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Neutral Citation Number: [2024] EWCA Crim 631

IN THE COURT OF APPEAL
CRIMINAL DIVISION



CASE NO 202401527/A1

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday, 24 May 2024

Before:

LORD JUSTICE WILLIAM DAVISS
MRS JUSTICE CHEEMA-GRUBB DBE
HIS HONOUR JUDGE DENNIS WATSON KC
(Sitting as a Judge of the CACD)

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

REX
V
DAVID RICHARDS

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground Floor, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MISS H BRICKEL appeared on behalf of the Attorney General
MISS K BROOME appeared on behalf of the Offender

J U D G M E N T

1. LORD JUSTICE WILLIAM DAVIS: On 27 October 2023 in the Crown Court at Croydon, David Richards was convicted of one offence of wounding with intent to do grievous bodily harm. On 27 March 2024 he was sentenced to a term of 24 months' imprisonment. That sentence was suspended for two years. Requirements were attached to the sentence, namely 250 hours of unpaid work and 38 days rehabilitation activity requirement. In addition a restraining order was made for a period of five years.
2. His Majesty's Solicitor General now applies for leave to refer that sentence to this court as unduly lenient pursuant to section 36 of the Criminal Justice Act 1988.
3. David Richards is now aged 59. In 2021 he lived on the first floor of a small block of flats in Croydon. In the flat beneath him on the ground floor lived a man named Philip Ennis. The flats had a communal garden. Mr Ennis's front door opened on to that garden.
4. The two men had lived as neighbours for about eight years. They did not get on. Mr Richards had regularly accused Mr Ennis of antisocial behaviour. He had set up a CCTV camera to monitor Mr Ennis's behaviour in the communal garden. More particularly, in November 2019 Mr Ennis had assaulted Mr Richards with a garden hoe. In May 2020 Mr Ennis's dog had bitten Mr Richards on the hand. Mr Ennis was charged with offences arising out of those incidents. In April 2021 he was on bail awaiting trial. He was ultimately convicted of the offences.
5. Mr Richards also was on bail in April 2021. That was in relation to an allegation of common assault on Mr Ennis. In due course Mr Richards was acquitted of that allegation.

6. On the morning of 29 April 2021, Mr Richards saw via his CCTV camera Mr Ennis ripping up plants in the communal garden and throwing them down the garden. At about 10.30 am Mr Richards went downstairs and into the communal garden. He was carrying a bag of garden tools in one hand and a set of shears in the other. He went towards Mr Ennis's front door. What followed was captured on CCTV footage. Mr Richards set down the bag close to Mr Ennis's front door. Mr Ennis was at or near to his front door. Within two to three seconds Mr Richards swung the shears twice at Mr Ennis. With the first swing Mr Ennis was struck on the top of his head. The second swing caught Mr Ennis's arm as Mr Ennis put his arm up to protect himself. The angle of the CCTV camera was such that Mr Ennis's action in the seconds before he was struck was not visible. In so far as it could be seen, it appeared that Mr Ennis had bent down in the direction of the bag of garden tools just before he was struck.
7. After he had been struck Mr Ennis went into his flat and called an ambulance. Mr Richards meanwhile moved away to another part of the garden. He called the police. When they arrived he showed the police officers the CCTV recording. He was arrested on suspicion of causing grievous bodily harm with intent. His response was: "Not even if I was defending myself?"
8. When interviewed, Mr Richards said that Mr Ennis had come out of his flat and that there had been a confrontation. Mr Ennis bent down as if to reach towards Mr Richards' bag of tools. It was at that point, said Mr Richards, that he had used the shears to defend himself. He gave a similar account in his evidence at the trial.
9. Mr Ennis sustained a six centimetre laceration to the top of his head. We have seen photographs of the injury. The laceration was gaping and significant. It required several sutures. The medical evidence was that Mr Ennis did not complain of any loss of

consciousness when he was treated at his local hospital immediately following the incident. He was discharged after the wound had been sutured. Mr Ennis returned to the hospital a week later complaining of headaches and vomiting. At that point the wound was healing well. A CT scan revealed nothing of significance. Post-concussion headache was the diagnosis. Mr Ennis was discharged again. He did not attend the hospital thereafter.

