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IN THE COURT OF APPEAL
CRIMINAL DIVISION



CASE NO 202401093/A4

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday, 14 June 2024

Before:

LORD JUSTICE WILLIAM DAVIS
MRS JUSTICE MCGOWAN DBE
MRS JUSTICE COCKERILL DBE

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

REX
V
EMANUELE KSHATRIYA

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MR P RATLIFF appeared on behalf of the Attorney General
MR J CROSS appeared on behalf of the Offender

J U D G M E N T

1. LORD JUSTICE WILLIAM DAVIS:

Introduction

On 26 October 2022 in the Crown Court at Inner London, Emanuele Kshatriya was convicted after trial of attempting to cause grievous bodily harm. Sentence was adjourned to await his trial on a separate indictment. On 31 January 2023 he pleaded guilty at South London Magistrates' Court to an offence of theft for which he was committed to the Crown Court for sentence. On 8 August 2023 in the Crown Court at Inner London, on the day the case was listed for trial, he pleaded guilty to assault occasioning actual bodily harm and doing acts tending and intended to pervert the course of public justice.

2. On 23 February 2024 in the Crown Court at Snaresbrook the defendant was sentenced by the judge who conducted the trial in October 2022. The sentences imposed were as follows: attempting to cause grievous bodily harm, 18 months' imprisonment; assault occasioning actual bodily harm, 12 months' imprisonment ordered to run consecutively; acts tending and intended to pervert the course of public justice, six months' imprisonment concurrent; theft, three months' imprisonment concurrent. The total sentence was 30 months' imprisonment. Ancillary orders were made with which we are not concerned.

3. His Majesty's Solicitor General now applies to refer the total sentence of 30 months' imprisonment as unduly lenient pursuant to section 36 of the Criminal Justice Act 1988.

4. The factual background

The offender, who is now aged 27, had been in a relationship with a woman named Nazife Sayim since 2016. They had two children together. It was not a happy relationship. The offender was convicted of assaulting Sayim in 2016 and in 2019. The

relationship came to an end in April 2020.

5. In the early hours of 4 May 2020 the offender went to Sayim's flat in South East London. It had been arranged that he would look after the children on 4 May. The two had an argument. In the course of the argument Sayim hit the offender on the head with a lamp. The offender lost his temper. He pushed Sayim with sufficient force for her to fall and hit her head on a piece of furniture. The offender then left the flat.
6. Sayim's three-year-old child was woken by the noise. She came from her bedroom to find her mother covered in blood. By the time the police came both children were with their mother and were crying. Sayim was taken to hospital. She had suffered various unpleasant facial injuries including a minimally displaced nasal fracture.
7. Later on the morning of 4 May the police went to the offender's address. He was found hiding under a bed. He had a superficial wound to the top of his head which did not require sutures. When interviewed he made no comment. He was released on bail on condition that he was not to contact Sayim.
8. Over the succeeding 10 days the offender sent a series of emails to Sayim. He told her that they needed to tell the police that both of them had been attacked by a black man who lived in the same block of flats as Sayim. He said that if Sayim did not change what she had said to the police he would be given a lengthy prison term. On 1 June 2020 the offender was arrested for witness intimidation. He asserted in interview that he and Sayim had been attacked by a black male. He suggested that this man must have threatened Sayim which is why she had said that he (the offender) was responsible for assaulting her.
9. The offender did not appear before the Magistrates' Court in relation to these offences of assault and perverting the course of justice until 27 August 2021. On that date he was

sent for trial in the Crown Court. He was bailed.

