Neutral Citation Number: [2020] EWCA Crim 1529

Case No: 202002434 A1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/11/2020

Before:

LADY JUSTICE THIRLWALL DBE
MR JUSTICE HOLGATE
and
MR JUSTICE BRYAN

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ATTORNEY GENERAL'S REFERENCE
UNDER SECTION 36 OF THE CRIMINAL JUSTICE ACT 1988

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Paul Jarvis appeared on behalf of the Attorney General
Jas Mann appeared on behalf of the Respondent

Hearing date: 12 November 2020
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Approved Judgment

1. John Gregson is 34. On 27th August 2020 at the Crown Court in Birmingham for an offence of wounding with intent to cause grievous bodily harm contrary to section 18 of the Offences against the Persons Act 1861 he was sentenced to a community order of 3 years duration with a rehabilitation activity requirement of 30 days and a 6 months alcohol treatment requirement. The victim surcharge was payable.

2. The respondent had been convicted on 20 February 2020 after a trial before HHJ Henderson. The Attorney General applies to refer the sentence to this court under section 36 of the CJA 1988 on the grounds that it is unduly lenient. We give leave.

3. We take our account of the facts from the reference save where the judge made specific findings. To the extent that they conflict with the reference we rely on the judge's findings which he made to the requisite standard.

4. The offence took place on 7 April 2019. The victim was Gaspar Tairo. The two men had been friends for years. They had spent the evening together and ended up drinking at the home of Gaspar Tairo with other people. One of the other people owed the respondent money and went home to get it. He did not return. The respondent became agitated. He was later to say that he had also lent Tairo £40 and became very angry when he realised that Tairo was using it to buy crack cocaine. The respondent became aggressive and started a fight with the victim. The two men exchanged blows. The respondent was shouting threats. At one point he picked up a bottle and brought it down onto the back of Tairo's head causing a wound, which was the basis of the count on the indictment. The wound bled profusely.

5. The noise of the altercation caused a neighbour to call the police. The respondent ran away before they arrived. He was arrested and interviewed on 6 July. He denied causing any injuries to the victim, saying he had run away after an argument about the crack cocaine, the victim having attacked him. He maintained his account at trial and was disbelieved.

6. The victim sustained a 4cm laceration to the back of the head with an associated minor head injury. There were some superficial lacerations to the victim's face and other minor soft tissue injuries.

7. The judge found that a single blow with the intact bottle had caused the laceration and had caused the bottle to break. He specifically rejected the suggestion that the respondent had used the bottle after breaking it. He referred to the medical evidence which supported his analysis. He continued, "Although the pictures are not at all clear there's nothing to suggest…that this was a glassing in any sense and it doesn't seem to me that I could be sure there was more than one blow with the bottle and that being the one that broke it."

8. The respondent had 6 previous convictions, none relevant to this offence. The most recent offence was in 2016. 5 were for summary driving offences, including drink driving. He had no convictions for any form of violence.

9. The respondent had been in stable employment for years. His employer had sent a supportive reference. There was before the court a presentence report and a

psychiatric report which the judge had sought in the light of the respondent's obvious problems with alcohol. During the course of the trial it had become clear that the defendant's drinking had begun while he was a serving soldier and after he had seen active service in Afghanistan.

10. According to the pre sentence report the respondent was born and brought up in Zambia and educated at boarding school. He came to this country at the age of 18 and joined the army. He was posted to Helmand province in Afghanistan and served in a fire fighting unit. During a period in 2007 his unit lost a lot of men. He did not sustain any major injuries but had struggled for years with the psychological effect of a grenade attack on his unit. Some of his fellow soldiers were shockingly injured. It is not necessary to set out the details of what the respondent experienced as he sought to assist his fellow soldiers. It is sufficient to record that we have read his harrowing account. He currently suffers from flashbacks disturbed sleep and nightmares and reexperienced those events.

11. He began drinking to cope with his experiences. When back in the United Kingdom he was regularly drinking to excess. He had pleaded guilty on two occasions within three months of driving with excess alcohol. As a result he was discharged from the army.

12. The probation officer identified that drinking was at the heart of the offence. He said that at that time he was drinking vodka and cider daily. At the time of the offence he had drunk about a bottle of vodka. He remembered the fight but did not remember hitting his friend over the head with a bottle. The respondent was remorseful, having accepted his guilt. He was empathetic towards the victim. The probation officer assessed him as at low risk of reoffending. The focus of the report to the court was the need for the respondent to deal with and overcome his drinking. Whilst acknowledging the likelihood of a custodial sentence the recommendation was for a long Community Order to give sufficient time to address the problems with requirements for unpaid work, an alcohol treatment requirement and a rehabilitation activity requirement.

13. The psychiatrist also supported an Alcohol Treatment requirement. He diagnosed mental and behavioural disorders due to harmful use of alcohol (ICD 10 F10-1) and found the account of nightmares and flashbacks met the criteria for reaction to severe stress, unspecified. It was his view that alcohol was clouding any other potential underlying diagnosis.

14. Mr Mann who appeared for the respondent at trial and before us began his mitigation with a reminder to the judge of the provisions of Section 125(1) of the Coroners and Justice Act of 2009 and submitted that it was not in the interests of justice to impose a sentence of imprisonment in accordance with the sentencing council guideline for an offence of wounding with intent contrary to section 18.

15. In response to this submission the judge said he would think first about the guideline. Before turning to the detail he described the incident thus "As I say, my view is this is a drunken fight between two friends. One of them picks a bottle up and whacks the other one over the head with it and it causes a classic head cut that bleeds like mad but is in no sense any serious injury in terms of the range for a section 18." He said that he could persuade himself that the case came within category 3 or the borderline of 2

and 3 and recognised that applying the guideline the shortest sentence of imprisonment would be more than 2 years and so could not be suspended (by reason of the suspended sentence guideline).

16. He went on to say "looking at the defendant, a bit of trouble but no violence before. Although not a diagnosed PTSD plainly I've no reason to doubt what he says about the experiences he had serving his country and I've no reason to doubt the flashbacks and all the rest of it that he describes and that he chose, as so many people do, a completely inappropriate but understandable coping mechanism and he managed to control himself for many years having gone through that, having drunk too much for a long time." He went on to comment that the effect of a 16 month delay from the events to sentence was that he was able to show that there had been no repeat of the behaviour, however worrying that extended wait had been.

17. The judge said towards the end of mitigation that he was prepared to be persuaded by Mr Mann that "what's in the PSR is probably in the particular circumstances of this case the proper way of dealing with it." At that point, if not before, it was clear that the judge was going to step outside the sentencing guidelines.

18. In his sentencing remarks the judge said "You are 34 years old. As we know from everything that we've read you served this country in the army for some time and …you were faced with at least one terrible event. I am not surprised to find that it has carried on affecting you, as it does with many people who go through these events not everyone does because it is a lottery whether it affects you or not, but it plainly has in your case. You chose to deal with it in a foolish way but understandably... not facing up to it trying to mask it by drinking too much.

19. He repeated his assessment that this was a drunken fight, that the respondent had picked up the bottle and used it once only. He told the defendant that he would have been facing a sentence of several years for this offence "particularly not helped by the fact that you did not face up to it at the trial but in all the particular circumstances of this offence bearing in mind as well the long delay and the fact that you have not reoffended I am just persuaded that it is appropriate to make the order that I am asked to do."

20. He continued, "the effect is in real terms that this is a suspended sentence because if you break this order you will be brought back and any breach will come before me if I am available and I will send you to prison for a significant length of time"

The AG's submissions

21. A number of points made in the written reference were not developed in argument before us and there is no need to refer to them. Mr Jarvis put the case before us with characteristic focus and clarity.

22. He first developed an argument to the effect that the judge must have had in mind a sentence of 4 or 5 years given the passage of the sentencing remarks to which we refer at paragraphs 18-20 above. He submitted that it was "difficult to unpick the sentencing remarks" to understand how he ended up with a community order. We disagree.

23. Taking the sentencing hearing as a whole it is clear that the judge first gave consideration to the guideline (see paragraph 15 above). Having concluded that following the guideline would lead to a longer sentence than he could properly suspend he did not, as some may have done, seek artificially to reduce the sentence to 2 years so that he could suspend it. He recognised that he either followed the guideline or he did not. That was a principled approach.

24. Mr Jarvis submitted that the judge did not explain why he was taking such an unusual course. He said that the judge did not engage with the interests of justice test in his sentencing remarks but he was careful to add that he was not saying that the judge had not applied the appropriate test – rather that he had not explained it. Whilst the judge did not say in terms that he considered it in the interests of justice to depart from the guideline, any fair and balanced reading of the sentencing hearing and the sentencing remarks which he addressed in somewhat conversational terms to the defendant, leads to the clear conclusion that he was departing from the guideline to achieve a just sentence in this case namely a Community Sentence.

25. Mr Jarvis drew to our attention that there was no punitive element in the sentence which he submits renders it unlawful. We agree.

26. By Section 177(2A) of the Criminal Justice Act 2003 ,where the court makes a community order, the court must - (a) include in the order at least one requirement imposed for the purpose of punishment, or (b) impose a fine for the offence in respect of which the community order is made, or (c) comply with both of paragraphs (a) and (b).

27. The court did none of these. By operation of subsection (2B), subsection (2A) does not apply where there are exceptional circumstances which (a) relate to the offence or to the offender, (b) would make it unjust in all the circumstances for the court to comply with subsection (2A)(a) in the particular case, and (c) would make it unjust in all the circumstances for the court to impose a fine for the offence concerned

28. We do not consider that any of the exceptional circumstances in Section 177(2B) were satisfied in this case. It is unfortunate that these provisions were not drawn to the attention of the judge leading him to impose a sentence which was unlawful and, in the absence of punishment, unduly lenient.

29. As we have already said the probation officer had recommended unpaid work, notwithstanding that the respondent was in full time employment and the respondent was prepared to undertake such work. He still is. The recommendation was appropriate. The reason the judge did not impose an unpaid work requirement is clear from the exchanges during the hearing namely that there was no possibility at that time of unpaid work being offered because of the effects of the Covid 19 pandemic. It was not pointed out to the judge (as it should have been) that there was no barrier to ordering unpaid work so that it could be carried out within 12 months of the making of the order, as and when such work became available. That course should have been taken here. Since August, increasing amounts of unpaid work have become available. We would expect that to continue, subject inevitably, to some interruptions as the Probation Service copes with the changing and difficult situation.

30. But even had the judge imposed an unpaid work requirement the position of the Attorney General would have remained the same. Distilled to its essential component Mr Jarvis' submission was that there was nothing about the offence or the defendant which the judge could properly have relied on in coming to a decision that it was not in the interests of justice to follow the guidelines in this case and impose a sentence of immediate imprisonment. We disagree.

31. It was accepted by prosecuting counsel at trial and by Mr Jarvis that there was a connection between the respondent's experiences in Afghanistan and the offence. The judge was clearly deeply affected by the respondent's account of what had happened and placed significant emphasis upon the fact that the trauma the respondent experienced was in the service of our country. Military service even in the most difficult conditions does not lead automatically to lenient sentencing for crimes committed later in life. Much depends on the circumstances of the case. The judge had read a great deal about the respondent and had observed him throughout the trial. That, taken with the other features to which we have already referred led him to conclude that a lengthy prison sentence would be unjust.

32. We were provided with an updated report from a different probation officer. The respondent has responded well to the community order, maintaining contacts and engaging in discussions with his probation officer. He is still working and has cut down his drinking. He is ready willing and able to engage with the Alcohol Treatment team and it is highly regrettable that he is still waiting for his first appointment three months after the order was made. We are told that this is to be escalated by Probation to the provider's managers. It hardly needs to be said that delay in treatment of this sort is fraught with danger. We would expect this issue to be resolved swiftly. The probation officer suggests that an Alcohol Treatment order of 12 months duration would have a better prospect of success than the current 6 months order.

33. It is very rare that following the sentencing guidelines will be contrary to the interests of justice. This very experienced judge had time before sentence to reflect and approached the sentencing exercise in a principled fashion. We are not persuaded that he was wrong to conclude that it would be contrary to the interests of justice to follow the sentencing guideline on the particular facts of the case before him. Nor, in the context of such facts, was he wrong to pass a Community Order, provided that it included the necessary punitive element.

34. The sentence was unlawful by reason of the absence of a punitive element and was therefore unduly lenient and we quash it. We replace it with a three year Community Order starting from the date of sentence and a Rehabilitation Activity Requirement of 30 days from date of sentence. There will also be an unpaid work requirement of 200 hours and an alcohol treatment requirement of 12 months from today.