10. In November 2023, after the conclusion of the trial, Mr Ennis made a victim personal statement. He said that he still was getting headaches which made him sleep. He complained of discomfort in his eyes. He said: "I have to go to the opticians and I also have some further head scans to do." He also stated that he believed that what he described as his cancer had come back because of the stress resulting from the incident. There was and is no medical evidence in relation to any of those symptoms and complaints.
11. Mr Richards was not charged until 13 July 2021. Having been sent for trial by the Magistrates' Court he appeared on 8 September 2021 for the first hearing in the Crown Court at Croydon. He pleaded not guilty. The trial was first fixed for a warned list for the week of 20 June 2022. That date was vacated on 17 June because no defence counsel could be found. The trial was refixed for the warned list for the week of 20 February 2023. Again the date was vacated. As we have said, the trial did not take place until October 2023.
12. There was further delay. Sentence initially was adjourned until 19 January 2024 for the preparation of a pre-sentence report. In the event the report was not available. Mr Richards was not sentenced until 27 March 2024.

13. Mr Richards had been convicted as long ago as March 1982 of assault occasioning actual bodily harm and theft. He was fined and conditionally discharged. He was aged 17 at the time and he had not been convicted of any offence since then.
14. Mr Richards until 2019 had been in very regular employment. He then fell prey to back problems which prevented him from continuing his work in the security industry. It was because he had to spend so much of his time at his flat during the day that he came into contact with Mr Ennis. This was the context in which the difficulties between the two men arose.
15. In her sentencing remarks the judge set out in considerable detail the factual background. She had heard the trial. She had heard evidence in relation to the history between Mr Richards and Mr Ennis, as well as the account of each man in respect of the incident on 29 April 2021. In the light of her findings of fact, she considered the Sentencing Council Guideline for the offence of wounding with intent. She concluded that it fell into the category of medium culpability because a weapon had been used, albeit not a highly dangerous one. She noted that there was an element of lesser culpability because the circumstances could be regarded as indicative of excessive self-defence. She found that harm fell into Category 3. There was insufficient evidence of a grave injury or permanent condition.
16. The judge noted that within the guideline a Category 3B offence led to a starting point of four years' custody with a category range of three years to six years. She did not say whether the circumstances of the case required any adjustment of the starting point before consideration of mitigating and aggravating factors. Her only comment was that Council guidelines are not tramlines. She found that the offence was mitigated by the lack of any recent or relevant criminal history on the part of Mr Richards and by the history of

abusive behaviour by Mr Ennis towards him. She also took into account that the offence had been committed in April 2021 since when there had been no other offending.

17. The judge then said:

"Having taken all these matters into consideration, I take the view that the offence is so serious that only a custodial sentence can be justified, but given the mitigating factors in your case, I do propose to suspend that sentence. It seems to me that the least possible sentence that I can impose is a sentence of 24 months, suspended for 24 months."

18. She then moved on to consider the requirements to be attached to the suspended sentence order and the need for a restraining order.

19. On behalf of the Solicitor General it is argued that the case fell squarely into Category 3B. In relation to culpability, the judge's finding that there had been an element of self-defence had to take account of the fact that Mr Richards had deliberately placed himself into a position where a confrontation was possible. A history of abuse in the guideline is a lower culpability factor. However, the Solicitor General argues that the position in this case did not warrant moving into Category C. Thereafter the judge had regard to the element of self-defence and previous abuse as mitigating factors. The Solicitor General submits this amounts to double-counting. The judge reached a conclusion that the proper custodial term was two years but gave no proper explanation as to how she got there. This was a case where the starting point of four years could be reduced because of Mr Richards' good character and the delay. Those factors did not justify a reduction of two years. Thus it is said the sentence should have been of such a length that it could not have been suspended. In relation to suspension, it is submitted that the judge made no reference to the Imposition Guideline. Had she done so, she could

have concluded only that this was a case where appropriate punishment had to be met by immediate custody.

20. Miss Brickel represented Mr Richards at trial, at sentence and has appeared before us.

She argues that there was no element of double-counting by the judge. Had the judge intended to take account of self-defence and the history of abuse in relation to culpability she could and would have expressly adjusted the starting point. She did not do so.

Rather, these elements were considered as mitigating factors. Further mitigating factors were also referred to by the judge.

21. Miss Brickel also relies on the positive pre-sentence report from which it could be

concluded that rehabilitation was a realistic prospect. Although the judge did not refer to Ali [2023] EWCA Crim 232, her attention had been drawn to it. Ali provides that when a court has to decide whether a sentence must be served immediately or whether it can be suspended, the high prison population is a relevant factor. Taking all matters into account, Miss Brickel submits that whilst this was a lenient sentence, it was one reasonably open to the judge.

