IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Couts of Justice
The Strand
London
WC2A 2LL

ON APPEAL FROM THE CROWN COURT AT MANCHESTER MINSHULL STREET
(HIS HONOUR JUDGE LOWCOCK [T20057509]
Case No 2024/02603/A2
NCN: [2024] EWCA Crim 1083

Friday 6 September 2024

B e f o r e:

LORD JUSTICE POPPLEWELL

MR JUSTICE HOLGATE

MRS JUSTICE YIP DBE

R E X

- v -

PAUL ASHMORE

Computer Aided Transcription of Epiq Europe Ltd,
Lower Ground Floor, 46 Chancery Lane, London WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Miss K Thorne KC appeared on behalf of the Applicant

Mr R Posner appeared on behalf of the Crown

J U D G M E N T

Friday 6 September 2024

LORD JUSTICE POPPLEWELL: I shall ask Mr Justice Holgate to give the judgment of the court.

MR JUSTICE HOLGATE:

1. On 1 November 2005, in the Crown court at Minshull Street, Manchester, the applicant (then aged 18) pleaded guilty to causing grievous bodily harm with intent (count 1) and to breach of an Antisocial Behaviour Order (count 3).

2. On 6 December 2005, His Honour Judge Lowcock sentenced the applicant on count 1 to an indeterminate sentence of detention for public protection under the Criminal Justice Act 2003, with a minimum term of 17 months' detention and on count 3, to a concurrent determinate term of 15 months' detention in a young offender institution.

3. The Registrar has referred to the full court the applicant's applications for an extension of time of 6,771 days in which to apply for leave to appeal against sentence. Whether this extension of time should be granted depends upon the merits of the proposed appeal against sentence.

4. The applicant was born on 9 March 1987. In the early hours of the morning of 29 April 2005, when he was aged just over 18, the applicant was standing outside a public house in Oldham Town Centre with Carl Fields and Paul Boyce. They had been drinking since the late afternoon and were all very drunk. Boyce had a grudge against the victim, Michael Jackson, as a result of something that had happened inside the public house. Boyce started a fight with Mr Jackson by punching him to the face. The applicant saw Boyce in a scuffle on

the ground and attempted to separate the two. He then deliberately stamped on Mr Jackson's head. Fields joined in, also by stamping on Mr Jackson's head. Then the applicant went back towards Mr Jackson, punched someone who had been trying to help him and stood on Mr Jackson's head.

5. During this incident Mr Jackson suffered multiple injuries which included a broken jaw, a laceration above one eye and bruising to his left ear. He had to undergo an operation for the insertion of a metal plate in the jaw. He had to stay in hospital for a few days.

6. On 20 July 2005, the appellant was arrested by the police. He was shown CCTV footage of the incident. He accepted assaulting Mr Jackson, although he could not remember what he had done because of his intoxication at the time. It was noted that the applicant was shocked by his behaviour.

7. Both Boyce and Fields also pleaded guilty to causing grievous bodily harm with intent.

8. The applicant had one previous conviction for an offence of violent disorder, committed on 16 August 2003 when he was aged 16, for which he received a Detention and Training Order for 12 months. An Antisocial Behaviour Order was also imposed. There are no details available as to what happened in that incident, other than that it involved a group or groups of males, the consumption of alcohol, and that one person unfortunately died. In particular, there is no information on the nature and extent of the applicant's involvement.

9. Before we consider the reasons given by the judge for the sentences he imposed, it is necessary to summarise the relevant powers of the court at the time of sentencing. The offences under section 18 of the Offences against the Person Act 1861 were both a "specified offence" and a "serious offence" for the purposes of the dangerous offender provisions in the

Criminal Justice Act 2003, as originally enacted (see section 224 and Schedule 15).

10. The judge did not treat either Boyce or Fields as dangerous. But in the applicant's case, because he was just over 18 at the time of the 2005 offence, and because the 2003 offence was a "specified offence", the former assumption of dangerousness in section 229(3) applied. Thus, the judge was required to assume that there was a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences, unless he considered that it would be unreasonable to conclude that there was such a risk. In reaching that judgment, the judge was required to take into account three matters:

(a) All such information as was available to the court about the nature and circumstances of the offences in both 2003 and 2005;

(b) Where appropriate, any information before the court about any pattern of behaviour of which either of the offences formed part; and

(c) Any information about the offender.