10. Some two weeks later on the evening of 11 September 2021, the offender booked a taxi to take him from Tower Bridge to Peckham. When the taxi arrived, driven by a Mr Amofah, the offender got into the taxi with a woman whose identity is not known. The offender spent the first part of the journey shouting at the woman who appeared to be crying. There came a point at which the woman said she wanted to be sick. Mr Amofah stopped the taxi. The woman was sick on the pavement. When the journey continued the offender had calmed down. He cuddled the woman and apologised to her.
11. On reaching Peckham, Mr Amofah commented that it was nice that the offender had been kind to the female. The offender became aggressive. He tapped the back of Mr Amofah's head saying that Mr Amofah needed to apologise. The offender got out of the taxi, as did Mr Amofah. Mr Amofah did so in order to open the door of the taxi for the female to get out.
12. There was a confrontation between the offender and Mr Amofah. According to a lady who lived nearby, the offender called Mr Amofah a black bastard. The offender took hold of Mr Amofah's shirt at which Mr Amofah "really whacked" the offender. That was the expression used by the witness. Both men fell to the floor. The lady ran into her house in order to call the police. When she came out shortly afterwards she saw Mr Amofah lying on the ground. The offender was stamping on his head and chest. The lady spoke in her evidence of the offender "really stamping, he did not seem to stop". Eventually the offender stopped his attack and walked away.
13. Mr Amofah's account of the incident was that he had been headbutted twice by the offender, following which the offender had held him round the head in a headlock. Mr Amofah then recalled being on the floor struggling with the offender before the

offender left.

14. When the police arrived Mr Amofah was lying on the floor. He was drifting in and out of consciousness. He had bruising to his face. He had a cut to his lip. He was taken by ambulance to hospital. At the hospital a CT scan showed two small areas of apparent bleeding in the brain which were suspected to be the result of trauma. He had significant soft tissue swelling of the left cheek and the scalp. No active treatment was required. In due course Mr Amofah made a good physical recovery.
15. The offender was arrested on 25 September 2021 for an unrelated matter. It was then appreciated that he was suspected of the attack on Mr Amofah. He was interviewed about that matter. He said that Mr Amofah had headbutted him and tripped him over. Whilst he was on the ground he had been pinned down by Mr Amofah. He had punched Mr Amofah in self-defence.
16. On 27 September 2021 the offender appeared before the Magistrates' Court charged with attempting to cause Mr Amofah grievous bodily harm. He was sent for trial in custody. On 27 October 2021 he was granted bail by the Crown Court. A trial date in April 2022 was fixed. The grant of bail was subject to a condition of an electronically monitored curfew. Initially this was a qualifying curfew. In November 2021 the terms of the curfew were amended such that the curfew was no longer a qualifying curfew for the purposes of deduction from any sentence as time served. On 14 January 2022 the case was listed for mention with the offender to attend. He failed to do so. A warrant for his arrest was issued. This was executed the following month but the offender was re-admitted to bail on the same terms as applied from November 2021.
17. The offender was on bail when, on 21 March 2022 at around 8.50 pm, he went to the home of Sayim's mother in Peckham. He banged on the front door. This triggered the

video doorbell fitted at the address. Sayim's mother was able to see that the offender was outside and appeared to be drunk. He was shouting and swearing. The mother called the police. Before they arrived the offender left taking the video doorbell with him.

18. The charge of attempting to cause grievous bodily harm was listed for trial in April 2022. The offender did not attend. In the event there was no court time to hear the trial. It was relisted for 24 October 2022. On that date the offender again was absent. He was tried in his absence. On 30 January 2023 the offender was arrested by a police officer who recognised him as somebody who had failed to attend court. The next day he appeared before the Magistrates' Court. He was charged with the theft of the video doorbell. He indicated a plea of guilty. He was committed for sentence to the Crown Court at Inner London.
19. When he appeared at the Crown Court, the trial of the charges relating to the events of May 2020 was put into a warned list for the following month. In fact the case was not reached. The trial was fixed for 7 August 2023. It was listed on that day. On the following day, after various discussions had taken place, the offender pleaded guilty to assault occasioning actual bodily harm and perverting the course of justice. There was a written basis of plea. The offender said that he did not accept that he had caused all the physical injuries sustained by Sayim but he accepted that the offence fell into Category 1 harm within the relevant guideline because of the psychological impact on Sayim.
20. Sentence was adjourned for the preparation of a pre-sentence report. Such a report was prepared dated 6 October 2023. It dealt *inter alia* with the risk posed by the offender.
21. On 13 October 2023 the case was listed for sentence before the judge who conducted the trial in October 2022. That judge said that the issue of dangerousness might be relevant. The prosecution agreed. The judge ordered what he called a dangerousness assessment.

