No: 201904318/A2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

[2020] EWCA 162

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday 4 February 2020

B e f o r e:

LADY JUSTICE SIMLER

MR JUSTICE LAVENDER

SIR PETER OPENSHAW

R E G I N A
v
BYRON STOKES

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Mr G Bedloe appeared on behalf of the **Appellant**

J U D G M E N T
(Draft for approval)

LADY JUSTICE SIMLER: On 7 October 2019 in the Crown Court at Lincoln, the appellant, who was then aged 20, born on 28 May 1999, pleaded guilty to offences of assault, contrary to section 20 of the Offences Against the Person Act 1861 and affray, contrary to section 3 of the Public Order Act 1986. He was sentenced on 21 November 2019 by Mr Recorder Watson to 27 months' imprisonment for the assault, with nine months concurrent for the affray. In view of his age a sentence of imprisonment should not have been passed. The sentence should have been announced as a sentence of detention.

The appellant appeals against that sentence with leave. We record that although the Recorder correctly announced that the victim surcharge order should apply, the order was incorrectly recorded in the court log as an order for £170. That must be quashed and for it the correct amount of £30 must be substituted.

The facts can be summarised as follows. On 23 February 2017 there was a spontaneously organised 5-a-side football match at a sports centre in Brixton. The match was a bad tempered one and when the opposition team scored against the team for which the appellant was playing, one of the opposition players, a man called Josh Smith, started celebrating. That led to him being punched in the face by a member of the appellant's team and his jaw was broken. Josh Smith retaliated. There was a scuffle. Others from the appellant's team rounded on him, punching and kicking him. Alex Smith, his brother, tried to pull him away but was also punched and kicked in the face. Alex Smith went to the floor at some point and the appellant's team rounded on him, punching and kicking him too. Alex Smith suffered a fracture to the left eye socket with damage to his right eye socket.

The following night, Alex Smith received a Facebook message from the appellant which said:

"You wanna watch your back, you little cunt". Josh Smith also received a message from the appellant, which said: "You've got slapped about last night. Watch your back chubbs."

The Crown's case at trial was that this was a joint enterprise of kicking and punching, that the kicks and punches to Alex Smith were while he was on the floor and by the use of shod feet. In due course four witnesses identified the appellant as the instigator and described him as such. In interview the appellant admitted presence but denied being involved in any violence. He refused to name any of his team mates. He did not ultimately plead guilty until the day of trial.

The appellant was 20 at the date of sentence. There was a lengthy delay (which is unexplained and most unfortunate) between the date of the commission of these offences and the sentencing hearing. He had no previous convictions but had a reprimand for assault occasioning actual bodily harm in 2012 and a youth caution for battery in 2016.

The pre-sentence report assessed him as a medium risk of re-offending and a medium risk of serious harm to others. Nevertheless, the report author referred to the period that had elapsed between the offence and the sentencing hearing, a period in which he had not come to the attention of police and had been proactive in disassociating himself from negative influences which contributed to reducing the risk of commission of further similar offences in the future. Having regard to the fact that the offences were committed just before he turned 18, the report writer also concluded that the risk he posed could be managed in the community by means of a 12-month community order with rehabilitation activity and unpaid work requirements.

The Recorder also had available (as have we) two victim impact statements from Alex Smith, the first dated 10 April 2018 and the second 7 October 2019. At the time of the first

statement, Alex Smith had not fully recovered from the physical injuries sustained and his eyesight remained affected. He was no longer playing football and felt anxious about going out in the Brixton area. By the time of the second statement he had made a full recovery from his eye injuries, though was still not playing football. No victim impact statement was provided by Josh Smith.

The Recorder categorised the assault as category 1 within the relevant Sentencing Council Guideline because there was both higher culpability and greater harm. That meant a starting point of three years with a range of two-and-a-half to four years' imprisonment for an adult after a trial. The Recorder treated the affray as aggravating the assault. He also regarded the offences as aggravated by the appellant's previous run-ins with police and by the location of the incident in a gym where people were playing what should have been a friendly game.

Against that in mitigation, the Recorder, although he was not referred to the Sentencing Council's Definitive Guideline on Children and Youth Sentencing ("the Guideline"), nonetheless referred to the appellant's age at the time of the offence and the passage of what he identified as 20 months (it should have been 30 months) since the offence that had led to a change in the appellant's circumstances. The Recorder described those as significant mitigating features, albeit without identifying to what extent he had reduced the notional sentence by reference to those features. Before credit he determined that the least sentence he could pass after trial would have been one of 30 months' imprisonment and he afforded 10 per cent credit, bringing the sentence down to 27 months.

In grounds of appeal both in writing and developed orally by Mr Giles Bedloe, counsel for the appellant, who also appeared below, the sentence is challenged as manifestly excessive and he submits, the judge was wrong not to have imposed a suspended sentence in this case.

Although Mr Bedloe accepts that it is most likely that he did not refer the Recorder to the Guideline he nonetheless contends that the Recorder failed to give sufficient weight to the appellant's youth and immaturity at the time of the offence in accordance with that guideline. He relies in particular on paragraph 6.3 which makes clear that where a significant age threshold is passed, it will rarely be appropriate that a more severe sentence than the maximum that the court could have imposed at the time the offence was committed should be imposed. He also relies on paragraph 6.42 which states that a custodial sentence must only be imposed as a measure of last resort; paragraph 6.43 which states that any custodial sentence must be the shortest commensurate with the seriousness of the offence; and paragraph 6.44 which states in determining whether an offence has crossed the custody threshold, the court must assess the seriousness of the offence, in particular the level of harm that was caused or was likely to have been caused, and must assess the risk of serious harm in the future. Finally, he relies on paragraph 6.46 which provides that when considering any relevant adult guideline the court should apply a discount depending on both chronological age and also, at least of equal importance, the emotional and developmental age and maturity of the child or young person. Mr Bedloe submits that in this case had the appellant been sentenced at the Youth Court, the maximum sentence would have been a sentence of detention of 24 months.

Even if the Guideline is disregarded, Mr Bedloe submits that this is a case where the Recorder ought to have reduced the sentence to a period that could have allowed for it to have been suspended. He emphasises the appellant’s immaturity at the date of commission of the offences as reflected by the messages he sent the following day, but he submits he has since matured, is now in a long term relationship and was midway through a plastering apprenticeship before the sentence, with the prospect of employment at the end of it. The

appellant had a difficult personal background and had remained out of trouble for the 30 months between the date of commission of the offences and the date of the sentencing hearing. Those were all exceptional circumstances that justified, he submits, the imposition of a suspended sentence in this case.

There is no dispute that this was a category 1 assault with greater harm because it was persistent and sustained, and higher culpability because of the use of shod feet. For an adult after a trial, as we have indicated, the starting point would have been three years.

We do not consider there is any basis for criticising the Recorder's approach in reflecting the affray offence in the overall sentence he imposed for the assault and for making an upward adjustment in light of the aggravating features to which we have referred. Nor, it seems to us, can the Recorder be criticised in any way for limiting credit to 10 per cent given that the appellant entered his guilty pleas on the date of trial and not earlier.

However, and while we do not consider that the Recorder can be criticised in this regard, we do consider there is force in the contention that inadequate regard was paid to the appellant's age. Had the Recorder been referred to the Guideline we consider a different approach would have been adopted.

The appellant was 17 at the date of the offences. He was not charged under 29 January 2018 and that delay is unexplained. By the date of charge, he was 18 years old and accordingly, had crossed a significant age threshold. We consider that paragraphs 6.1 to 6.3 are particularly relevant in this regard. They provide as follows:

> "6.1 There will be occasions when an increase in the age of a child or young person will result in the maximum sentence on the date of the finding of guilt being greater than that available on the date on which the offence was committed (primarily turning 12, 15 or 18 years old).
>
> 6.2 In such situations the court should take as its starting point the sentence

> likely to have been imposed on the date at which the offence was committed. This includes young people who attain the age of 18 between the commission and the finding of guilt of the offence26 but when this occurs the purpose of sentencing adult offenders27 has to be taken into account, which is:
> • the punishment of offenders;
> • the reduction of crime (including its reduction by deterrence);
> • the reform and rehabilitation of offenders;
> • the protection of the public; and
> • the making of reparation by offenders to persons affected by their offences.
>
> 6.3 When any significant age threshold is passed it will rarely be appropriate that a more severe sentence than the maximum that the court could have imposed at the time the offence was committed should be imposed. However, a sentence at or close to that maximum may be appropriate."

Had the appellant been sentenced at the Youth Court, Mr Bedloe is correct that the maximum sentence available would have been two years' detention. That sentence would have been available in the case of a persistent offender. Here, this was a nasty assault involving two victims, but Alex Smith made a full recovery. In those circumstances, and having regard to the maximum sentence available, it is our view that it would not have been appropriate to pass a more severe sentence than that maximum, having regard to the appellant's age.

Notwithstanding that conclusion, we consider that the Recorder was nonetheless entitled to pass a sentence of immediate custody. This was, as we have indicated, a serious assault and affray. It caused an unpleasant and serious injury to Alex Smith and in our judgment appropriate punishment can only be achieved by immediate custody in this case.

In light of these conclusions, we consider that the shortest sentence commensurate with the seriousness of the offending and having regard to mitigation and credit for guilty pleas, was a sentence of detention of 12 months. We therefore quash the sentence of imprisonment imposed by the Recorder and substitute for it a sentence of immediate detention of 12 months. The concurrent sentence of nine months' detention is undisturbed. To that extent only, the appeal is allowed.

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

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