

NCN: [2019] EWCA (Crim) 2103
No: 201903918 A3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 19 November 2019

B e f o r e:

LORD JUSTICE SIMON
MR JUSTICE JACOBS
HER HONOUR JUDGE MUNRO QC
(Sitting as a Judge of the CACD)

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

R E G I N A
v
TOBIAS MILLS

Mr P Jarvis appeared on behalf of the **Attorney General**
Mr A Goh appeared on behalf of the **Offender**

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J U D G M E N T

LORD JUSTICE SIMON:

1. The Solicitor General applies for leave to refer a sentence passed on the offender on 27 September 2019 at the Crown Court at Portsmouth under section 36 of the Criminal Justice Act 1988 as being unduly lenient. We grant leave.
2. The offender Tobias Mills, aged 22, was charged with two offences. Count 1 making a threat to kill, contrary to section 16 of the Offences Against the Person Act 1861, and count 2, assault by beating, contrary to section 39 of the Criminal Justice Act 1988. The offences occurred on 14 January 2019 and the victim was Lauren McCue. On 26 March 2019 at the plea and trial preparation hearing the offender pleaded not guilty to both counts and the case was set down for trial on 19 August. On that day he pleaded guilty to both offences on re-arraignment.
3. On 27 September 2019 the offender was sentenced by His Honour Judge Hetherington, following receipt of a pre-sentence report, on count 1 to a term of 22 months' imprisonment suspended for 24 months with a Rehabilitation Activity Requirement of 15 days to attend a building a better relationship programme and on count 2 to a term of four months' imprisonment concurrent, suspended for 24 months with the same requirement. He was also made the subject of a restraining order for five years, ordered to pay a victim surcharge and to make a contribution of £1,200 towards the costs of the prosecution.
4. The background to the offence and a significant aggravating circumstance was that on 11 January, a matter of days before these offences, the offender had been sentenced at Lewes Crown Court to a term of three months' imprisonment suspended for 12 months

for an offence of assault occasioning actual bodily harm in which the victim was a former domestic partner. He was also sentenced to a concurrent term of two months' imprisonment, also suspended for two months, for an offence of damaging criminal property to the value of £5,000 or less. In addition, the court had imposed a 40-hour unpaid work requirement and a rehabilitation activity requirement and made an order that he pay £625 compensation to the victim.

5. Two days later, on 13 January, the offender and his new partner and longstanding friend, Lauren McCue went out to celebrate the fact that he had not received an immediate term of imprisonment for committing those offences. They went to a local public house in the evening and then returned together to the offender's father's house where the offender opened a bottle of whisky. At some point an argument broke out between them. The offender spat at her and said he wanted to kill himself. He took a large kitchen knife and placed it in his back pocket. When he tried to leave the house she stopped him. He took out the knife and brandished it at her. He held it to her sternum and said: "I want to put it in and twist it." She said that she would tell his father what he had done, to which he said he would stab his father as well. They continued to argue until he dropped the knife and she moved it to a place of safety.
6. The offender then picked up a smaller knife and tried to get out of the house by climbing through a window. When she tried to stop him again, he grabbed her by the throat and said: "I want to kill you." He repeated this several times while holding her on the sofa. She thought he was going to kill her. He then threw her onto a coffee table. She struck the table and fell to the floor. The incident ended when he climbed through the window

and ran off.