11. The judge passed a sentence of detention for public protection. In fact, such a sentence was not available in the case of the applicant because he had passed his 18th birthday at the time when he was convicted of the section 18 offence (see section 226(1) of the 2003 Act).

12. We note in passing that in a case where the former section 226 applied, a sentence of detention for public protection was only to be imposed if the court concluded that detention for life did not have to be imposed; and also that an extended sentence under section 228 would not be adequate to protect the public from serious harm from further specified offences.

13. Instead, if the applicant were to be treated as dangerous under the 2003 Act, the relevant provision was the former section 225. If the court considered that a sentence of imprisonment for life was justified, it had to impose that sentence. But if not, it had to impose an indeterminate sentence of imprisonment for public protection (see section 225(2) and (3)). No other sentencing options were open to the court.

14. We infer (although he did not expressly say so) that the judge did not consider that a life sentence was justified. So the sentence that the judge should have pronounced was imprisonment for public protection under section 225(3).

15. For completeness, we note that a sentence of detention in a young offender institution could lawfully be imposed under count 3, given that the applicant was aged at least 18 and under 21 when convicted.

16. Sentencing was adjourned after pleas of guilty were tendered so that the court could receive a pre-sentence report on the applicant. The report was very brief. It contained no more details about the index offence and no further information about the 2003 offence. The author of the report noted that throughout the interview the applicant was "extremely remorseful". He said that the incident was so bad, that it should not have happened, and that he did not know why he had behaved as he did. The applicant was empathetic towards the victim and said that he had not deserved to be attacked.

17. Section 3 of the pre-sentence report gave some brief information about the applicant. It described his "traumatic upbringing", which included witnessing the "extensive violence" and serious injuries which a previous stepfather had inflicted upon his mother. There was also conflict between his two stepfathers and disruption to his education. The applicant, however,

did not appear to rely on his background as an excuse for his own offending. But the author thought that witnessing so much violence might have had a deep impact on the applicant, such as learning negative behaviour and failing to deal appropriately with his own anger.

18. The assessment of risk of harm to the public and of re-offending briefly was set out in paragraphs 4.1 to 4.2 of the report as follows:

> "4.1 On two occasions now [the applicant] has shown that his behaviour can cause a serious risk of harm to others. There could be many factors influencing this behaviour such as peers, alcohol or past experiences, while the fact that he has failed to learn by his previous mistakes can all be predictors of his future behaviour. Given these factors, and using probation service assessment tools, OASys and OGRS, [the applicant] is currently assessed as posing a high risk of future harm.
>
> 4.2 As regards to re-conviction, [the applicant] now needs to learn some valuable lessons, mainly regarding choosing appropriate peers who would have a positive influence upon him, learning to consume alcohol to moderation and examining how his past experiences may be triggers to his own anger. [The applicant] agreed that these are areas of work that he needs to focus upon. However, there remains a medium risk of future re-offending."

19. The conclusions of the report were given in section 5. Paragraph 5.1 stated:

> "Mr Fields [presumably intending to refer to the applicant] has been identified as a dangerous offender…"

The author of the report relied solely upon the risk assessment we have quoted from paragraph 4.1. It is plain from the language of the report that the statutory test for dangerousness was not applied by the author.

20. Paragraph 5.2 recommended that the applicant should complete a programme of six areas

of work during any custodial sentence, covering such matters as peer influence and the negative behaviour that may result, and awareness of the effects of heavy alcohol consumption on rational decision making.

21. In his sentencing remarks, the judge referred to the applicant's 2003 offence of violent disorder, without adding any further information as to what happened on that occasion. He then said:

> "This conviction means that I am required by law to assume that there is a significant risk to the public of serious personal injury by your committing further specified offences. I do not consider that it would be unreasonable to conclude that there is such a risk. I take into account everything I have heard and read about you, particularly the account of your background, which appears in the pre-sentence report. In relation to the question of considering the nature of the risk to the public, I have taken into account the serious nature of this and your previous offence and the consequences of this offence for your victim, the pattern of behaviour which broke this from your previous offence all form part of what I know about you."

22. The judge then moved on to the circumstances of the two other co-defendants, before proceeding directly to announce the sentences he was imposing on all three. In the case of the applicant, the judge said that if he had been imposing a determinate sentence the term would have been three years and six months' custody, after allowing full credit for the guilty plea. In other words, the sentence after trial would have been five years and three months' custody. The judge specified a minimum term of 17 months.

23. The judge noted that Boyce had not landed a kick on the victim, although he had attempted to do so. He had previous convictions for criminal damage and a public order offence in 2004. The judge said that he would have imposed a sentence after trial of detention in a young offender institution for three years and six months. But after allowing full credit for the guilty plea, the sentence was reduced to two years and four months.

24. In relation to Fields, who was of previous good character but who had also stamped on the victim's head, the judge said that he would have imposed a sentence after trial of four years' detention in a young offender institution. But after allowing full credit for the guilty plea, this was reduced to two years and eight months' detention.

25. We are grateful to Miss Katy Thorne KC for her clear and helpful written and oral submissions. In summary, she submits:

> (1) The sentence was manifestly excessive and/or wrong in principle and a determinate sentence should have been imposed. The judge did not apply the principles laid down in *R v Lang* [2005] EWCA Crim 2864; [2006] 1 WLR 2509, handed down on 3 November 2005.
>
> (2) The judge did not consider the applicant's immaturity and his greater potential for rehabilitation by virtue of his young age.
>
> (3) The judge did not properly assess the applicant's previous conviction for a specified offence in determining whether he was dangerous.
>
> (4) There was disparity in the sentence passed on the applicant and his co-defendants as regards the custodial terms thought to be justified.

26. Miss Thorne pointed out that over six years after being sentenced, the applicant was released into the community on 11 January 2012, presumably on the basis that it was no longer necessary to keep him in prison for the protection of the public. He then spent nearly nine years in the community before being recalled to prison on 11 December 2020. This was

because Class A drugs, valued at £15,000, and cash of £25,000 were found in his home. An OASys assessment, carried out on 6 October 2022, related solely to the drug allegations, which were not "specified offences". There has been no suggestion of a risk of violence to members of the public. Miss Thorne also said in her Advice, dated July 2024, that the applicant had not been charged with the drug offences.

27. We are grateful also to Mr Richard Posner, who appeared on behalf of the Crown at short notice and updated the court. He said that the applicant was in fact charged on 8 March 2024. On 28 May he pleaded guilty to: (1) possession of cocaine with intent to supply on 11 December 2020; (2) possession of £24,600 as criminal property; (3) conspiracy to supply cannabis between June and December 2020; and (4) conspiracy to produce counterfeit currency between September and December 2020. It is anticipated that he will be sentenced in the Crown Court at Manchester on 30 September 2024.

28. We are also grateful to Mr Posner for his submissions on the appeal. He says that the judge referred to the statutory test for determining dangerousness, and then went on to apply it in a manner which cannot be faulted. He says that the judge took into account the nature of the 2005 offence and the 2003 offence, and the applicant's pattern of behaviour. Notwithstanding the applicant's youth and immaturity at the time of the 2005 offence, the judge had been entitled to reject that as a mitigating factor. It was not unreasonable for the judge to decide that the presumption in section 229(3) had to be applied.

29. Having said all of that, Mr Posner very fairly says at the end of his written submissions:

> "29. However, the learned judge was not assisted by hearing any submissions on *Lang*, when considering the imposition of an IPP, when arguably he should have been. Had he done so, the learned judge may have reached a different series of conclusions as to whether to presume the applicant dangerous.

> By considering the factors the court invited sentencers to take into account – those reproduced in paragraph 29 of the grounds of appeal…" (referring to *Lang* at [17])

Discussion

30. The effect of *R v Roberts* [2016] EWCA Crim 71; [2016] 1 WLR 3249, is that we must consider whether the sentence imposed by the judge on the applicant was wrong in principle or manifestly excessive on the basis of the legal framework which applied at the time of sentence, and not subsequent changes in the law (see [19] to [21] and [42]). In the present case the central issue is whether, on that basis, the judge erred when he decided in December 2005 that the applicant should not be treated as dangerous for the purposes of the 2003 Act. Consequently, our decision is not affected by what has happened to the applicant since the sentence was imposed: for example, when he was released on licence in 2012, then recalled to prison in 2020, and subsequently pleaded guilty to the further offences.