On behalf of the offender it was said that a Newton hearing was required in relation to the instigator of the violence in September 2021 involving Mr Amofah. Although the judge had heard the trial, he adjourned the sentence for such a hearing with the dangerousness assessment to be conducted thereafter.

22. The adjourned hearing was not listed until 23 February 2024. At that point the judge determined that a trial of issue would not be required since he conducted the trial at which the offender had been convicted. He had heard the accounts of Mr Amofah and, more particularly, the lady from the house close to the scene of the attack. He was in a position to determine the issue. It is not clear from the material we have whether the offender expressly agreed with that course or whether the offender was offered the chance to give his account. Whatever the position, it was not argued before us that the course taken by the judge was inappropriate. In relation to the offender giving evidence, any argument that he ought to have been given the opportunity to give his account would be of no weight. He had had that opportunity at trial which he had spurned by his failure to attend. The judge also concluded that the pre-sentence report prepared the previous October was sufficient for any assessment of dangerousness.

23. The sentencing hearing

The judge had victim personal statements from Sayim and Mr Amofah. Sayim's statement was dated September 2023. She referred to the initial upheaval resulting from the events of May 2020 which involved her and her children being placed into temporary accommodation. She said that the psychological impact of those events was an accumulation of what had gone before, as well as the injuries she had sustained in May 2020. She remained in a state of constant anxiety. She was always in fear of what the offender might do to her.

24. Mr Amofah made his statement relatively close to the time of the attack on him. The precise date of the statement is not apparent. At the point of him making the statement he was suffering from flashbacks to the attack committed on him by the offender. At the time of the attack he had been terrified that he was going to die. He had had to give up his job as a taxi driver because he was too scared to drive and to pick up passengers given what had happened with the offender. He was suffering memory problems and a loss of confidence.
25. The pre-sentence report concentrated on the offence involving Sayim. It set out an account of the events of May 2020 which did not correspond with the agreed basis of plea. In particular it suggested a more sustained attack on Sayim than was accepted in the basis of plea. The author of the report noted that, as part of the sentence imposed for the more recent of the previous assaults on Sayim, the offender had completed a Building Better Relationships Programme. The offender had said that he had learnt much from the programme and had put what he had learnt into practice. The view of the author of the report was that this proposition was not borne out by events; rather the reverse. The report concluded that the offender posed a high risk of harm to anyone with whom he was in a relationship and a medium risk of harm to members of the wider public. The concern of the author was that the risk could not be managed without enforceable licence conditions.
26. A psychiatric report had been prepared dated 8 October 2023. This stated that the offender suffered from a recurrent depressive disorder. The psychiatrist did not consider that there were any apparent symptoms of this disorder at the time of any of the offending. The offender also suffered from post-traumatic stress disorder, said to be due to occasions in the past when he had been attacked in the street. This meant that he had a

heightened perception of threat, leading to an exaggerated response, including the use of violence. His ability to react rationally was impaired.

27. The prosecution provided a sentencing note for the hearing which referred to the relevant Sentencing Council guidelines. In relation to the offence of assault occasioning actual bodily harm, it was said that it fell into Category 1B. Harm was high, as was conceded in the basis of plea. There were elements of higher and lower culpability. As to the offence of attempting to cause grievous bodily harm, it was submitted that as a completed offence it would have been categorised as a Category 3A offence. The sentencing note suggested that there was no offence-specific guideline in relation to perverting the course of justice. Recent authority was cited setting out the factors to be taken into account when sentencing for that offence.
28. In his sentencing remarks the judge said that he had read the pre-sentence and psychiatric reports. His rehearsal of the facts on the attack on Mr Amofah was brief. He simply said: "There was a most unpleasant fight during which he was headbutted to the face." The judge noted that Mr Amofah had suffered a bleed on the brain. In relation to Sayim, the judge set out an account of events which was not in accordance with the basis of plea. He described the offence of perverting the course of justice as a relatively minor matter.
29. The judge turned to the guidelines. He found that the offence relating to Mr Amofah fell into Category 3B. He did not identify the offence-specific guideline to which he was referring. He said that this provided a starting point of one year's custody with a category range of up to two years' custody. Because of the aggravating factors, which he identified as previous convictions and offending on bail, the sentence would be 18 months' imprisonment. In relation to the offence against Sayim, the judge concluded that it was a Category 2B offence with a category range of up to 18 months' custody. The

appropriate sentence was 12 months' imprisonment. For the other offences, shorter concurrent sentences were the proper disposal.

30. The correct formulation of what amounts to an unduly lenient sentence is still that provided by the then Lord Chief Justice in Attorney General's Reference No 4 of 1989 [1990] 1 WLR 41:

"A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate."

31. In this case we are satisfied that the judge did not apply his mind to all the relevant factors. As a result his sentence fell outside the range of sentences which reasonably could be considered appropriate. First, he did not have regard to the correct guideline when considering the appropriate sentence in relation to the attempt to cause grievous bodily harm to Mr Amofah. The starting point and category range to which he referred when dealing with that offence related to the guideline for the offence contrary to section 20 of the Offences Against the Person Act 1861. The prosecution correctly had directed his attention to the guideline for the offence contrary to section 18. As explained in Laverick [2015] EWCA Crim 1059 and Muthuraja [2019] EWCA Crim 1740, the correct approach when sentencing for an attempt to cause really serious harm is to consider what the sentence would have been had the offence been completed. Thereafter, the sentence should be discounted as appropriate to allow for the fact that really serious harm did not result.
32. The prosecution in the Crown Court argued that culpability was high because the assault had been prolonged and strangulation was involved. On behalf of the offender it is said that there was lesser culpability as a result of the effect of the offender's post-traumatic

stress disorder which ought to have reduced culpability to a significant degree.

33. In our view this case was one of high culpability. Taking the description of the independent eyewitness as the most reliable account, this was clearly a prolonged assault. The nature of the assault, namely repeatedly stamping on the head and chest of a defenceless man on the ground, meant that there could not reasonably have been any perception at that point of any threat. The offender's post-traumatic stress disorder did not therefore affect his culpability for what he did to Mr Amofah. That conclusion is supported by analysis of the Sentencing Council guideline in relation to sentencing offenders with mental disorder.
34. Because the offender did not cause really serious harm, it is less easy to categorise the harm that would have resulted had the offence been completed. In the course of submissions on behalf of the Solicitor General it was argued that the offender only stopped doing what he was doing because he thought he had caused really serious harm. That may indeed be correct. There is an argument for saying that stamping on a man's head very easily could cause catastrophic injury of the highest category of harm. However, neither the prosecution in the Crown Court nor the Solicitor General before us argue that harm should be categorised above Category 3.
35. The starting point for the completed offence of causing grievous bodily harm with intent in Category 3A is five years' custody with a category range of four to seven years. The offence was aggravated because the offender was on bail, he had convictions for violence, the offence was committed in a public place, the victim was providing a service to the public and there was hostility displayed by the offender based on race. There were no mitigating factors. The proper sentence for the completed offence where really serious harm in the lowest category of harm was caused would have been no less than six

years' imprisonment. Given the nature and duration of the attack, it was pure chance that the offender's attempt did not succeed. The discount by reference to Laverick should have been modest.

