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IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT NOTTINGHAM
HHJ HARBAGE T20227151

CASE NO 202303307/A2

NCN: [2024] EWCA Crim 1255

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 5 September 2024

Before:
LORD JUSTICE MALES

MRS JUSTICE MAY

MR JUSTICE BRYAN

REX
V
EBRIMA FATTY

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MR S TETTEY appeared on behalf of the Appellant.

J U D G M E N T

MRS JUSTICE MAY:

1. On 3 July 2023, on the first day of his trial, the appellant was re-arraigned and pleaded guilty to a charge of section 18 wounding with intent. He had earlier pleaded guilty to a count of possession of a bladed article. On 25 August 2023, he was sentenced to 9 years' detention in a young offender institution on the section 18 offence with a concurrent sentence of 12 months' detention for the bladed article. He appeals the total sentence of 9 years' detention with leave of the single judge.

The facts of the offending

2. The section 18 wounding offence occurred on 16 March 2022, when the appellant was aged 17. The victim was Oliver Roberts, who was then aged 16. For ease and without any disrespect, we shall refer to parties other than the appellant by their surnames. On an earlier occasion Roberts had fallen out with a friend of the appellant's named Mohammed Ceesay. There had been a scuffle, which resulted in Roberts tearing some of Ceesay's clothing.

3. On 16 March 2020, Roberts went out to meet two friends, CJ and Nojus. Roberts had a baseball bat with him. The three came across Ceesay close to a Tesco store. Ceesay was with a large group of his friends including the appellant. Roberts pulled out the baseball bat and brandished it towards Ceesay. A fracas broke out between the two groups. At some stage, the appellant left and ran down a nearby alleyway. Roberts passed the baseball bat to his friend CJ and did not thereafter retake possession of it.

4. Shortly after that, the appellant reappeared. He was in possession of a Rambo-style knife

which he waved around. The two groups moved away. Someone from the appellant's group said to Roberts, "Come on to Southgate and we'll finish it off". They were seen by an off-duty policeman who shouted at the group to "pack it in". Feeling threatened, Roberts and his friends began to walk back towards the Tesco store. The appellant and his friends followed and another fight broke out. During the course of that exchange the appellant stabbed Roberts in the buttock with the knife. Roberts ran away but collapsed shortly after. The blade had perforated his bowel and he drifted in and out of consciousness. The appellant ran from the scene.

5. Roberts was taken to the Queen's Medical Centre in Nottingham where he underwent an emergency laparotomy. He had lost a significant quantity of blood. His colon was stapled and he was admitted to critical care and placed on a ventilator. Roberts underwent a further operation in which he was fitted with a stoma. He was taken off ventilation on 20 March and remained in hospital until 4 April. Over the following months, Roberts underwent several further procedures and at the time of sentence he was still fitted with a stoma. It was unclear whether he would need it permanently.

6. Roberts attended an identification procedure and picked out the appellant. The appellant was arrested and answered "no comment" to all questions. As we have already noted, he initially pleaded not guilty to section 18 wounding but on the first day of trial was rearraigned and changed his plea to guilty. The Crown had originally brought the case on the basis that the stabbing had been an intentional "bagging", which is a practice recorded amongst young people with gang associations whereby someone is stabbed through the buttocks and into the intestines in order to create a non-fatal but humiliating and

life-changing injury, requiring the use of a colostomy bag either temporarily or permanently, hence the name. The appellant entered his plea on the basis that he did not know of the practice of "bagging" and had not stabbed Roberts with any intention to cause such an injury. The Crown did not seek to dispute that basis of plea.

