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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Couts of Justice
The Strand
London
WC2A 2LL

ON APPEAL FROM THE CROWN COURT AT WARWICK
(HIS HONOUR JUDGE POTTER) [T20220187]

Case No 2023/03623/B1
[2024] EWCA Crim 1115

Friday 13 September 2024

B e f o r e:

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

MR JUSTICE HOLGATE

MR JUSTICE ANDREW BAKER

R E X

- v -

ANTHONY TERENCE O'DONNELL

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)

Mr T Forte appeared on behalf of the Appellant

Mr T Walkling appeared on behalf of the Crown

J U D G M E N T
(Approved)

Friday 13 September 2024

LORD JUSTICE HOLROYDE:

1. In February 2020 the National Amateur Youth Boxing Championships were interrupted and brought to an end by a prolonged and ugly incident of violence involving members of the O'Donnell/McDonagh extended family, and the Doherty family.

2. In September 2023, following a trial in the Crown Court at Warwick before His Honour Judge Potter and a jury, the applicant was convicted of violent disorder. On 15 July 2024 he was sentenced to two years and eight months' imprisonment.

3. He now appeals against his conviction on one ground for which the single judge gave leave, and he renews his application for leave to appeal against conviction on two further grounds which were rejected by the single judge. He also applies for leave to appeal against his sentence, that application having been referred to the full court by the Registrar.

4. We have been much assisted by the written and oral submissions of Mr Forte, on behalf of the appellant and Mr Walkling, on behalf of the respondent, both of whom appeared below. We are very grateful to both of them for their focused and realistic submissions.

5. There appears to have been a history of ill-will between the O'Donnell/McDonagh and Doherty families.

6. The Boxing Championships were held at a leisure centre in Coventry. The first day was uneventful. On the second day one of the young boxers taking part was Brian McDonagh, then aged 14. Members of the Doherty family who lived nearby were in the audience. Members of the O'Donnell/McDonagh family feared for the safety of Brian McDonagh.

7. That afternoon a convoy of some 14 vehicles carrying well over 50 men arrived at the leisure centre. In the appellant's case that had been a journey which had taken well over an hour. Two pick-up trucks belonging to the Dohertys were immediately attacked and the tyres punctured. The group of men entered the venue and went straight for the Doherty group who were near the bar. Chairs were thrown and the Dohertys were threatened with weapons, including knives, pickaxe handles and a spade. A Mr David Fellows (a friend of the Dohertys) was knocked to the ground and attacked by at least six men. He was slashed to the temple and face with a knife, and also suffered a knife wound to his hand.

8. The actions of the appellant were captured on good quality CCTV footage. Having arrived as a passenger in one of the vehicles, he walked into the venue and threw two chairs over a barrier, shouting as he did so. He then drew his right hand across his neck as a gesture, before throwing more chairs and continuing to shout. The appellant then went outside, where he directed others, before re-entering the venue with others and throwing more chairs, one of which struck a member of the Doherty family.

9. The group then advanced towards the bar. The appellant repeatedly clapped his hands before climbing over the bar and remaining behind the bar for a short period. He left the premises, but again returned for a final time. On this occasion he once again ran into the bar area, before finally leaving in the vehicle in which he had arrived.

10. The incident as a whole lasted about nine minutes. Mr Fellows and other members of the Doherty family were taken to hospital. Mr Fellows needed multiple stitches to his wounds. In addition to the damage to the Dohertys' cars, the venue suffered significant damage and loss. The remainder of the Boxing Championship was cancelled. The total loss to the business had been estimated at about £4,500, but that did not include any sum for loss of

reputation and future custom.

11. The disorder, which involved overall more than 50 members of the O'Donnell/McDonagh family attacking nine of the Dohertys, took place in front of about 300 members of the public, many of them young.

12. The appellant was arrested on Christmas Eve 2020. When interviewed, he declined to answer any questions.

13. The incident resulted in many persons being charged, and a series of trials took place. The defendants (members of the O'Donnell/McDonagh family) were charged with a variety of offences, including violent disorder. A number of them pleaded guilty to various charges; others were convicted; still others, acquitted.

14. The prosecution case at trial was that even if the O'Donnells and McDonaghs had initially gone to the venue out of concern for Brian McDonagh, they immediately began to use unlawful violence against the Dohertys.

