Neutral Citation Number: [2019] EWHC 2015 (Admin)

Case No: CO/1318/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT IN MANCHESTER
DIVISIONAL COURT

Manchester Civil Justice Centre
1 Bridge Street,
Manchester M60 9DJ

Date: 25/07/19

Before :

LORD JUSTICE HICKINBOTTOM
and
MR JUSTICE BUTCHER

- -

Between :

THE DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

- and -

PIERCE GILES

Respondent

- -
- -

Simon Heptonstall (instructed by **CPS Appeals and Review Unit**) for the **Appellant**
Rebecca Filletti (instructed by **Hay & Kilner**) for the **Respondent**

Hearing date: 25 July 2019

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Approved Judgment

Lord Justice Hickinbottom :

Introduction

1. This is an appeal by the Crown by way of case stated from the decision of justices sitting at the North Tyneside Magistrates' Court on 30 November 2018 to sentence the Respondent Pierce Giles in respect of an assault occasioning actual bodily harm, to which he had pleaded guilty, without having held a Newton hearing and reaching a factual determination as to whether (and, if so, the extent to which) (i) the Respondent had demonstrated towards the victim of the offence hostility based on his actual or presumed sexual orientation and/or (ii) the offence was motivated by hostility towards persons who are of a particular sexual orientation. It had been the prosecution case that the Respondent had demonstrated, or been motivated by, such hostility.

The Statutory Provisions

2. Section 143(1) of the Criminal Justice Act 2003 ("the 2003 Act") provides that, in considering the seriousness of any offence for the purposes of sentencing, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.

3. By section 146(3)(a) and (b), if the sentencing court finds an offence was committed in any of several identified sets of circumstances, it must treat that fact as an aggravating factor and it must state in open court that the offence was committed in those circumstances. I stress the mandatory nature of those requirements. The sets of circumstances identified include:

> "… that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on… the sexual orientation (or presumed sexual orientation) of the victim" (section 146(2)(a)(i)); and
>
> "… that the offence is motivated (wholly or partly)… by hostility towards persons who are of a particular sexual orientation" (section 146(2)(b)(i)).

I shall refer to those as "the homophobic circumstances". For these purposes, it is immaterial whether or not the offender's hostility is also based, to any extent, on any other factor (section 146(4)). It is important to note that the requirement of section 146(3)(b) – that, if so found, the court must state in open court that the offence was committed in homophobic or other section 146 circumstances – is an independent statutory requirement. That marks the abhorrence and stigma attached by Parliament to offences committed in such circumstances; and the public interest in the publication of the fact that an offence was committed in such circumstances.

4. References in this judgment to "section 146" are to section 146 of the 2003 Act, unless otherwise indicated.

5. Section 125(1) of the Coroners and Justice Act 2009 requires a sentencing court to follow any guidelines promulgated by the Sentencing Council. The Sentencing

Council's Definitive Guideline on Hate Crime sets out the following approach to sentencing for offences aggravated under section 146 (so far as relevant to this appeal):

> "A court should not conclude that offending involved aggravation related to… sexual orientation… without first putting the offender on notice and allowing him or her to challenge the allegation.
>
> When sentencing any offence where such aggravation is found to be present, the following approach should be followed….
>
> - sentencers should first determine the appropriate sentence, leaving aside the element of aggravation related to… sexual orientation… but taking into account all other aggravating or mitigating factors;
>
> - the sentence should then be increased to take account of the aggravation related to… sexual orientation…;
>
> - the increase may mean that a more onerous penalty of the same type is appropriate, or that the threshold for a more severe type of sentence is passed;
>
> - the sentencer must state in open court that the offence was aggravated by reason of… sexual orientation…;
>
> - the sentencer should state what the sentence would have been without that element of aggravation.
>
> The extent to which the sentence is increased will depend on the seriousness of the aggravation. The following factors could be taken as indicating a high level of aggravation…".

There then follows a list of factors. For example, it is factor indicating a high level of aggravation if "the expressions of hostility were repeated or prolonged". There is a second list of factors which may indicate that the aggravation is less serious, including if "it was limited in scope or duration" or if "the offence was not motivated by hostility on the basis of… sexual orientation…, and the element of hostility or abuse was minor or incidental."

The Facts

6. On 6 May 2018 at Wallsend, the Respondent assaulted a man called Guy Mowbray occasioning him actual bodily harm, contrary to section 47 of the Offences Against the Person Act 1861.

7. Based on evidence from Mr Mowbray and his friend Adam Rowe, it was the prosecution case that they were sitting at a table in a public house when the Respondent, who was sitting at the next table, accused Mr Rowe of deliberately staring at him, which Mr Rowe denied. The Respondent was abusive to Mr Rowe and

Mr Mowbray, calling them "gay" and making other homophobic comments. They tried to calm him down, but the argument between them became heated, and a member of staff came over to ask them to tone things down. The Respondent was abusive to her as well, and she said she was going to get the manager. At that point, Mr Mowbray heard the Respondent shout "You stupid puff". Mr Rowe said he heard him say, "You fucking puff" – and he (Mr Rowe) said that he felt shocked "because [he] didn't think people thought like that anymore and [he did] consider this to have a hate related factor to it". The Respondent then threw a glass at Mr Mowbray, hitting him to the back of the head. It caused a 3cm cut, for which he was treated briefly in hospital.

8. On 26 October 2018, the Respondent was charged with an offence under section 47. The prosecution notified both the court and the Respondent that, in the event of a conviction, it intended to ask the court to treat the case as aggravated by hostility on the grounds of sexual orientation in accordance with section 146.

9. The matter was first listed for plea before District Judge (Magistrates' Court) Elsey at North Tyneside Magistrates' Court on 23 November 2018, when the Respondent indicated that he proposed to plead guilty to the charge but only on the basis that no homophobic language was used and that there was therefore no statutory aggravation under section 146. He was obviously and understandably concerned at the prospect of a more severe sentence if he were to be sentenced on the basis that he had used homophobic language and found to have been hostile towards Mr Mowbray on the basis of his sexual orientation. Contrary to CrimPR rule 24.11(5)(a), no written basis of plea was submitted; nor did the Crown press for one. However, the prosecution made clear that it maintained the case as it presented on the full facts set out in the statements, including the homophobic abuse by the Respondent towards Mr Mowbray and Mr Rowe.

10. After hearing submissions, the District Judge said that he considered the custody threshold was met whether or not the offence was aggravated by homophobic hostility. He recognised that, if sentenced on the basis that the offence had been committed in homophobic circumstances, section 146 would require an uplift to the sentence; but he considered the uplift would be "marginal" as the words spoken were at the lower end of the scale of homophobic abuse. In his view, it would not be in the interests of justice to require the victim to attend court and face the ordeal of giving evidence if the sentence would not be significantly increased. He considered the Respondent should simply be sentenced on the basis of his plea – i.e. on the basis of his version of events – and he adjourned the matter to enable a pre-sentence report to be prepared.

11. The adjourned sentencing hearing was listed before a bench of three justices at the same magistrates' court on 30 November 2018. The justices were advised by their legal adviser that they were required to determine whether a Newton hearing (R v Newton (1983) 77 Cr App R 13; (1982) 4 Cr App R (S) 388) was required; and if they were satisfied that the prosecution version of events would attract a materially different sentence from the version of events put forward by the Respondent, then they should hear evidence to determine the correct basis for sentence. If they were not satisfied that there would be a material difference in sentence, the Respondent should be sentenced on the basis of his version of events.

12. The justices considered that the use of the glass as a weapon was such an aggravating factor that the homophobic comment as described by the Respondent, if found to be true, would not materially increase the level of sentence. They were therefore satisfied that a Newton hearing was not necessary, and proceeded to sentence on the basis of the Respondent's version of events.

13. Having considered the sentencing guidelines for assault, the Respondent's low risk of reoffending, his previous good character, his personal mitigation as a carer for his mother, his guilty plea and the recommendation of the author of the pre-sentence report, they imposed a 12 month community order with a rehabilitation activity requirement of a maximum of 15 days and 210 hours of unpaid work. They awarded £150 compensation to Mr Mowbray, £85 costs and £85 victim surcharge.

The Questions for the Court

14. In its case stated, the magistrates' court has posed the following questions for this court.

Question 1: Is it open to a court to determine that a case presented by the prosecution as aggravated by virtue of section 146, which is disputed by the defence, does not require a Newton hearing, where it is of the opinion that the existence of the aggravating factor would not make a significant difference to the sentence in the context of the case as a whole?

Question 2: If the answer to question 1 is "Yes", was the court right to make that determination in the circumstances of this case, being mindful that a Newton hearing would require the injured party to give evidence and be cross-examined?

Discussion

15. When an offender pleads guilty to an offence, unless he indicates that he disputes any part of it, he is taken as having done so on the basis of the prosecution case. A Newton hearing is held when an offender pleads guilty but disputes the case as put forward by the prosecution; and his version of events would, if true, make a material difference to the sentence. If there would be no material difference in sentence, even if the offender's version were true, there is no need to hold such a hearing. As the Deputy Lord Chief Justice (Judge LJ) put it in R v Underwood [2004] EWCA Crim 2256; [2005] 1 Cr App R 13; [2005] 1 Cr App R (S) 90 – a case which continues to give helpful guidance on the conduct of Newton hearings – at [10(e)]:

> "Where the impact of the dispute on the eventual sentencing decision is minimal, the Newton hearing is unnecessary. The judge is rarely likely to be concerned with minute differences about events on the periphery."

Where the dispute is material, then the court "must (i) invite such further representations or evidence as it may require, and (ii) decide the dispute" (CrimPR rule 24.11(5)(c)). Generally, it is inappropriate not to hold a Newton hearing merely to avoid the victim having to relive the trauma of the offence (R v Mackenzie [1985] 7 Cr App R (S) 441 at page 443).

16. At the 23 November 2018 hearing, as I have described, the District Judge considered that (i) the custody threshold would be met whether the offence was motivated by homophobic hostility or not; and (ii) if it was so motivated, section 146 required the sentence to be uplifted; but (iii) the uplift would be "marginal" because the words alleged to be used were "at the lower end of the scale of homophobic abuse"; and (iv) it was not in any event in the interests of justice to require Mr Mowbray to attend court "and face the ordeal of giving evidence if the sentence would not thereafter be significantly increased" (paragraph 7 of the Case Stated).

17. However:

    i) There was no evidence that Mr Mowbray would find attending court and giving evidence an "ordeal", and nothing to suggest that he would not have been ready and willing to give evidence had (e.g.) the Respondent pleaded not guilty and a trial had ensued; the fact that the District Judge considered it might be an ordeal for him is an indication of the possible serious consequences of the alleged homophobic hostility; Mr Rowe would also be able to give relevant evidence; and, in any event, as I have said, generally, it is inappropriate not to hold a Newton hearing merely to avoid the victim having to relive the trauma of the offence.

    ii) The District Judge described the words alleged to have been used as "at the lower end of the scale of homophobic abuse". However, such abuse is capable of disclosing homophobic hostility as a driver for the offence; the evidence was that the abuse was not limited to a single throw-away word cast as an aside, rather it was persistent; such abuse is capable of being "more deeply hurtful, damaging and disrespectful to the victims than the simple versions of these offences" (see R v Rogers [2007] UKHL 8; [2007] 2 AC 62 at [12] per Baroness Hale of Richmond); and the evidence was that the abuse shocked Mr Rowe.

    iii) The fact that the District Judge took the view that the custody threshold was in any event reached was not to the point: if homophobic circumstances were proved, then that was capable of materially increasing the length of any custodial sentence.

18. I am therefore unconvinced by the reasons the District Judge gave for considering that a Newton hearing was not necessary.

19. However, when the matter came before the justices for sentencing on 30 November 2018, they reconsidered afresh whether a Newton hearing was required. The only reason they gave for considering that such a hearing was not necessary was set out in paragraph 15 of the Case Stated, as follows:

> "We assessed the use of a weapon in the context of an assault occasioning actual bodily harm was such an aggravating feature that the homophobic comment as outlined by the [prosecution] would not materially increase our level of sentence. We were therefore satisfied that a Newton hearing was not necessary and proceeded to sentence on 30 November 2018 on the basis outlined by the defence."

20. With respect to the justices, I do not follow the logic of that reasoning. If homophobic hostility might have led to the use of a weapon against the victim, then it seems to me that that would or might be statutory aggravation of a particularly high level.

21. In my view, the justices clearly erred in not holding a Newton hearing to determine whether, as the prosecution alleged, the Respondent demonstrated hostility towards Mr Mowbray based on his actual or presumed sexual orientation, and/or the offence was motivated by such hostility, as evidenced by his alleged abuse towards Mr Mowbray and Mr Rowe. Both the District Judge and the justices appear to have accepted that the Respondent may have demonstrated or been motivated by such hostility. The version of events given by Mr Mowbray and Mr Rowe in their statements was clearly not fanciful – Ms Filletti did not suggest it was – and, if accepted, it would be highly likely if not certain to be concluded that the offence was committed in homophobic circumstances. If such hostility on the basis of sexual orientation were proved, then I do not see how, on the facts of this case, it could be said that it would necessarily be immaterial to the sentencing exercise. By section 146, where an offence is committed, Parliament has specifically marked homophobic circumstances as being a mandatory aggravating factor for sentencing purposes; and, whilst I would not go so far as saying that an offence committed in such circumstances must inevitably result in a more severe sentence, as Mr Heptonstall submitted it is difficult to think of circumstances in which in practice it would not. Such circumstances would be at most exceedingly rare. In my view, this case certainly does not fall into that category.

22. In any event, even if a case were to arise in which homophobic circumstances (or other circumstances falling within section 146) were found to be present at the time of the offence but the court could properly conclude that that would make no difference to the sentence to be imposed, section 146(3)(b) requires the sentencing court to state in open court that the offence was committed in such circumstances, if it is found that that was so; and, therefore, even if a Newton hearing were considered to be unnecessary for the purposes of sentencing, in my view the court would generally be bound to hold a hearing to ascertain whether section 146 circumstances existed at the time of the offence so that a statement under that provision could be made. It seems to me that to decline to make the relevant findings would frustrate the purpose of section 146(3)(b) which, as I have described, imposes a requirement independent of the requirement to treat the fact that the offence was committed in the relevant circumstances as an aggravating factor for sentencing purposes. Such statements serve a number of purposes. As Mr Heptonstall submitted, a statement ensures that, if an offender repeats such hostility in the future, there is a record of past offending involving such hostility. Furthermore, such a statement may be important to the victim and be in the public interest as reflected by the statutory provision.

23. Returning to section 146(3)(a) and the aggravation of the sentence, sentencing involves a good deal of judgment on the part of the sentencing court; but, where Parliament has constrained the discretion of the court by setting mandatory requirements when sentencing particular types of case, a sentencing court must remain true to those requirements. In this case, section 146 required the justices to grasp the nettle; and, at a Newton hearing, to determine to the criminal standard of proof whether the Respondent was homophobically abusive as Mr Mowbray and Mr

Rowe said in their statements he was; and, on the basis of the facts as they found them to be, whether homophobic circumstances for the purposes of section 146 were proved. If so, they were then required by the statute to consider the extent to which the sentence they would have imposed in the absence of those circumstances should be increased. In failing to take these steps, in my view, the justices clearly erred.

Conclusion

24. For those reasons, I would answer Question 1 with a highly qualified, "Yes": it is in theory open to a court to determine that a case presented by the prosecution as aggravated by virtue of section 146, which is disputed by the defence, does not require a Newton hearing, where it is of the opinion that the existence of the aggravating factor would not make a material (rather than "significant") difference to the sentence. However, where the evidence is such that it leaves open a finding that homophobic circumstances (or other circumstances set out in section 146) may be made out (and thus the statutory aggravation for sentencing purposes must be applied), it is difficult to conceive of circumstances which, in practice, the aggravation will be necessarily immaterial such that a Newton hearing to find the facts will not be required. Certainly, if such circumstances exist, they will be very rare in practice. In any event, for the reasons I have given, even if such a case were to arise, the court may be required to hold a hearing to ascertain whether section 146 circumstances were present at the time of the offence, so that a statement under section 146(3)(b) can be given in open court.

25. The answer to Question 2 is, "No": at the hearing on 30 November 2019, the magistrates court was wrong to conclude that, if section 146 circumstances were to be proved, then that could not make a material difference to the sentence in the context of the case as a whole. The court was required to hold a Newton hearing to find the relevant facts, and then make an assessment as to whether there were homophobic circumstances in this case and, if so, the extent to which the sentence should be increased as a result.

26. In the circumstances, subject to my Lord Butcher J, I would allow the appeal, quash the sentence imposed and remit the matter to the magistrates' court to re-sentence in accordance with this judgment.

27. The magistrates' court will wish to hold a Newton hearing to determine the facts; and then, dependent upon the facts as found, to determine whether homophobic circumstances attended this offence. If so, they will be required to make a statement to that effect in open court (section 146(3)(b)); and also to consider the extent to which those circumstances aggravate the sentence (section 146(3)(a)). As the Sentencing Guidelines suggest, that usually requires a two-stage process. First, the court will need to determine the sentence that would have been appropriate if the offence had not been attended by the homophobic circumstances. Second, the court will need to determine the aggravation to that sentence, in terms of the increase in the sentence, which the homophobic circumstances dictate. Generally, again as the Sentencing Guideline emphasises, transparency in sentencing will require the analysis to be set out in the sentencing remarks, no matter how briefly.

28. In this case, the magistrates will also have to consider whether, as a result of delay, double jeopardy and/or the part service by the Respondent of the sentence imposed on

30 November 2018, the sentence otherwise appropriate should be mitigated. Although a matter for the magistrates, Mr Heptonstall fairly and properly conceded, even if the magistrates were to find that the offence here was attended by homophobic circumstances and the sentence should therefore be made more severe, they may consider it would be unfair and unjust if the Respondent's sentence were substantially more severe than that previously imposed. There appears to me to be much force in that point.

Mr Justice Butcher :

29. I agree.