31. In *Lang* at [15] and [17] this court set out a number of important principles on the interpretation and application of the dangerous offender provisions. The particularly relevant passages for the purposes of this application were set out by the court in *R v Leighton Williams* [2024] EWCA Crim 686 at [13] to [14]. That is a case which bears similarities to the present one. Those paragraphs do not need to be repeated here, but we would reiterate what was said at [15]:

> "It is important for appellate courts to keep in mind what was said at paragraph 17(v), that the decision of the sentencing judge involves an evaluative judgment akin to the exercise of a discretion. This court should not overturn the decision merely on the ground that this court would have reached a different one. It must be persuaded that the sentencing decision involved an error of principle or was outside the range of conclusions which were properly open to the sentencing judge."

32. It is also important for us to emphasise what was said in *Lang* at [17(vi)] about relatively young offenders. It is necessary to bear in mind that they may change and develop within a shorter timescale than adults. This and their level of maturity may be highly pertinent when assessing what their future conduct may be and whether it may give rise to significant risk of serious harm from further specified offences.

33. In the same vein, it is well established – and indeed was established at the time of the sentencing – firstly, that there is no sudden change in a person's level of maturity when he or she turns 18; and secondly, it is necessary for a sentencer to consider whether a person's developmental and emotional age is more or less advanced than their biological age (see, for example, *R v Peters* [2005] EWCA Crim 605, [2005] 2 Cr App R(S) 101, at [10] to [12], reiterated more recently in *R v Clarke* [2018] EWCA Crim 185; [2018] 1 Cr App R(S) 52 at [5]. Thirdly, it is necessary to consider the extent to which a relatively young person has acted impulsively and whether their conduct has been affected by inexperience, emotional volatility or negative influences (see *Leighton Williams* at [18]).

34. For a combination of reasons we have come to the clear conclusion that the imposition of an indeterminate sentence for public protection in this case was wrong in principle and also manifestly excessive. Effect was not given to key principles set out in *Lang* and the other authorities to which we have referred, either explicitly or by implication. As was stated in *Lang* at [15], unless the information about offences, pattern of behaviour and the offender show a significant risk of "serious harm", it will usually be unreasonable to conclude that the assumption in section 229(3) is determinative. In the circumstances of this case, this was particularly important for an offender who had only just turned 18.

35. First, the nature and extent of the applicant's role in the 2003 offence, which gave rise to

the presumption in section 229(3), was not identified in the pre-sentence report. Nor was it considered by the judge in his reasoning. Second, the judge did not identify a pattern of behaviour based on both the 2003 and 2005 offences from which the requisite future risk for the purposes of dangerousness ("future risk") could be inferred. Third, he did not assess the applicant's level of maturity, not even in terms of biological age, let along developmental maturity. Fourth, he did not assess the implications of those factors in relation to the offences in 2003 and 2005 and future risk. Fifth, he did not assess the applicant's prospects of rehabilitation and development and their implications for future risk.

36. We acknowledge that the judge had little assistance from the pre-sentence report. That document did not consider these factors, despite their obvious importance in this case. Nevertheless, there were some pointers in the report which indicated that the applicant was immature relative to his chronological age, such as the serious violence and problems he had faced at home, the disruption to his education, his susceptibility to peer pressure, and his abuse of alcohol. The report recommended appropriate programmes for rehabilitating the applicant in those areas. The court should have evaluated all these matters and factored them into its assessment of whether the applicant was dangerous. If that had been done, we consider that on the material before the judge the only proper conclusion he could have reached was that the applicant could not reasonably be treated as dangerous. The presumption was displaced.

37. As regards the remaining ground of appeal, we see no merit in the applicant's contention that there was unjustified disparity between the length of the custodial term assessed for the applicant, compared to those imposed on his co-defendants. Given the differences in the roles played by the three co-defendants and their antecedents, no criticism can be made of the differences in the length of those custodial terms.

38. However, in our judgment, the sentence of five years three months' custody after trial was not manifestly excessive, taking into account the applicant's mitigation, as well as his role in what was a serious and vicious attack.

39. Because the applicant should not have been assessed in 2005 as dangerous, so that an indeterminate sentence for public protection should not have been imposed, we consider that it is in the interest of justice that the necessary extension of time in which to apply for leave to appeal against sentence should be granted. We also grant leave to appeal against sentence and we allow the appeal.

40. We quash the sentence on count 1 and we substitute a sentence of detention in a young offender institution for three years and six months. The concurrent sentence on count 3 remains undisturbed.

41. To this extent only the appeal is allowed.