36. Second, the judge fell into error in his assessment of the offence of assault occasioning actual bodily harm. In this case his error went in the opposite direction. He adopted an erroneous view of the facts of the offence. Rather than this being a sustained attack, the offence involved a short-lived assault which occurred on the spur of the moment in reaction to the offender being struck with a lamp. The correct categorisation of the offence was Category 2C, providing a category range of up to 36 weeks' custody. However, there were significant aggravating factors. The offender had twice in the past been convicted of assaults on Sayim. He had only just completed a programme intended to address violent behaviour towards her. He was still subject to the suspended sentence to which the programme requirement had been attached. The offence occurred in Sayim's home in the early hours of the morning. The domestic context was an important factor. The end of the assault had been witnessed by Sayim's very young child. A sentence at or slightly above the category range would have been justified.
37. The next error made by the judge related to the offence of perverting the course of justice. He was misled by counsel in the Crown Court. He was not directed to the Sentencing Council guideline for the offence which was in force from 1 October 2023. In another respect his error was to understate the significance of the offence, an error which occurred irrespective of the existence of the guideline. The offence was not a relatively minor matter. It was a sustained attempt to persuade a witness to change their story. In the guideline it was at the very least a Category 2B offence with a starting point of 12 months' imprisonment and a category range of nine months to two years. It was

offending wholly separate from the offence to which it related. A consecutive sentence was appropriate for that offence.

38. The offender was entitled to a reduction of 10 per cent in respect of the offences of assault and perverting the course of justice by reference to his late pleas.

39. In the Crown Court the judge did not address the issue of dangerousness. Since the total sentence he imposed was less than four years' custody, the issue did not arise. It will be apparent from what we have said thus far that the overall sentence ought to have been significantly in excess of four years. We must consider therefore whether the offender presents a significant risk of serious harm to the public from the commission of further specified offences. He is a mature adult. In last 10 years he has committed four separate offences of violence. His offending has escalated in seriousness. The offence involving Mr Amofah could have resulted in very grave injury. Whatever the offender's mental problems, the assault on Mr Amofah went far beyond any exaggerated reaction to perceived threat. We accept that the assessment of risk by the author of the pre-sentence report was based on a false understanding of the nature of the offence involving Sayim. However, had the author appreciated the true nature of the attack on Mr Amofah, she undoubtedly would have placed the risk to the wider public at a higher level than she did. We take particular note of her reference to the need for strictly enforceable licence conditions.

40. In those circumstances, we are satisfied that the offender does pose a risk which requires a sentence designed to protect the public. In our view an extended determinate sentence is necessary. No other conclusion is reasonable.

41. Conclusion

In his submissions before us today, Mr Cross, who represented the offender at the

sentencing hearing, accepted that the sentence was both merciful and lenient but argued that this was a sentence imposed by an experienced judge and a judge who had conducted the trial in relation to the most serious offence. We must give due regard to the fact that the judge who imposed the sentence had heard the evidence in the trial. That factor has very little weight in this case since the judge applied the wrong guideline to that offence. The various errors made by the judge resulted in an unduly lenient sentence. We consider that the appropriate course will be to impose a sentence for the attempt to cause grievous bodily harm as the lead offence, that sentence then to reflect the totality of the offending. The offences of assault occasioning actual bodily harm and perverting the course of justice would warrant consecutive sentences. However the total sentence must be adjusted to ensure that it is just and proportionate.

42. We give leave to refer the sentences. We quash the sentences imposed in relation to all offences save the offence of theft. In relation to the offence of attempting to cause grievous bodily harm, the sentence will be an extended determinate sentence. The custodial term will be six years' imprisonment. The period of extended licence will be three years. Therefore the total extended determinate sentence will be nine years. Sentences of nine months' imprisonment and 12 months' imprisonment will be imposed in relation to the offences of assault occasioning actual bodily harm and perverting the course of justice. Those sentences reflect the pleas of guilty. They will run concurrently with the extended determinate sentence, since that sentence is intended to reflect the entirety of the offending. We leave unaffected the sentence imposed for the offence of theft.

43. The offender has been released from the sentence imposed by the judge. He had spent a considerable period in custody prior to sentence. He must surrender to Walworth Police

Station at 4.00 p.m. this afternoon.

44. The effect of the extended determinate sentence is that the offender will serve at least two-thirds of the custodial term before the Parole Board consider his release. The time served thus far will count towards the sentence. That will be a matter of calculation for the Prison Service. Pursuant to section 240A of the Criminal Justice Act 2003 we direct that 13 days, representing 26 days subject to qualifying curfew, must also count towards the sentence we now impose.

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

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