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Neutral Citation No. [2024] EWCA Crim 776

IN THE COURT OF APPEAL
CRIMINAL DIVISION



CASE NO: 2024 00462 A2

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 20 June 2024

Before:

LORD JUSTICE DINGEMANS

and

HIS HONOUR JUDGE LICKLEY KC

REX

v

NEIL ANDREW SEER

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MR HARRY BAKER appeared on behalf of the Appellant

J U D G M E N T
Approved

LORD JUSTICE DINGEMANS:

Introduction

1. This is the hearing of an appeal against sentence with the leave of the single judge. The appellant is a 38-year-old man.
2. On 3 January 2024 he pleaded guilty in the Crown Court at Cardiff to strangulation, contrary to s.75 Serious Crime Act 2015, and assault occasioning actual bodily harm, contrary to s.47 Offences Against the Person Act 1861. Both of the offences were committed in September 2022.
3. On 10 January 2024 he was sentenced to 2-years-7-months for the strangulation and 12 months' imprisonment concurrent for the assault occasioning actual bodily harm. This was a total of 31 months' imprisonment.
4. The appellant had before these convictions 22 convictions for 42 offences committed between June 2002 and June 2019. These included relevant previous convictions of battery and affray, common assault, and robbery. The appellant had also been convicted of conspiracy to supply Class A controlled drugs on 14 June 2019 and sentenced to 8 years' imprisonment. He had been released on licence and was on licence at the time that he committed these offences. It seems that his relationship with the victim started while he was in prison when they started corresponding. He was recalled after these offences were committed in October 2022 and he had spent some 30 months on licence before he was sentenced for these offences. The exact dates are not given to us but are not in any event material.
5. When sentencing, the judge was invited to but did not make a discount to take account of time served on recall. The judge said this:

"You are currently on recall. Your counsel has asked me to take that into account. I am afraid I do not consider it appropriate that I take that into account in circumstances where you were released on licence."

This appeal raises the issue of whether, in the particular circumstances of this case, the

judge was wrong not to exercise the discretion that he had to take into account the time of delay between the report of these offences and the commencement of the prosecution.

The factual circumstances

6. It is necessary to set out some of the factual circumstances. The appellant and the complainant had been in a relationship, having met through a mutual contact. They started sending letters to each other while the appellant was in prison on the drug conspiracy offences. The appellant was released on 8 September 2022 on licence. He went to the complainant's address and the complainant reported that the appellant's behaviour had begun to change about a day after release.
7. On 19 September 2022 the complainant and the appellant had gone to stay at a caravan park in Somerset. The plan was to stay on the Friday, but on the Monday the complainant went to the bedroom to sleep for around an hour. When she woke up, she said she was confronted by the appellant behaving aggressively towards her. He started shouting and complaining about her being ungrateful for the trip. The pair continued to argue. They went to a public house, but the complainant left. On the way back she rang her daughter, saying she could not continue to stay at the park and did not know what to do, and was crying and upset. She described the appellant as "starting at her".
8. An argument then ensued, with both parties shouting at each other. It was at that stage that the appellant grabbed the complainant by the throat. She described him as squeezing her neck to the point where she was struggling to breathe. The appellant then threw the complainant over a table and she landed on her side. This caused pain and bruising. When the complainant was trying to get up, the appellant threw her out of the caravan. She tried to get back in and he dragged her out again with such force that her T-shirt ripped. The complainant managed to get back in whilst the appellant was outside, but the appellant also managed to get back into the caravan and grabbed her by the neck and squeezed it very hard. The complainant could not breathe and in that moment she thought she was going to be killed. She bit the left side of the appellant's chest in an attempt to get him off her, and that was successful. The arguing continued and the complainant recorded part of it on her

phone. The argument eventually came to an end, and the pair agreed to sleep in separate beds and the situation was defused. The complainant had sustained injuries, consisting of bruising and marks to the upper leg, arms, back and neck.

9. The next morning the complainant received a call from the police (because the matter had been reported) but she spoke to them and did not say anything. The complainant said that was because the appellant had told her not to say anything because he feared going back to prison. With encouragement from her daughter, the complainant did report the matter some weeks later. The appellant then presented himself at Newport Police Station on 4 October. He was arrested, and in interview gave a prepared statement denying the alleged facts of strangulation and causing the injuries, saying that he acted in self-defence because he was assaulted. He was recalled to prison.
10. That was October 2022. Thereafter there is no information as to what occurred in relation to the prosecution before 22 November 2023, when the appellant received a postal requisition. It is apparent that there must have been involvement from the Crown Prosecution Service because of the sending of the postal requisition and, we infer, there must have been some assessment of the merits of the case in circumstances where the appellant had given a prepared statement denying any responsibility for the offending. In short, and the point that Mr Baker to whom we are very grateful for his written advice and oral explanations this morning makes is that there is no explanation given for the 12 to 13 month delay in progressing the prosecution of the appellant for these offences.
11. The appellant appeared in the Magistrates' Court and indicated a not guilty plea and the matter was committed to the Crown Court at Cardiff. The appellant then pleaded guilty at the pre-trial preliminary hearing at the Crown Court at a time when he was entitled to 25 per cent credit.

The sentence

12. So far as the sentence was concerned, the judge found that the starting point for count 1, strangulation, was 18 months having regard to the decision in *R v Cook* [2023] EWCA Crim 452. The strangulation had only stopped on the second occasion because the victim had

bitten the appellant in self-defence. There were aggravating factors, being previous convictions, the offence occurred in a domestic setting and the offence occurred while the appellant was on licence. There was mitigation, being the appellant's young children and steps he had taken in prison to address his behaviour. The judge took a starting point of 3 years 6 months and reduced that to 3 years to reflect the mitigation. As far as the actual bodily harm was concerned, that was, the judge said, between categories A2 (with a starting point of 18 months) and B2 (with a starting point of 6 months). The judge took a midway starting point of 12 months. The judge said it should have been consecutive but it was all part of the same incident. So what the judge did was add to the 3-year sentence in relation to count 1 a sentence of 6 months, also on count 1, then reduced it by 25 per cent for plea, to give a sentence of 2 years and 7 months. He imposed a concurrent sentence of 12 months on count 2, reflecting issues of totality. As already indicated, he gave no discount for the time which the appellant had been waiting on recall for these proceedings to be progressed.

The grounds of appeal

13. The grounds of appeal are that, first, the sentence was too long bearing in mind the starting point of 18 months, see *R v Cook* [2023] EWCA Crim 452; [2023] 4 WLR 71, for the offence of strangulation and the guilty plea.
14. In our judgment there is nothing in this particular point. This was a very serious attack, which occurred on two occasions; it was aggravated by relevant previous convictions, the domestic setting, persistence and the fact that it took place on licence; and there was a separate assault occasioning actual bodily harm which was taken into account, as the judge was entitled to, on count 1, with the second sentence being consecutive.
15. That then brings us to the main issue on the appeal, which is whether there should have been a discount for the recall. In general terms the fact of a recall is neither here nor there to a subsequent sentence. This is because the appellant is serving his time for an earlier sentence and has been recalled for breaching his licence. Further, if the appellant denies his guilt in an interview in relation to the new offence, he cannot reasonably complain if the matter is considered carefully before those proceedings are commenced. On the other hand, any

sentence must be just and proportionate, and it is apparent that there was this 12 to 13-month delay after the investigation seem to have concluded and before the postal requisition started matters.

16. So far as the law is concerned, the statutory regime was analysed in *R v Castello* [2010] EWCA Crim 371; [2011] 1 WLR 638. That emphasised the importance of the fact that the sentence starts when it is pronounced and that a judge cannot make a sentence consecutive to a continuing sentence where the person is still in custody. A second point from the relevant regime identified in *Castello* was that any term of imprisonment can only count to one sentence.
17. In *R v Kerrigan* [2014] EWCA Crim 2348; [2015] 1 Cr App R (S) 29, relevant principles were identified at [40], which included the fact that the custodial sentence is to be set for the second and new offence only, and that in general terms the fact of a recall is not relevant to the sentence. But at [14]:

"A judge retains the discretion to do justice on the particular facts of a case, for example in the case of excessive delay, and may therefore reduce an otherwise appropriate sentence accordingly."

That approach was followed in *R v Phillips* [2015] 2 Cr App R (S) 9 and *R v Christie* [2019] EWCA Crim 1386; [2019] 2 Cr App R 54. In these circumstances it is apparent that the judge below did have a discretion (if he chose to exercise it) to take into account the fact that there had been a delay in the prosecution of the appellant. The judge, however, considered that it was not appropriate to exercise his discretion to make any discount. In circumstances where the recall was for a separate drugs offence, and the appellant had denied the offence the subject of his appeal, which made some consideration of whether it was appropriate for the matter to be pursued inevitable, in our judgment it is impossible to say that the judge's exercise of discretion was justiciably wrong. In those circumstances and notwithstanding the skill with which the point than argued, we dismiss the appeal.

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