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NCN: [2021] EWCA Crim 1244

IN THE COURT OF APPEAL

CRIMINAL DIVISION



No. 202102023 A2

Royal Courts of Justice

Tuesday, 27 July 2021

Before:

LADY JUSTICE CARR
MR JUSTICE SPENCER
HIS HONOUR JUDGE MICHAEL CHAMBERS QC

REGINA
V
AAI

**REPORTING RESTRICTIONS:
THE PROVISIONS OF SECTION 45 OF THE
YOUTH JUSTICE AND CRIMINAL EVIDENCE ACT 1999 APPLY**

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5 New Street Square, London, EC4A 3BF

Tel: 020 7831 5627 Fax: 020 7831 7737

CACD.ACO@opus2.digital

Mr. J. Scobie QC appeared on behalf of the appellant.
The Crown were not represented.

JUDGMENT

LADY JUSTICE CARR:

1 This judgment carries a reporting restriction under section 45 of the Youth Justice and Criminal Evidence Act 1999. No matter relating to the applicant in these proceedings may be included in any publication if it is likely to lead members of the public to identify him as a person concerned in the proceedings, in particular his name, his address, the identity of any school or other educational establishment attended by him, the identity of any place of work and any still or moving picture of him.

Introduction

- 2 This is an application for leave to appeal against sentence which has been referred by the Registrar to the full court. We grant leave.
- 3 The appellant is now 17 years old. He suffers from autism and learning difficulties and has complex welfare needs. On New Year's Eve 2020, when he was 16 years old, he committed a serious offence of wounding with intent, contrary to section 18 of the Offences Against the Person Act 1861. He was charged, and in due course, pleaded guilty. He was sentenced on 28 June 2021 by his Honour Judge Fraser ("the Judge"), sitting in the Crown Court at Guildford to four years' detention under section 250 of the Sentencing Act 2020 ("section 250").
- 4 Mr Scobie QC, who did not appear below, appears for the appellant. We are grateful for his helpful submissions. He has been accompanied in court by members of the appellant's large family including his grandmother, his great grandmother, two uncles, a brother and his father. In addition, the court has been assisted by the presence of Ms Francis from the Youth Offender Service and Ms Ralph, a specialist treating nurse.

The facts

- 5 At about 5.40 p.m. on New Year's Eve 2020 Mrs Jacqueline Coomber, a 36-year-old lady,

arrived by train at Oxted Station, Surrey on her way back from work. She walked a short distance down Station Road West towards her home. Walking behind her was a group of youths, including the appellant. There had been previous episodes of anti-social behaviour by youths outside Mrs Coomber's home, which she had reported. As she approached her home, she saw the group gathering outside. She told them to move, but they shouted at her, some mocking her American accent. Her 46-year-old husband, Mr Grant Coomber, was at home and heard the commotion. He went outside to assist his wife and saw a group of eight to ten youths standing in an arc facing her and shouting. He approached his wife and asked what was going on. He tried to calm the youths. A female attempted to speak to him, but he could not hear what she said. A male youth kept trying to butt into their conversation in an aggressive fashion. Mr Coomber tried to wave that male away in order that he could speak to the female youth, but the youth punched Mr Coomber two or three times to the left side of his face.

- 6 The appellant then struck Mr Coomber to the neck with a knife. Mr Coomber felt a sharp blow and knew he had been cut, but did not realise the severity of the wound at the time. The group then scattered and ran off. The appellant was heard to say, "I've sliced him, I've sliced him." He dropped the knife.
- 7 Mr and Mrs Coomber returned to the station to seek help. Mrs Coomber also telephoned the emergency services. Railway staff applied bandaging and pressure to the wound until medical assistance arrived. Mr Coomber was by now slipping in and out of consciousness. He was eventually placed on the floor. Paramedics arrived and cut the clothing from his torso in order to treat the wound with a blood clotting agent and to administer oxygen. It took 12 to 13 minutes to stabilise his condition. He was taken by ambulance for emergency surgery at Saint George's Hospital. The injury was an uneven, horizontal, 6 to 8-inch laceration, running from the left ear under the jawline to the middle of the throat. The wound was cleaned and the blood vessels were cauterised. The wound was closed with

sutures, and Mr Coomber was discharged in the early hours of the next day.

- 8 A blue, plastic-handled Stanley knife was found near the scene bearing Mr Coomber's blood and DNA, and also the applicant's DNA, were recovered from its handle. The appellant was arrested on 7 January 2021 after attending Redhill Police Station by prior arrangement. He remained silent in interview.

The sentence below

- 9 The Judge carried out a careful sentencing exercise. He recited the facts and the devastating consequences that the attack had had on the Coomers. He took account of the appellant's previous good character, his youth and his guilty plea, in respect of which he allowed 30% credit. He stated that, alongside the submissions in mitigation, he had considered all the material before him, including a detailed Pre-sentence Report, a psychiatric assessment and in particular, the effects of the appellant's diagnosis of Autistic Spectrum Disorder ("ASD") on social interaction and his understanding, a psychological report underlining the effects of that disorder on the appellant's behaviour, the appellant's effective mental age and complex psychological needs, the Child Adolescent Mental Health Services ("CAMHS") report, setting out the appellant's learning difficulties, his limited formal education and his social isolation over the years, the Communication Passport setting out the appellant's communication difficulties, the appellant's letter in which he stated how sorry he was for what he had done and a letter from his mother.
- 10 The Judge also considered the relevant Sentencing Council Guidelines, including the Guideline on Assault ("The Assault Guideline"), the Guideline on the Overarching Principles for Sentencing Children and Young People ("the Young People Guideline") and the Guideline on Sentencing Offenders with Mental Disorders ("the Mental Disorders Guideline").

- 11 The Judge assessed harm initially to be greater, and culpability to be higher. Culpability was higher, given the use of a Stanley knife to inflict injury. He noted that culpability was reduced by a mental disorder. He stated that he would return to that matter, wanting to deal with it alongside the appellant's age and other vulnerabilities. The appropriate starting point, he said, for an adult having committed this offence without any mental disorder linked to the commission of an offence would have been one of 12 years' imprisonment. The Judge concluded that the starting point had to be a custodial sentence, given the serious nature of the offence. Full regard was given to the appellant's vulnerability, ASD diagnosis and consequent difficulties, his limited education, and thus, his social isolation, having less formal schooling at the age of 12, his immaturity and consequent susceptibility to the influence of others and the limits of his understanding of the consequences of his actions.
- 12 Having had regard to the appellant's welfare and the need to prevent him from committing any more offences, the Judge considered whether a detention and training order or a youth rehabilitation order with intensive supervision and surveillance should or could be imposed. This was an extremely serious offence, said the Judge; he took the view that the only appropriate sentence, notwithstanding all of the appellant's very significant vulnerabilities, was a term of detention under section 250.
- 13 Despite the appellant's age and vulnerabilities, he said, this offence was so serious that nothing but a significant custodial sentence could be justified. He went on to conclude that there was insufficient evidence to make out a finding of dangerousness. The Judge then reduced the starting point from 12 years to 6 years. Taking account of the 30% reduction for the plea, and keeping in mind the additional difficulties caused by COVID, the shortest sentence that could be imposed was 4 years' detention. The appellant had been on qualifying curfew for 169 days of which one day was the equivalent of half a day in custody which would count towards his sentence.

The Pre-Sentence Report, medical evidence and other material

14 Before turning to the grounds of appeal, we summarise the relevant reports as follows.

15 First, there was a psychiatric report from Dr Al-Taiar, dated 15 April 2021. Dr Al-Taiar concluded that the appellant was suffering with features of a moderate depressive episode in the background of recurrent depressive disorder and triggered by social stressors. In addition, his presentation and history suggested that he was suffering with a mild form of learning disability. He also had the features of ASD. It was likely that this condition would worsen should he be sent to custody, as he might be vulnerable to exploitation. Amongst other things, offenders with ASD have an impaired ability to understand the mental state of others to interpret social intentions and subtle social nuances. They can become confused and overwhelmed, especially under stress, and manifest poor impulse control, aggression and negative peer interaction. They have difficulty processing information in the same way that another person would in terms of statements made by other people and their conduct. An offender with ASD does not understand the world in the way that everyone else does. The appellant's presentation and risk levels did not however, he said, warrant treatment in a secure psychiatric hospital or follow-up by the forensic psychiatric services.

16 Secondly, there was a psychological assessment from Ms Merrill, dated 20 March 2021. Ms Merrill had been assisted in her assessment by Ms Astbury, an autism specialist. Ms Merrill concurred with a diagnosis of ASD. She noted the appellant's IQ as 67, which was in the extremely low range, and in the bottom 1% when compared to his peers. The appellant demonstrated a range of difficulties in interview which were consistent with both ASD and a low level of cognition. He demonstrated aspects of extreme anxiety, poor working memory, a lack of reciprocal social understanding and challenges with processing verbal communication. He appeared cognitively to be much younger than his actual age. He was unused to making decisions for himself, as he spent little time away from the family

environment, where he trusted those around him to make decisions for him. He had not been in education since the age of twelve and had no experience of developing socially and emotionally in a social environment. He did not go out of the home without a family member and had no experience of making decisions for himself. He had not developed the skill of evaluating information in order to make decisions. His reading age would be much lower than his chronological age and the information he needed to understand would have to be consistent with that understandable by a child of 10 years of age. He was unlikely to understand the consequential nature of making decisions either for himself or within the law. He appeared highly vulnerable. He did as he was told, appeared to question little and did not make his own decisions. He became anxious around groups of people, and emotionally withdrawn in order to cope with the situation. He did not ever go anywhere without someone who could interpret situations for him. He would not be able to understand or respond effectively to a large social group. He appeared easily to enter “fight or flight” state.

17 Ms Merrill stated that at the time of the offence he was out with his cousin, which was rare, and did not know what to do within the group. When the confrontational situation arose, he did not know where to go or what to do. It was unlikely that he had ever experienced this level of confrontation in public, as he did not go out. Prior to the incident, the appellant was already in an anxious state. In people with ASD anxiety was typical and acute anxiety could often lead to individuals being unable to cope, and “fight or flight” survival mode being enacted. The ability to process information in this state was reduced, and any confrontational situation would be extremely difficult to manage. ASD meant that social interaction and social understanding were areas of deficit. It was very likely that at that time of the incident he was unable to predict what would happen and unable to process what was going on effectively. He would not naturally consider the consequences of his action.

18 Thirdly, there was a Pre-sentence Report. This set out the background and indicated that the

appellant was very remorseful. He presented a medium likelihood of reoffending, posing a high risk of serious harm. A custodial environment, it was said, would make him extremely susceptible to the influences of more sophisticated offenders. There were concerns that this would have a long-term, damaging impact on the appellant's psychological well-being and the impact of this could lead to him self-harming again. There was the potential for him to form a criminal identity to cope, which could result in further offending. A community sentence would strive to put a more robust package together to address his likelihood of reoffending. A lengthy Youth Rehabilitation Order with intensive supervision and surveillance with an extended activity requirement of 91 days was the proposal put forward by the author, Ms Francis.

- 19 The Judge also had before him a cognitive assessment report dated November 2019 and an update from Ms Ralph at CAMHS dated 17 June 2021, together with a communication passport and letter from the appellant and his mother. His mother stated that the appellant was particularly dependent upon her. He rarely left her side. She described the effect of the criminal proceedings on the appellant's anxiety levels. For example, he was biting his fingers until they were sore and bleeding as a coping strategy.

Subsequent material

- 20 We have the benefit of an updated report from Surrey Young Offending Service dated 21 July 2021. The appellant has been at Lincolnshire Secure Children's Home. The case worker there states he has engaged well, with consistently positive behaviour, has been polite and well mannered. He has attended all the activities on offer to him. He ignores any negative behaviour and influences. He has engaged in classroom lessons. There are no emotional well-being concerns. He has, however, declined to take his medication due to a lack of trust. His young offending service worker states that, no doubt, the appellant has benefitted from the opportunities. However, there are continued concerns around his ability to manage his emotions whilst being detained and the impact on his long-term emotional

health. He is sensitive to noise and struggles with sleep due to the disturbances. He tends to agree because he is unable to process and it is easier for him to agree. It represents, in Mr Scobie's words, "a line of least resistance". Without regular input from mental health services the view is expressed that the appellant could start to self-harm again. The appellant's CAMHS worker agrees that the appellant complies because of a lack of understanding. There are concerns that all of his efforts are going into surviving until this appeal hearing, and that when he becomes 18 next February, he will be moved to a Young Offender Institution, where he will struggle to manage. It is said that if a community order is still an option, a Youth Rehabilitation Order with intensive supervision and surveillance with interventions is still available.

- 21 Mr Scobie has indicated to us that the current position is that the appellant's hopes are pinned on this appeal. Through Ms Ralph, we are told that the appellant has been becoming more withdrawn and less communicative. By way of example, she spoke to him twice yesterday. Whilst he normally speaks at least to her, he shut down and was not talking at all. She repeated that he was, in her words, in survival mode. She indicated again that the appellant only trusts his mother, and is not taking his medication in his current placement. This could have a long-term and major effect on the appellant's mood and mental health.

Grounds of appeal

- 22 Mr Scobie indicates at the outset that he does not seek to diminish the gravity of this offending; nevertheless this was an spontaneous single slash by someone who was not a habitual knife carrier. His central submission is that this case cried out for a finding of lower culpability, given the particular features set out in the addendum defence sentencing note where, in essence, the central headlines of the psychological report of Ms Merrill are drawn out. This appeal is brought because this appellant has a mental disorder. His level of understanding is entirely different to that of someone without ASD. At the moment, the appellant is in coping mode. Under the sentence as currently imposed upon

him, he faces the prospect of being placed amongst habitual young criminals – and he will be exploited. He is someone who complies with anyone, good or bad. The essence of the concerns expressed are that the appellant will be placed potentially in a position which will have irrevocable, long-term consequences for his future.

