[2021] EWCA Crim 734

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202001802/A1

Royal Courts of Justice

Strand

London

WC2A 2LL

Thursday 29 April 2021

Before:

LORD JUSTICE BEAN

MRS JUSTICE FARBEY DBE

RECORDER OF NEWCASTLE

(HIS HONOUR JUDGE SLOAN QC)

(Sitting as a Judge of the CACD)

REGINA

V

MYCKEL RICHARDO BETTY

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NON-COUNSEL APPLICATION TO REINSTATE AN ABANDONED APPEAL AGAINST SENTENE

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J U D G M E N T

LORD JUSTICE BEAN: On 20 March 2020 Myckel Betty and his cousin, Duvon Betty (both then aged 17), were convicted in the Crown Court at Stoke-on-Trent following a trial before Mr Recorder Gumpert (as he then was) and a jury, of an offence of wounding a man called Nathan Lockley with intent contrary to section 18 of the Offences Against the Person Act 1861. On 25 June 2020 HHJ Gumpert (as the judge had then become) sentenced Myckel Betty to five-and-a-half years' detention in a young offender institution and Duvon Betty to 5 years' detention.

Counsel, Mr Woodhouse, was asked to, and did, advise Myckel Betty to make an application for leave to appeal against sentence. His advice was dated 7 July 2020 and an application was duly lodged.

On 29 July 2020, before counsel had had any opportunity to discuss the matter with Myckel or vice versa, Myckel signed a notice of abandonment of his application.

Duvon had also applied for permission to appeal against sentence. He did not abandon his appeal. He was granted leave to appeal by the single judge and, on 23 February 2021, this Court (Stuart-Smith LJ, McGowan J and Sir Alan Wilkie) allowed Duvon's appeal against sentence and made a substantial reduction in his sentence.

Myckel Betty now applies for permission to treat the notice of abandonment as a nullity.

The Criminal Procedure Rules rule 36.13(5) states that:

> "(5) An [applicant] who wants to reinstate an application or appeal after abandoning it must—
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> (a)apply in writing, with reasons; and
>
> (b) serve the application on the Registrar."

This is an open textured rule but the jurisdiction to reinstate an abandoned appeal is exercised in accordance with case law. The leading case is the decision of a five-judge constitution of this Court in the case of R v Medway (1976) 62 Cr App R 85. The judgment of the Court, delivered by Lawson J, contains a long and scholarly review of the previous case law on the topic. The effect of the case is well summarised in the headnote which states:

> "The Court has jurisdiction to give an applicant or appellant leave to withdraw a notice of abandonment of appeal or application for leave to appeal where the notice of abandonment can be treated as a nullity, ie where the abandonment was not the result of a deliberate and informed decision - in other words, where the mind of the applicant or appellant did not go with his act of abandonment. Headings such as mistake, fraud, wrong advice, misapprehension etc should be regarded only as guidelines, the presence of which may justify the exercise of such jurisdiction of the Court and are not exhaustive of the types of case where this jurisdiction can be exercised.
>
> There is no inherent jurisdiction in enabling the Court to give leave in other special circumstances."

Medway has been followed in many subsequent cases. But we observe that the phrase "where the mind of the applicant or appellant did not go with his act of abandonment" is not the wording of a statute; it is an alternative way of expressing the previous phrase "where the abandonment was not the result of a deliberate and informed decision".

It would, we think, be inappropriate in a case as clear as this to embark on a detailed examination of what was in the mind of Mr Betty when he signed the notice of abandonment. It may have been a deliberate decision, but could hardly be said to be an informed one. He has given some information in a letter to the court saying that he was depressed about the case and the sentence and did not want to face another court hearing.

In the ordinary case, these might be insufficient reasons to bring the application within the principle laid down in Medway. But this is a very striking case. It would be wrong in our

view for this court, on an application by one of two co-defendants whose cases are very similar (though, as we shall come on to point out, not identical) to take no action when this court has already decided, on a full appeal by his co-defendant, that the sentencing judge made an error of principle which applies equally to both cases.

We therefore grant permission to Myckel Betty to reinstate his application for permission to appeal. We will go on to consider the application for permission to appeal against sentence. We grant leave to appeal.