7. Lauren McCue suffered bruising to various parts of her body. She called the police who arrived a short time later. While they were there the offender returned and was arrested. He told the police at the scene that he had no real recollection of what had taken place earlier. When he was formally interviewed a short time later he said he had not been aggressive towards Lauren McCue. He denied threatening to kill her. He was subsequently charged.
8. The offender had received a caution for battery in September 2017. In April 2018 he committed the offences of criminal damage and assault occasioning actual bodily harm for which he had been sentenced on 11 January 2019.
9. There was a short form pre-sentence report before the court dated 17 September. The offender told the author that he had been friends with his victim for a number of years and that shortly before the index offences their friendship had become more intimate. He said that at the time of the offences he had been suffering from anxiety. He also said that at the time he had been consuming alcohol and cocaine on a daily basis. He could not remember anything about his behaviour towards the victim at his father's house. The author was reluctant to accept this account as genuine. The offender said he had no reason to doubt Lauren McCue's description of what he had done and that he was remorseful for his actions. He said he understood the impact his actions must have had on her. Again the author expressed some doubts about this. Given that he committed violent offences against her a matter of days after having been sentenced for similar

violence against a former partner, the author questioned the offender's level of understanding about the human cost of his conduct.

10. The offender told the author that since the January offences he had stopped using cocaine and going out drinking. He had moved away from the area where he had been living in order to distance himself from old associates with bad habits. The author formed the view that the latest offences formed part of an emerging pattern of violence towards intimate partners, linked to the abuse of alcohol and drugs. She noted that on 19 June 2019 the offender had appeared before the Lewes Crown Court in respect of a breach of his suspended sentence order for poor compliance. He had admitted the breach and the order was activated in part, with the result that the offender received an immediate custodial sentence of six weeks' imprisonment.
11. He was assessed as posing a medium risk of conviction and a high risk of harm to those with whom he was in an intimate relationship. As an alternative to immediate custody, the author suggested that a community order could be a possible disposal in the offender's case.
12. At the end of her witness statement, the victim said that as a result of what the offender did to her she now has trust issues. She does not feel safe on her own and worries about the possibility of violent reprisals against her from the offender.
13. The maximum sentence for an offence of making a threat to kill is a term of 10 years' imprisonment. At the sentencing hearing it was agreed between prosecution and defence

that, by reference to the Intimidatory Offences Definitive Guideline, the harm fell in Category 2 and the Culpability was A because the offender brandished a knife. Category 2A offending has a starting point of two years' imprisonment with a range of one to four years.

14. In mitigation, defence counsel, Mr Goh (then appearing for the offender as he does on the application) submitted that the offender was a changed man. He had moved away from the bad influences in his area and was working as a scaffolder, he was no longer taking drugs and was receiving help from an organisation called "Change Grow Live".
15. In his sentencing remarks, the judge adopted a starting point of two years. He said the principal aggravating factor was the offender's previous convictions, but this was balanced out by the steps the offender had taken to address the causes of his offending behaviour. That meant the sentence after a trial would have been one of two years' imprisonment. With credit for the late pleas of guilty, the sentence would be reduced to 22 months' imprisonment, which would be suspended bearing in mind what the judge considered to be a realistic prospect of rehabilitation.
16. Mr Jarvis for the Solicitor General does not take any issue with the categorisation of the offence charged as count 1 as being Category 2A with a starting point of two years and a range of one to four years. However, he submits that there were a number of aggravating factors which did not "balance" (the word used by the sentencing judge) the mitigation of the offender's subsequent steps to address his offending behaviour: the alcohol detoxification on 19 July, the move from Eastbourne to Bognor Regis and his

employment prospects as a scaffolder.

17. Mr Goh for the offender submits that the sentence was appropriate and in any event not unduly lenient. All the aggravating factors had been taken into account by the judge. He draws attention to various features of the case. First, the evidence suggested that the offender acted out of frustration as a consequence of his mental state at the time, it being significant, Mr Goh submits, that he was trying to leave the house and that his victim was trying to prevent him doing so. It was not an offence committed in a "pure" domestic context. Secondly, he accepts that the victim would have been in fear, but submits that at no stage was there any imminent danger of her being stabbed. Third, although the offence was committed within two days of the imposition of the suspended sentence, the supervision elements of that sentence had not taken effect by the time of the index offences. Fourth, the offender had voluntarily removed himself from Eastbourne to Bognor Regis and had actively sought assistance from the probation service and other services. Fifth, by the date of sentence he had made significant strides to deal with his "emotional and personal issues" and had not come to the attention of the police since January.

18. We have seen a pre-appeal report dated 13 November which among other matters considered the attachment of more onerous conditions as part of the suspended sentence, and whose conclusions we can summarise by reference to the final paragraph:

To conclude, Mr Mills has attended all but one scheduled appointment and has provided evidence to deem his absence acceptable. He has given his commitment to attend and engage with his current suspended sentence order. There is currently a robust risk management plan in place to manage the risk

that Mr Mills poses. He is currently assessed as posing a medium risk of serious harm and it is my assessment that the risk he poses is currently manageable in the community.

19. The approach to sentencing in this case should in our view have begun with a consideration of the seriousness of the offender's threats to kill his victim, intending that she would fear that the threat would be carried out. Applying the Intimidatory Offences Definitive Guideline on Threats to Kill, page 33, it was culpability Category A because the initial threat was reinforced by a visible weapon. It was intermediate harm since there was intermediate effect, some distress, psychological harm and practical impact on the victim. Category 2A has a starting point of two years' imprisonment with a range of one to four years.

20. There were in addition a number of aggravating circumstances which were material to an assessment of the seriousness of the offending. First, in addition to the threats to kill, the offender assaulted Lauren McCue so as to cause significant bruising (count 2). These can be clearly seen on the photographs that we have seen. While no objection could be taken to concurrent sentences, the aggravating circumstance of an assault following the threats to kill should have been reflected in the sentence imposed on count 1. Second, although the offender was not trying to confine the victim (a point taken by Mr Goh), the threat to kill was very plainly committed in a domestic context. The guideline that applies to threats to kill states "Where offence committed in a domestic context, also refer to Domestic abuse – overarching principles." Paragraph 7 of that definitive guideline makes clear that the "domestic context of the offending behaviour makes the offending more serious because it represents a violation of the trust and security that normally exists between people in an intimate or family relationship." Third, in the present case the

offender was under the influence of alcohol and drugs at the time of the offences which aggravated their seriousness. Fourth, in addition the offender had a previous conviction for assaulting a former partner in April 2018, thereby occasioning her actual bodily harm. That conviction constituted a statutory aggravating factor. Fifth, and perhaps most significantly, the offender was subject to a suspended sentence in respect of the April 2018 offences, when he committed the index offences. It was a suspended sentence that had been passed a matter of days before he threatened to kill and then assaulted another victim, Lauren McCue. The breach of the suspended sentence was not only an aggravating circumstance in itself, it undermined the mitigation to which the sentencing judge obviously attached importance: the offender's steps to put his life in order. He had had a chance to do so and the fact that he later took urgent steps to turn his life around must also have been seen against the fact that he had earlier and after the commission of the index offences been in breach of the suspended sentence imposed in January 2019 due to poor compliance. It was this that had resulted in the partial activity of the suspended sentence in June 2019.

21. In our judgment these aggravating circumstances did not come near to "balancing" the mitigation and the steps the offender had belatedly taken to turn his life around. The sentence should have been a term of not less than three years before credit was given for the late plea. With credit of 10 per cent, the sentence should have been a term of 32 months' imprisonment. The suspended sentence of 22 months on count 1 was unduly lenient. We take into account the offender has attended some meetings with the probation service since the sentence was imposed in September, that he may (although the position is not clear) have made some payment in respect of costs and that he will

have to serve a sentence of imprisonment as a result of our decision, albeit in relation to a primary offence where clear guidelines should have been applied. In these circumstances, we will quash the suspended sentence of 22 months on count 1 and substitute a sentence of 30 months' imprisonment. The sentence on count 2 will be a concurrent term of four months. The costs order will be quashed since it depended on the offender being at liberty and in employment in order to pay it. The restraining order will continue unaffected. The new sentence will run from the time that the offender surrenders to custody.