Sentence

7. By the time of sentence the appellant was aged 19. He had been just short of his 18th birthday when he stabbed Roberts. The judge was accordingly faced with a very difficult sentencing exercise. The judge had before him the following reports: a psychiatric report, a psychological report, together with an addendum and a pre-sentence report. The appellant was assessed as having a full-scale IQ of 73 in the borderline range. He came from a stable family home and had attended mainstream school. The addendum psychology report concluded that he did not have the cognitive capacity to understand what was involved in "bagging". He had no previous convictions or cautions. Probation expressed concerns about his level of maturity. We note that in the pre-sentence report, the appellant is recorded as having said that he did not intend any serious harm. Of course, by his plea, he must be taken to have accepted that that was his intention albeit not specifically to cause an injury requiring a colostomy bag.

8. Having set out the facts of the offence, the judge turned to the Adult Guideline applicable to section 18 offences, noting that this offence fell into the highest category for culpability and harm, where there is a starting point of 12 years and a range of 10 to 16 years. He went on to refer to aggravating and mitigating factors, concluding that if the appellant had been "an adult say, ten years older", the aggravating and mitigating factors

would balance out resulting in a notional sentence, after trial, of 12 years. The judge went on to say:

> "The fact is you are still young. You were 17, nearly 18 at the time; you are now just over 19. I do take into account the sentencing guidelines for sentencing children and young people. That guideline refers to people who are under 18. You are not in that category but it is well recognised that achieving the milestone of 18 is not a cliff edge and that maturity is not something that happens on a single day...
>
> I am conscious of your immaturity at the time and your borderline intelligence and I bear in mind what is set out in the psychologist's and psychiatric reports all of which I have read in great detail. Bearing in mind what I have read I apply a reduction of two years for that reason."

The judge then applied a discount of 10 per cent to the sentence of 10 years to reflect the appellant's plea on the first day of trial, passing the sentence of 9 years' detention to which we have already referred. The judge declined to find the appellant *dangerous* and passed a concurrent sentence of 12 months for the bladed article offence.

Grounds of Appeal

9. The ground of appeal advanced ably and succinctly by Mr Tettey for the appellant, in his written grounds as expanded upon briefly this morning, really amounts to this. The judge should have approached sentence on the basis that the appellant was a child and should accordingly have made a greater reduction to the appropriate adult sentence. He does not dispute that for an adult, 12 years after trial, was the appropriate term, but he says the reduction of 2 years was too little to reflect the appellant's youth at the time of the offence. Referring us to ***Ahmed*** [2023] EWCA Crim 281, he argued that the judge was

wrong to treat the appellant as falling outside the scope of the child guideline ("…You are not in that category"). He says that, in accordance with the guidance in *Ahmed*, the judge should have approached sentence on the basis of the appellant's age at the time of stabbing (when he was 17) and should have applied the guidance at paragraph 6.46 of the Sentencing Council Overarching Guideline: Sentencing Children and Young People ("the Children Guideline") to the effect that a sentence of between one-half and two-thirds of the equivalent adult sentence should be adopted for a 15 to 17 year old.

Discussion and Conclusions

10. In *Ahmed,* at [21] and [22] dealing with "the proper approach", Lord Burnett, the Lord Chief Justice, giving the judgment of the court, said this:

> "21. In our judgment, the applicable principles are clear. Those who are under the age of 18 when they offend have long been treated by Parliament, and by the courts, differently from those who are adults. That is because of a recognition that, in general, children are less culpable, and less morally responsible for their acts than adults. They require a different approach to sentencing and are not to be treated as if they were just cut-down versions of adult offenders...
>
> Section 59(1) of the Sentencing Code requires every court, when sentencing or dealing with an offender who was under the age of 18 at the time of the offending, to follow the Children guideline except in the rare case when the court considers it would be contrary to the interests of justice to do so. Paragraphs 6.1 to 6.3 of that guideline are relevant in such circumstances, and we are unable to see any justification in logic or principle for the submission that those paragraphs should only be followed where the offender has only recently attained adulthood... "

Later, at [32], the Court went on to set out a number of points of guidance, including at (iii) and (iv):

> "(iii) The court must take as its starting point the sentence which it considers was likely to have been imposed if the child offender had

> been sentenced shortly after the offence....
>
> (iv) The starting point taken in accordance with (iii) above will not necessarily be the end point. Subsequent events may enable the court to be sure that the culpability of the child offender was higher, or lower, than would likely have been apparent at the time of the offending. They may show that an offence was not, as it might have seemed at the time, an isolated lapse by a child, but rather a part of a continuing course of conduct. The passage of time may enable the court to be sure that the harm caused by the offending was greater than would likely have been apparent at that time. Because the court is sentencing an adult it must have regard to the purposes of sentencing set out in section 57 of the Sentencing Code. In each case, the issue for the court to resolve will be whether there is good reason to impose on the adult a sentence more severe than he would have been likely to have received if he had been sentenced soon after the offence as a child."

11. Applying these principles in a case such as the present requires the Court to determine, first, what sentence would have been likely to have been passed on the child, at the age they were when the offence was committed. In this case, the appellant was aged 17. It is true that he was only just shy of his 18th birthday but it was apparent from the reports that he was assessed as lacking maturity. When approaching sentence of a child, it is important that courts work through all the provisions of the Children Guideline which identify the particular considerations to be addressed and the alternative sentences which may be available in any case. The section of the guideline dealing with custodial sentences at paragraphs 6.4 to 6.9, emphasises that custody for children is a sentence of last resort where no other is appropriate. Where that is the case, paragraphs 6.45 and 6.46 are key:

> "6.45 Only if the court is satisfied that the offence crosses the custody threshold, and that no other sentence is appropriate, the court may, as a preliminary consideration, consult the equivalent adult guideline in order to decide upon the appropriate length of the sentence.
>
> 6.46 When considering the relevant adult guideline, the court **may**

> feel it appropriate to apply a sentence broadly within the region of half to two thirds of the adult sentence for those aged 15 – 17 and allow a greater reduction for those aged under 15. This is only a rough guide and must not be applied mechanistically. In most cases when considering the appropriate reduction from the adult sentence **the emotional and developmental age and maturity of the child or young person is of at least equal importance as their chronological age**. This reduction should be applied before any reduction for a plea of guilty." (emphasis in original)

12. Applying the Children Guideline to the present case and considering the appellant as a child of 17, there is no question but the seriousness of the offence and the degree of harm caused would have rendered custody the only appropriate disposal. The question is then what length of custodial sentence would have been appropriate for this offence, committed by a child of 17, albeit just short of his 18th birthday. It is apparent from his sentencing remarks that the judge had the Children Guideline in mind but he evidently did not consider it to be of direct application when sentencing this appellant ("That guideline refers to people who are under 18. You are not in that category..."). This is no doubt why the judge did not refer to or follow the recommendation made at 6.46 of the Children Guideline. Had he done so, then he is likely to have taken, at least as a starting point, a sentence of between 6 to 8 years being one-half to two-thirds of the adult sentence of 12 years at which he had already arrived. To that extent only, in his careful and clear sentencing remarks, we think that the judge erred. This appellant was nearly 18 when he stabbed and injured Oliver Roberts so badly. The prosecution accepted his basis of plea to the effect that the stabbing was not an intentional "bagging". Had that been the case, then a very different approach would have been required. However, the prosecution had accepted that the appellant did not intend to inflict a "bagging" injury, moreover the appellant was assessed as immature for his age. That being so, we consider that a

sentence at the upper end of the range suggested in paragraph 6.46, namely 8 years would have been appropriate for a boy of the age the appellant was when he stabbed Roberts. We see no reason to elevate the sentence beyond that which is likely to have been passed when he was 17. It follows that the 2-year reduction applied by the judge here was, in our view, insufficient and has resulted in a sentence which is excessive. Taking a sentence of 8 years and applying a 10 per cent reduction for plea at trial, results in a sentence of 7 years and 2 months. Accordingly, and to that extent only, we allow the appeal. The sentence of 9 years' detention passed on the section 18 offence will be quashed and replaced with one of 7 years 2 months' detention in a young offender institution. All other sentences and orders remain the same.

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

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