- 23 It is submitted that, in balancing the nature of the reasons for the appellant's actions and the intent necessary for an offence under section 18, the Judge failed adequately to reflect the the level of the appellant's understanding of the consequences; his level of understanding was different to the understanding of another without the same disability. Here, it is said there was a direct alternative to immediate custody. The Youth Rehabilitation Order on offer was not a soft option. Four years' detention is a very long time for someone in the appellant's position. The Judge failed to appreciate the circumstances overall.

Discussion and analysis

- 24 As set out in the Young People Guideline, when sentencing young people, the court must have regard to the principal aim of the youth justice system (to prevent offending by young people) and the welfare of the young person. The seriousness of the offence will be the starting point. The approach to sentencing should be individualistic and focused on the young person, as opposed to offence focused. The sentence should focus on rehabilitation where possible. A court should also consider the effect that the sentence is likely to have on the young person, both positive and negative, as well as any underlying factors contributing to the offending behaviour. The court should have regard to factors that may diminish culpability, such as immaturity, susceptibility to peer pressure and a failure to fully appreciate the effect of their actions. When considering a young person who may be particularly vulnerable, sentencers should consider which disposal is best able to support the young person and which disposals could potentially exacerbate any underlying issues. This is particularly important when considering custodial sentences, as there are concerns about the effect on young people of being in closed conditions with significant risks of self-harm.

25 In terms of assessing culpability, the Mental Disorder Guideline identifies that the sentencer should make an initial assessment of culpability in accordance with any relevant offence specific guideline, and then consider whether culpability was reduced by reason of the impairment or disorder. The Mental Disorders Guideline identifies three questions which may be a "useful starting point", namely: at the time of the offence did the offender's impairment or disorder impair their ability i) to exercise appropriate judgment ii) to make rational choices iii) to understand the nature and consequences of their actions.

26 To put matters in context, putting aside the question of dangerousness, the Judge had the following options in principle:

- i) A Youth Rehabilitation Order, with or without intensive supervision and surveillance. This is a community sentence with a maximum length of three years;
- ii) A Detention and Training Order. This is a custodial sentence with a maximum term of two years;
- iii) Detention. A Detention Order under section 250 may only be imposed if the court is of the opinion that neither a Youth Rehabilitation Order or a Detention and Training Order is suitable. There is no statutory minimum period, but in practice, the offence should merit a sentence of significantly more than two years. Thus, whilst a sentence of detention for less than two years may be passed in appropriate circumstances, that is likely to be rare (see *R (D) v Manchester Youth Court* [2001] EWHC 869 (Admin); [2002] 1 Cr App R (S) 135).

27 In reality, the options facing the Judge were either Detention or a Youth Rehabilitation Order with intensive supervision and surveillance. The appeal has proceeded on that basis.

28 As the Hudge remarked, this was not an easy sentencing exercise. On the one hand, this was an extremely serious offence. On the other hand, it was committed by a vulnerable

young person, due to his ASD, with serious learning difficulties, extreme immaturity and social isolation. The question here is whether the Judge got the balance right.

29 We have come to the view that the gravity of this offending was so severe that he had no option but to impose a significant custodial sentence. We start with the Assault Guideline. It is common ground that this was a case of greater harm with injury that was serious in the context of the offence. This was a terrifying attack in which Mr Coomber could very easily have died, and indeed, almost did die. Mr Coomber speaks of the excruciating pain, terror and humiliation that he felt at the time. He thought that he was going to die. He explains how the trauma of the night has robbed him and his wife of their peace, safety, well-being and view of the world. They now have additional home security measures in place. Their ability to work has suffered. Mr Coomber sometimes hardly sleeps at night, and he has nightmares when he does. He has been diagnosed with post-traumatic stress disorder, moderate depression and impaired social functioning. He has become withdrawn and is not communicating well. He has undergone cognitive behavioural therapy. He is aware of his scarring and he cannot shave normally. His ability to focus on hobbies, relax and enjoy life have been affected. Mrs Coomber also speaks of the horror of the incident. She did not sleep for days. She too now struggles with work and has memory difficulties.

30 Equally, the Judge was right to make an initial assessment of culpability before considering the appellant's mental disorder in line with the Mental Disorder Guideline. On that basis, this was higher culpability offending, given the use of a weapon. The Judge adopted the term of 12 years for an adult offender. In our judgment, this was generous to the appellant. There were the following aggravating features: Mr Coomber had come out of his home into street at night to protect his wife and calm the situation down; his wife was present at the time of the attack on her husband; there were on-going effects on both of them; the appellant was part of a group on a public street in the dark; he left the scene and disposed of the knife. A term materially longer than 12 years would have been justified for an adult

before taking into account the mitigation available, including the factors pointing towards reduced culpability.

31 The Judge then considered the appellant's ASD and other difficulties. The appellant was well out of his normal comfort zone, out with his cousin in a group when he did not know how to behave. He was already agitated. His ability to process information was reduced, and the confrontational situation difficult for him to manage. The appellant would not naturally consider the consequences of his actions. In addition, he was extremely immature, with learning difficulties.

32 Whilst these matters can be said to have been linked to the commission of the offence, thus reducing culpability, it cannot however be said that the appellant's culpability was extinguished. Whatever the reason for the presence of the knife in his pocket, the appellant remembered that it was there in time to use it. By his guilty plea, he used the knife intending to cause Mr Coomber really serious harm. From his exclamations in the immediate aftermath, he was in no doubt that he had succeed in wounding Mr Coomber. Having dropped the knife and left the scene, it appears that the appellant went to ground after the attack and abandoned his telephone. The first activity on his new telephone was on 5 January 2021, two days before his arrest. We note that careful attention was paid to the question of whether or not the appellant was fit to plead and able to form the relevant intentions.

33 The Judge was, in our judgment, entitled then to take a global approach to the mitigation available to the appellant, including the factors pointing to lower culpability, alongside his youth and good character. The factors giving rise to his reduced culpability, in particular, his ASD, youth and immaturity all overlap. A reduction of 6 years, 50% of the term adopted by the judge for an adult without mental disorder, cannot in our judgment be said to be unreasonable. Then, there was credit afforded for the guilty plea and for the

circumstances arising out of the pandemic. As we have indicated, the Judge would in fact have been entitled to start at a term well beyond 12 years. In these circumstances, we cannot accept that the Judge was wrong to take the view that the only appropriate sentence was a custodial term of detention. He put it this way:

"This is an extremely serious offence, and I am afraid, I have come to the view that the only appropriate sentence, notwithstanding all of your significant vulnerabilities, is a term of detention for this serious offence, and that despite your age and vulnerabilities, your offence is so serious that nothing but a significant custodial sentence can be justified."

34 Without more, we would not be prepared to say that the sentence was either manifestly excessive or wrong in principle. But there is more. Unlike the Judge, we have the advantage of knowing how the appellant has responded to his circumstances since sentence, and of being able to see with greater clarity the effect of serving time in his present environment and the concerns for the future in adult detention. The reason for his general compliance at the moment is simply because he takes the least line of resistance. The new material reveals starkly and in particular the difficulties and potentially long term harm that a significant period of detention, in due course in a Young Offender Institution, will cause him. We have already noted the fact that the appellant is currently not taking his medication because of trust issues away from his mother. The further information highlights the degree to which the appellant would, undoubtedly, be particularly vulnerable in the environment to which he will move when he reaches the age of 18 next February. The impact on him will be significantly greater than it would be on somebody without his difficulties.

35 To this end, in the light of the additional and more recent information that we have before us and which the Judge did not have, we consider that the term of detention can be and should be reduced so as to minimise the time to be spent by the appellant in an adult custodial environment. As we have indicated, this is in no way to criticise the Judge. We are reminded of the words of Lord Thomas CJ in *R v Rogers* [2016] EWCA Crim 801; [2016] 2

Cr App R (S) 36 at [8] where he considered the circumstances in which the court will receive updated information not before the trial judge. He referred to the comments of Lord Judge CJ in *R v Caines; R v Roberts* [2006] EWCA Crim 2915; [2007] 1 WLR 1109 at [44]:

“.....So...if a young offender has responded positively to his custodial sentence, and his progress is such that it may be counter-productive for him to serve the sentence actually imposed, it may be reduced on appeal, or changed to a non-custodial disposal, without any implied criticism of the decision of the Crown Court. In short, post sentence information may impact on and produce a reduction in sentence...”

36 We therefore propose to reduce the sentence, therefore, to one of three years' detention.

To this limited extent, we allow the appeal. The sentence of four years' detention is quashed. A sentence of three years' detention will be substituted in its place.

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5 New Street Square, London, EC4A 3BF

Tel: 020 7831 5627 Fax: 020 7831 7737

CACD.ACO@opus2.digital

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