In the light of the previous decision of this Court we have come to a clear conclusion. We shall say what our decision is. Since the appellant (as he now is) is neither present nor represented before us he will have seven days after notification of the decision to inform the Court if he wishes to apply for any reconsideration of the case, although we are not encouraging him to do so.

We turn to the facts. On the evening of 20 September 2019 Nathan Lockley had been out drinking with his girlfriend in Stoke-on-Trent. The two of them decided to walk to a friend's house in the Norton area. As they walked towards the centre of Norton they noticed a group of teenagers on the Village Green. A female who had been part of that group of teenagers became abusive towards Mr Lockley's girlfriend (Rachel Stevenson) and a fight ensued between them. Mr Lockley intervened in that fight and attempted to separate Ms Stevenson and the teenager she had been fighting with.

Mr Lockley subsequently became aware of Myckel and Duvon Betty who had arrived on the scene. They initially told Mr Lockley to "fuck off", Mr Lockley responded by telling them to do the same and thereafter he was attacked and stabbed. He attempted to getaway from the incident and started to run, however he was pursued by Myckel and Duvon Betty, slipped, fell and landed on his back. He was attacked once again and stabbed in his left

arm and the left side of his chest. Myckel and Duvon Betty subsequently ran from the scene. Nathan Lockley was conveyed to hospital.

More by luck than judgment on the part of either of the two cousins Betty, the medical intervention at hospital was very successful. The victim was discharged from hospital after approximately 2 hours.

The learned judge passing sentence on Duvon Betty and Myckel Betty took in each case a starting point under the section 18 guideline of 12 years. In the case of Duvon he found that Duvon had only kicked rather than stabbed the victim although he had been the one who had brought the knife to the scene. Duvon was of previous good character. The judge took a starting point of 12 years, made a deduction of 2 years for previous good character and the fact that Duvon had not used the knife, and said that the notional sentence for an adult would therefore have been 10 years. He made a reduction of 50% for Duvon's age and immaturity and imposed a sentence of 5 years.

This Court in its judgment in Duvon's appeal said that the judge had taken the wrong starting point. As the section 18 guideline makes clear, and as this Court made clear in the case of R v Fa Xue (30 April 2020); [2020] EWCA Crim 587, if a section 18 case is to be categorised as category 1, that is involving both greater harm and higher culpability, the injury classified as greater harm must be injury which is serious in the context of the section 18 offence, in other words, more serious even than the level of seriousness which is inherent in a conviction for causing grievous bodily harm with intent.

This Court held in Duvon’s appeal that that did not apply in the present case and that therefore the correct starting point under the guideline should have been 9 years. They then made the same deduction as the judge had in Duvon's case, taking the starting point for the notional starting point had Duvon been an adult down to 7 years and making the same 50%

reduction, resulting in a sentence on Duvon of three-and-a-half years' detention under section 91.

Turning to Myckel Betty. The judge, as we have said, took the same starting point as 12 years, added to it 2 years for the fact that Myckel had some previous convictions, reaching a notional starting point (had he been an adult) of 14 years reducing that by 50% to 7 years. The judge then made a further reduction for the fact that Myckel, unlike Duvon, had been on remand in local authority accommodation for 18 months up to the date of sentence. Because of the way in which certain types of pre-trial custody cannot be taken into account in the calculation of a sentence the judge, quite rightly, made a reduction so that the sentence imposed on Myckel was five-and-a-half years; it would otherwise have been 7 years had Myckel spent the time on remand in prison.

It seems to us that justice requires that we should follow the previous decision of this court in Duvon's case. The correct starting point should have been 9 years rather than 12 years. We shall then follow the judge's lead in adding 2 years for the previous convictions, making the notional sentence on an adult of 11 years, apply the same 50% reduction as the judge and this court did in Duvon's case to five-and-a-half years, and then make the same deduction to reflect the fact that Myckel had spent 18 months on remand in local authority accommodation.

The result is that we allow the appeal, quash the sentence on Myckel of five-and-a-half years' detention under section 91 of the 2000 Act and substitute a sentence of 4 years' detention under section 91 of the Powers of Criminal Courts (Sentencing) Act. The concurrent sentence of 4 months' imprisonment for possession of a bladed article remains unaffected.