15. The appellant's case was that he attended solely in order to remove Brian McDonagh safely from the venue. Once there, his case was that he did no more than use reasonable force in necessary defence of himself and his family. He accepted that he had possibly thrown one chair in self-defence. He gave evidence to this effect. He acknowledge that he had in the past been convicted of one offence (an offence of fraud), but said that he was a family man, in work and not of a violent nature.

16. The grounds of appeal against conviction refer to three aspects of the trial. We take them in the order in which they arose.

17. Submissions were made on behalf of one of the co-accused, and adopted by Mr Forte on behalf of the appellant, to the effect that the jury could not properly understand or make judgements as to the lawfulness or otherwise of violence used by the appellant without some context, and in particular without evidence of previous incidents between the O'Donnells/ McDonaghs and the Dohertys, and threats made as a result of those previous incidents; and further, that it was essential for the jury to be provided with the previous convictions of a number of the Doherty family so that the jury could properly assess the propensity of the Dohertys for serious violence.

18. The applications were opposed by Mr Walkling on behalf of the prosecution on the grounds that introducing the material would serve only to distract the jury from the real issue, which in the appellant's case was whether he was defending himself or seeking to defend Brian McDonagh, and would risk a good deal of inappropriate satellite litigation.

19. The judge in his ruling referred to the familiar provisions of the Criminal Justice Act 2003 and in particular to section 100(1) and (2), which provide:

> **"100 Non-defendant's bad character**
>
> (1) In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if —
>
> (a) it is important explanatory evidence,
>
> (b) it has substantial probative value in relation to a matter which —
>
> (i) is a matter in issue in the proceedings, and
>
> (ii) is of substantial importance in the context of the case as a whole,
>
> or

(c) all parties to the proceedings agree to the evidence being admissible.

(2) For the purposes of subsection (1)(a) evidence is important explanatory evidence if —

(a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and

(b) its value for understanding the case as a whole is substantial."

20. The judge referred to the precautions which had been taken by the organisers of the Boxing Championships, which the jury could find showed that Brian McDonagh was indeed potentially at risk. The judge also referred to the CCTV footage. He said that it showed that the Doherty family, far from seeking to escape to avoid confrontation with the defendants, had themselves engaged in confrontation and had used a number of items as weapons. The judge observed that there was no sense in which the prosecution were seeking to hide the fact that the Dohertys were no strangers to violence. The judge reflected on whether the proposed evidence would shed light on the issues in the case, which were whether on the date in question the appellant and his co-accused were or might have been seeking reasonably to defend themselves or others.

21. The judge concluded that even if the proposed evidence could be said to have some probative value, it was far from having substantial probative value. He said that the real danger was not that without such evidence the jury would find it impossible or difficult properly to understand other evidence; the real danger was that the introduction of the proposed evidence would muddy the water and lead the jury into a consideration of matters which would not substantially assist them in resolving the key issues in the case. He therefore refused the application.

22. The next matter arose at the end of the appellant's evidence. The jury had been taken to CCTV footage of the appellant's activities. In one clip it could be seen that the appellant had his mouth open as if he was saying something. Neither counsel had asked any questions about this. The judge asked the appellant to watch the clip again to see whether he could work out what he had been saying. The judge asked:

> "It rather looked to me as though you were saying 'Come on' twice. Do you agree with that, or do you not know?"

The appellant replied that he could not be sure. We understand, however, that at some point in the proceedings the appellant did accept that he had twice shouted "Come on". He explained that he had been shouting in order to get the Dohertys to back off because he wanted everyone to be safe.

23. The third matter relates to a further ruling made by the judge. Two men who knew the appellant well – Mr Blake and Mr Cullen – had provided statements of character references. Mr Blake, his employer for five years, said that he had never known the appellant to be violent and was surprised by the allegations because of the appellant's friendly, kind and warm nature. Mr Cullum – a friend who had played football with the appellant for seven years – said that he had always found the appellant to be a gentle man who had never shown any violence or been involved in any football altercations, unlike some other members of their team. Mr Cullum, too, expressed surprise at the allegations, saying: "The most I've ever heard him do wrong on the pitch is swear".

24. Mr Forte wished to adduce that evidence. Mr Walkling objected. Mr Walkling argued that although a defendant of good character can adduce evidence of his general good character, it was inadmissible for a defendant who was not of good character to adduce

evidence relating to one aspect of his character.