22. This was an unusual case. The history between Mr Richards and Mr Ennis was

significant. It played a substantial role in the events of 29 April 2021. Mr Richards was a man nearing his 60th birthday, of effectively good character, who had led a useful and law-abiding life prior to that date. His behaviour was completely out of character.

Mr Richards was a very unlikely candidate as someone who would wound another with intent.

23. Whatever one thinks of the hackneyed expression "guideline not tramlines", it does

convey the concept of flexibility which flows from statute, namely sections 59 and 60 of the Sentencing Code.

24. Section 59(1) requires the court to follow any relevant sentencing guidelines unless the court is satisfied that it would be contrary to the interests of justice to do so. That duty includes a requirement to impose on the offender, in accordance with the offence-specific guidelines, a sentence which is within the offence range: see section 60(2). Section 60(4) reads:

"If the offence-specific guidelines describe different seriousness categories-

- a. the principal guidelines duty also includes a duty to decide which of the categories most resembles the offender's case in order to identify the sentencing starting point in the offence range, but
- b. nothing in this section imposes on the court a separate duty to impose a sentence which is within the category range."

25. It is with those provisions in mind that the sentence imposed by the judge in this case must be considered. We accept that the Solicitor General legitimately can criticise the judge for failing to explain her reasoning clearly. That does not mean that she fell into error in her final sentence. There is no issue but that the case fell into Category 3 harm. The correct way to approach categorisation of culpability was first to decide which category most resembled the case of Mr Richards. Since his use of a weapon was the clearest indication of the level of culpability, it was appropriate to put the offence into culpability category B. The elements of lesser culpability properly could be considered both by reference to section 60 of the Code, as already cited, and taking into account the rubric within the specific offence guideline which reads:

"Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics giving appropriate weight to the relevant factors to reach a fair

assessment of the offender's culpability."

26. By that route it would have been correct to adjust the starting point for Category B downwards. In our view a sentence of three years before mitigating and aggravating features were considered would have been a reasonable conclusion.
27. The only aggravating factor applicable to Mr Richards was that he committed the offence whilst on bail. The mitigating factors were his lack of previous convictions, his positive good character, the delay in the course of the proceedings, the absence of any further offending since April 2021 and the positive features of the pre-sentence report. The overall reduction for mitigating factors which significantly outweighed the aggravating factor would have been a matter for the judgment of the judge. As we have said, it would have been helpful had she explained her approach. Standing back, we do not consider that a reduction of 12 months from the sentence of three years would have been unreasonable.
28. By that route the judge was entitled to reach a sentence of two years' imprisonment. The decision on whether the sentence should be immediate required consideration of the Imposition Guideline. The judge did not refer specifically to that guideline. She said that suspending the sentence was indicated because of the mitigating factors. In the guideline strong personal mitigation is a factor which is to be taken into account in determining whether a sentence can be suspended. The Solicitor General rightly argues that the guideline refers to factors on both sides of the equation. It is argued that this was a case in which appropriate punishment could only be achieved by immediate custody. The judge's failure to refer to that factor must undermine her conclusion.
29. We agree that in most circumstances the use of a weapon to wound somebody, coupled with the intent to do really serious harm, will require punishment by way of an immediate custodial sentence. However, we repeat, this really was an unusual case. The

circumstances were unusual. Given his background and age the offender was unusual. In all those circumstances it was not unreasonable for the judge to have concluded that it was not necessary to impose immediate custody in order to achieve appropriate punishment.

30. The test for whether a sentence is unduly lenient remains as stated by the then Lord Chief Justice in Attorney General Reference No 4 of 1989 [1991] WLR 41. A sentence is unduly lenient, "where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate."
31. We have applied that test to the sentence imposed in this case. Whilst the judge did not express herself with clarity, we are in a position to identify the findings of fact she made and the weight she gave to particular factors. Applying her findings in the way that we have, we are satisfied that the sentence imposed, whilst lenient, was within the range open to a reasonable judge dealing with this offence committed by this offender.
32. In those circumstances, whilst the sentence may have been lenient, it was not unduly so. We refuse leave to refer the sentence.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground Floor, 46 Chancery Lane, London, WC2A 1JE

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk