evidence of significant degree of planning or premeditation - the Offender had to collect the component parts and then construct his weapon; additionally this process had to be concealed from detection by prison staff. Further, the offence was premeditated - by his own admission the Offender had made the weapon with the express purpose of attacking this victim. He waited for an opportunity and then used it.
- Secondly, it is submitted that this was a highly dangerous weapon given the facts and circumstances of this case. Reliance is placed in particular on the decision of this court in *Lawrence* [2022] EWCA Crim 567 at [10] to [11] in a judgment given by Judge Robinson.

24. In respect of harm, it is submitted that the nature of the injury and the associated psychological impact combined to justify categorisation in harm 2. This is on the basis of a permanent or irreversible injury or condition. Harm category 2 does not require the injury to have caused disruption to a victim's day-to-day life.

25. If the offence had been categorised as falling into category 2A the Definitive Guideline recommends, as we have said, a starting point of 7 years' custody, with a range of 4 to 10 years.

26. Further, submits Mr Hookway, there were aggravating factors.

- The offending was committed in the prison setting.
- The Offender had an extensive list of previous convictions.

- Finally (although he places less weight on this) the Offender attempted to dispose of the weapon.

27. The mitigation, submits Mr Hookway, was limited to:

- The Offender's relative youth.
- Lack of maturity
- His troubled background.

28. It is submitted that the aggravating factors justified a greater upward adjustment whilst the mitigation only justified a more modest reduction.

29. Finally, Mr Hookway reminds this Court that were the sentence to be increased that might open the gateway for an extended sentence to be imposed, as had been the original intention of the Judge before she had to correct the sentence.

Submissions on behalf of the Respondent Offender

30. On behalf of the Respondent Offender Mr Whitehead submits that the sentence was not unduly lenient. He reminds this Court that the sentencing Judge is a very senior and experienced criminal judge and that in essence she had to exercise judgment applying well-established concepts and principles to the facts of this particular case. He submits that this is not the sort of case in which the Court of Appeal is either entitled to or should interfere with that judicial evaluation by the first instance court. He submits that there was not a significant degree of planning and the Judge was entitled to reach that conclusion. It was conceded before the sentencing Judge that the weapon was likely to amount to a highly dangerous one but having considered the decision of this court in ***O'Bryan*** [2021] EWCA Crim 1472 Mr Whitehead submits that this was not necessarily so.

31. Further, he submits that the Judge was entitled to categorise culpability as falling into category B - medium - rather than category 5 - high.

32. Turning to harm, it was conceded that the victim sustained an unsightly injury to his cheek, but it was not life threatening nor did it restrict his long-term lifestyle; it was not a grave injury - it did not amount to a permanent disability or have a physical impact upon the

victim, although it would leave a permanent scar. At the hearing before us Mr Whitehead has emphasised that the Offender had clearly and deliberately chosen to attack the victim on the face rather than, for example, attacking any artery. Accordingly, he submits that the Judge's assessment of harm falling into category 3 was appropriate and was certainly open to her. He does concede that there were aggravating features. However, there were mitigating features as well, which the Judge properly took into account. He submits that the Judge also rightly had in mind the principle of totality.

33. It is conceded that the Respondent Offender posed a significant future risk but the sentence passed was one which a judge was entitled to pass and so the question of an extended sentence does not arise.
34. Finally, Mr Whitehead submits that the sentence could be regarded as being merciful but was not unduly lenient.

Our assessment

35. The principles to be applied on an application under s.36 of the 1988 Act are well established and were summarised in *Attorney-General's Reference (Azad)* [2021] EWCA Crim 1846; [2021] 2 Cr App R (S) at [72] by the Chancellor of the High Court:

"(1) The judge at first instance is particularly well placed to assess the weight to be given to competing factors in considering sentence.

(2) A sentence is only unduly lenient where it falls outside the range of sentences which the judge at first instance might reasonably consider appropriate.

(3) Leave to refer a sentence should only be granted by this court in exceptional circumstances and not in borderline cases.

(4) Section 36 of the 1988 Act is designed to deal with cases where judges have fallen into 'gross error'."

On that last point see also the judgment of Potter LJ in *Attorney-General's Reference (No 132 of 2001) (Bryn Dorian Johnson)* [2002] EWCA Crim 1418; 2003 1 Cr App R (S) 41 at [24].

36. In the seminal case of *Attorney-General's Reference (No 4 of 1989)* (1990) 90 Cr App R

366 at 371, Lord Lane CJ emphasised, as this Court has done ever since, that the role of this Court is not simply to retake the sentencing decision as if it were the sentencing court and that mercy is a virtue and does not necessarily mean that a sentence was unduly lenient.

37. Turning to the present case, we remind ourselves of those fundamental principles. It is not the role of this Court, for example, to substitute its own assessment for that of the sentencing court on matters of fact, degree and evaluation, such as whether something was "*significant*" or whether a weapon was "*highly*" dangerous. These are concepts which require the application of judgment on the facts of each individual case. While this Court can and must interfere with the assessment of the sentencing court where it was not reasonably open to that court or where the court has erred in principle, those do not seem to be apt ways to describe this case. We are not persuaded by the submissions for the Solicitor General that this sentence was unduly lenient. Serious and disturbing though this offending undoubtedly was, not least because it took place in the prison setting, we must be careful to remain within the proper boundaries of the role which this Court can properly perform on an application such as this. We also bear in mind that the sentencing Judge is a senior and experienced criminal judge. Despite the persuasive way in which the submissions have been advanced for the Solicitor General, we have reached the conclusion that the sentence in this case could be regarded as merciful but we do not consider that it was unduly lenient.

Conclusion

38. For the reasons we have given, the application by the Solicitor General under s.36 of the 1988 Act is refused.

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

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