25. The judge noted that there was no authority specifically on this point. He ruled as follows:

> "I remind myself that [the appellant] has given unchallenged evidence that he has only one conviction, not for violence, and he has observed on a number of occasions during the course of his evidence that he has never before been involved in a situation of violence and he has not been challenged on that point. In the circumstances I do not consider that further evidence on that specific point is admissible. In coming to that judgment, I do not regard in any sense that it has deprived him of the point that is sought to be made on his behalf, that he has never committed a violent act – an offence of violence – because, of course, the jury know that. I will warn the jury that the fact that he has a conviction is not something that they should allow themselves to be prejudiced against him, and it does not in any sense made it any more likely that he is guilty of this offence.
>
> In my judgment the jury have sufficient admissible evidence to consider the point that has been made on behalf of [the appellant] and I do not consider it permissible or admissible for a party to adduce evidence that is of partial character – a specific aspect of his character – in circumstances where that defendant is not of good character."

In due course the judge did indeed direct the jury in the terms he had there indicated.

26. We turn to the grounds of appeal against conviction. Ground 2, which Mr Forte has leave to argue, relates to the ruling which we have just mentioned. Mr Forte accepts that the judge was entitled, as he did, to decline to give even a modified good character direction. Mr Forte submits, however, that the appellant was entitled to adduce evidence in support of his case that he had no history of any violence; violence would have been out of character; and it was therefore more likely that any violence he did use was lawful self-defence. The judge, he submits, was accordingly wrong to exclude the evidence of Messrs Blake and Cullum.

27. Mr Walkling submits that the judge was correct. He argues that in the absence of a good character direction, the proposed evidence was irrelevant to any issue. The appellant had been allowed to give evidence that he had no propensity to violence; there was clear evidence that he had in fact used violence on this occasion; and the only issue was whether he had done so unlawfully. The proposed evidence, submits Mr Walkling, was therefore irrelevant.

28. Ground 1 (the first of the two grounds on which the single judge refused leave) is that the judge was wrong to exclude the evidence of bad character of the Dohertys. Mr Forte submits that the background history between the families was "absolutely key" to the jury's understanding of the appellant's thought processes at the material time. It is submitted that the appellant knew that the Dohertys were violent men with previous convictions, and that was something which would have operated on his mind. If the jury had been aware of the full picture, submits Mr Forte, that would have worked in the appellant's favour.

29. Mr Walkling submits that the judge was correct. The history which the defence wished to put forward had not been agreed and would lead to substantial satellite litigation. Although in his oral submissions Mr Forte confined his focus to the bald facts of the previous convictions of the Dohertys, which he suggested could be reduced to agreed facts, Mr Walkling points out that the application originally made to the judge went further than that. Moreover, submits Mr Walkling, there was no evidence that the appellant knew what convictions the Dohertys had and he therefore could not have been influenced by any such matter.

30. Ground 3, on which leave was also refused, criticises the judge's question asked of the appellant. It is submitted that this was not an impartial intervention by the judge, but rather a prosecution-minded suggestion which seriously undermined the appellant's case.

31. Mr Walkling disputes this. He submits that the judge was entitled to seek clarification. Moreover, submits Mr Walkling, the appellant in any event accepted that he had indeed shouted "Come on".

32. We have reflected on these submissions. We consider first the renewed applications. We see no arguable merit in either ground 1 or ground 3. As to ground 1, it is impossible to argue that without the proposed evidence the jury would find it impossible or difficult properly to understand other evidence in the case. It therefore cannot be said that the application relates to important explanatory evidence. Nor did the proposed evidence have substantial probative value on the real issue in the case, namely whether the appellant was proved to have been acting unlawfully and not in reasonable self-defence. The jury had the CCTV footage showing the conduct of the Dohertys, and there was no evidence that the appellant knew of any specific conviction of any of them. We are therefore satisfied that the judge's ruling in this regard was correct for the reasons he gave.

33. As to ground 3, the judge was entitled to seek clarification of a point which the jury were likely to have been considering. He did so in neutral terms. He did not thereby elicit some prejudicial evidence which would otherwise be absent from the case: the appellant admitted that he had shouted "Come on", and it was for the jury to evaluate whether his explanation for doing so might be true. It is, therefore, not possible to argue that the judge's question and the appellant's answer gave rise to unfair prejudice; still less that it rendered the conviction unsafe.

34. For those reasons, which are similar to those given by the single judge, the renewed applications for leave to appeal against conviction on grounds 1 and 3 fail and must be refused.

35. We turn to ground 2. Here, with respect to the judge, we are satisfied that he fell into error by acceding to a submission by the prosecution which was unsupported by authority and wrong in law. The appellant was not seeking to misrepresent himself as a man of previous good character. He acknowledged his previous conviction for dishonesty. But he was entitled to present his case on the basis that, notwithstanding that conviction, he had never been involved in violence and was not a violent man. He was entitled to ask the jury to consider that his unaggressive nature made it less likely that he wished to involve himself in unlawful violence, and more likely that any violence he did use was in lawful self-defence. Indeed, the judge accepted that the appellant was entitled to do so, and, as we have noted, he directed the jury accordingly.

36. In those circumstances the appellant was, in principle, entitled to adduce other relevant evidence to the same effect. It is not necessary for us in the circumstances of this case to decide whether the judge might have been correct to exclude the evidence of Messrs Blake and Cullum, if it could be said that they merely repeated precisely the same evidence as the appellant had already given. Although those proposed witnesses did not add much to the appellant's own evidence, they did add something to the bald fact that he had no previous convictions for violence. They gave first-hand accounts of his behaviour in circumstances in which some people might have displayed aggression, and they brought what the jury could regard as independent confirmation of the appellant's own evidence that he was not violent.

37. We therefore accept Mr Forte's submission that the judge was wrong to exclude this evidence. But does that one error render the conviction unsafe? We are satisfied that it does not. As we have said, the evidence of Messrs Blake and Cullum added little to the evidence of the appellant which has been unchallenged and which had been the subject of an appropriate and fair direction. Thus, the assertion of his non-violent disposition was before

the jury, unchallenged, and could be considered by the jury in the context of what the appellant was shown on the CCTV footage to have done. Furthermore, the evidence against the appellant provided by that footage and by witnesses was extremely strong. We are therefore satisfied that the conviction is safe and the appeal against conviction fails.

38. We turn to the application for leave to appeal against sentence. The appellant's one previous conviction was for a serious offence of fraud. Although he was aged only 20 or 21 at the time he committed it, and although he pleaded guilty, he was sentenced to 40 months' imprisonment. He was on licence from that sentence at the time of this offence.

39. At the sentencing hearing the judge was assisted by a pre-sentence report and by supportive letters and statements confirming the appellant's industry and commitment to his family. In the long period which had elapsed between the offence of violent disorder and the trial and sentence – a period which had been increased by the Covid-19 pandemic – his wife had given birth to their two children. She spoke in a letter of the difficulties which she and the children would face if the appellant was sent to prison. The appellant was said now to be very remorseful for what he had done.

40. The judge had to sentence in all 23 men who had pleaded guilty to, or been convicted of, offences arising out of this incident The judge concluded in general terms that, whatever the reasoning behind the original attendance of those many men at the location, "within a very, very short period of time each of you lost your head, and your primary interest was in confronting, or having a violent confrontation with the Doherty family, irrespective of any concerns that you might have had up until that stage about the wellbeing of your brother, Brian".

41. The judge considered the Sentencing Council's definitive guideline for offences of

violent disorder. He placed the appellant's offence into category B1, but said that because of the aggravating feature of offending on licence, the sentence moved up "towards the upper range where it crosses over into culpability A, harm 1, given your repeated involvement and given, in my judgment, your prominent role, certainly in phase one of the violence, notwithstanding, as I recognise, the absence of your possession of an offensive weapon or a bladed article".

42. The judge took into account the various matters of mitigation. He accepted that during the period since the offence the appellant's life had changed significantly. He noted, however, that the appellant's decision to plead not guilty had contributed to the long period of time which had passed. He recognised though that no one anticipated at the time of not guilty pleas that the trial and sentence would not take place for several years. To that extent he said that he treated delay as a mitigating feature.

43. The judge concluded that the appropriate sentence after trial was one of two years and eight months' imprisonment. He added that even if he had imposed a shorter sentence of a length which in law was capable of being suspended, he would not have suspended it: "because of the extent of the violence in this case and because of the extent of your involvement, I would have concluded, bearing in mind the guidelines on the imposition of custodial and community penalties, that appropriate punishment could only be achieved by the imposition of immediate custody. It would have been that factor that would have loomed large, notwithstanding the other points that have been made and I would have to take into account in your case".

44. The application for leave is made on the ground that the judge wrongly categorised the offence. Mr Forte submits that no culpability A factors were present and that the judge should have placed culpability into level C, or at the bottom of level B. As to harm, Mr Forte

argues that there were no "multiple or extreme category 2 factors" and that the case therefore could not fall into category 1. It should, he submits, have been category 3 or at the bottom end of category 2. He further submits that the mitigation substantially outweighed the one aggravating factor of the appellant being on licence. This, he suggests, should not have greatly increased the sentence, because it was a different type of offence and the licence period was near its end.

45. Mr Forte draws particular attention to the long passage of time during which the appellant complied with all conditions of his bail, displayed good conduct throughout, and experienced substantial change in his personal and family circumstances. Mr Forte submits overall that the judge took too high a categorisation for the incident generally, and particularly in the individual case of the appellant. He argues that the sentence should have been one which was capable of being suspended and should have been suspended. He suggests that the judge failed to give appropriate consideration to all the factors listed in the guideline as to Imposition of custodial and community sentences.

46. The respondent submits that the judge in fact placed the appellant at the top of category B1, which has a starting point of three years' custody, and a range of two to four years. Mr Walkling submits that the judge was entitled and correct to do so. He points out that the eventual sentence was below the starting point for category B1.

47. Reflecting on these submissions, we think it important to remember that the judge had presided over this and all the other trials arising out of the incident, and had sentenced all those who had pleaded guilty to or were convicted of offences arising from it. He was, therefore, uniquely well placed to assess the comparative culpability of all involved.

48. The judge was entitled to make the findings he did as to the nature and extent of the

appellant's involvement. We reject the submission made in writing that, because of the acquittals of certain other defendants, the judge was obliged to take a different view as to the basis of the appellant's conviction.

49. As to the guideline, we agree with Mr Forte that it is appropriate to keep in mind the inherent nature of the offence of violent disorder which is reflected in all the sentence levels in the guideline, and also to keep in mind that there may be a conviction of the offence which occurs in circumstances of much more extensive and serious disorder than occurred here.

50. We agree with Mr Forte that it would not be correct to assess the appellant's offence as involving category 1 harm. Multiple or extreme category 2 factors were not present. But we reject the submission that harm should have been placed into category 3. The offence was, in our view, plainly within category 2 because "the incident results in serious physical injury or serious fear and/or distress". Moreover, whilst we accept that other features of harm fall slightly below the levels listed as being indicative of category 2, the judge had to take into account that the incident caused significant cost to business and significant damage to property.

51. As to culpability, the judge was correct to place the offence into category B on the basis that the appellant participated in an incident which involved serious acts of violence.

52. There was, however, also present a feature of the case which, in our view, came close to the category A factor of "targeting of individuals by a group". As we have noted, this was an incident involving 50-plus men on the appellant's side, and a far smaller number on the Dohertys' side. Moreover, the point was made by way of mitigation that it was only the Dohertys who were the targets of aggression and violence, not other spectators who were present.

53. Category B2 has a starting point of two years' custody and a range of one to three years. In the circumstances we have indicated, the judge was entitled to make a significant initial upwards adjustment from that starting point because of the overall assessment of harm and culpability, and because of the element of persistence in returning to the hall and continuing the violence. The fact that the offence was committed whilst on licence was a serious aggravating feature not to be understated.

54. In our view, these various considerations entitled the judge to move up from the guideline starting point to a sentence of around three years' custody, before considering mitigation. The eventual sentence of 32 months' imprisonment makes only a small reduction for mitigation. It can certainly be said that other judges might well have given more weight to that aspect of the case. But the judge was in the best position to evaluate all these matters and, in our judgement, the sentence of 32 months' imprisonment, although certainly stiff, was not manifestly excessive.

55. We add that even if we had been persuaded to a sentence of two years' imprisonment or less, we agree with the judge that immediate imprisonment would have been unavoidable. We do not accept that the judge failed to consider factors listed in the guideline as suggesting that suspension could be appropriate. It is implicit in the judge's sentencing remarks that he had weighed them all up, but had given appropriate emphasis to the seriousness of the conduct. This was, quite simply, outrageous behaviour in a public place, with families and children present to witness it.

56. Drawing these threads together our conclusions are these. The renewed application for leave to appeal against conviction on grounds 1 and 3 is refused. The appeal against conviction is dismissed. We grant leave to appeal against sentence, but we dismiss the

appeal.

57. The practical result of our decisions is that the appellant remains convicted and his sentence remains as before.

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

Lower Ground Floor, 46 Chancery Lane, London WC2A 1JE

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk
