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IN THE COURT OF APPEAL

CRIMINAL DIVISION

**[2022] EWCA Crim 1310**



Nos. 202202229 A3;

202202230 A3

Royal Courts of Justice

Wednesday, 14 September 2022

Before:

LORD JUSTICE SINGH  
MR JUSTICE FRASER  
MR JUSTICE HENSHAW

REX  
V

JOSHUA ANTHONY KEHOE (AKA YATES)  
GEORGE HARPER

**ATTORNEY GENERAL'S REFERENCE:  
Under Section 36 Of The Criminal Justice Act 1988**

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CACD.ACO@opus2.digital

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MR J DUFFY appeared on behalf of the First Respondent

MR K SUTTON appeared on behalf of the Second Respondent

MR B HOLT appeared on behalf of the Solicitor General

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**J U D G M E N T**

LORD JUSTICE SINGH:

### Introduction

- 1 This is an application on behalf of His Majesty's Solicitor General for permission to refer two sentences which are regarded as being unduly lenient under s.36 of the Criminal Justice Act 1988 ("the 1988 Act").
- 2 The principles to be applied on such an application are well established and have been summarised as follows:
  - (1) The judge at first instance is particularly well placed to assess the weight to be given to competing factors in considering sentence.
  - (2) A sentence is only unduly lenient where it falls outside the range of sentences which the judge at first instance might reasonably consider appropriate.
  - (3) Leave to refer a sentence should only be granted by this court in exceptional circumstances and not in borderline cases.
  - (4) Section 36 of the 1988 Act is designed to deal with cases where judges have fallen into gross error: see, for example, *Attorney General Reference (Azad)* [2021] EWCA Crim 1846, [2022] 2 Crim App R (S) 10 at para.72 in the judgment given by the Chancellor of the High Court.
- 3 In the present case, on 15 June 2022 at the Crown Court at Liverpool, HHJ Bond sentenced George Harper to a total of two years and eight months' imprisonment and Joshua Kehoe to a total of four years' imprisonment. Harper had pleaded guilty to five offences on the indictment. Kehoe pleaded guilty to four offences on the same indictment. There was one count, Count 5, which concerned only Harper. The other matters were to lie on the file in the usual way.
- 4 The lead offence in this case was an offence of causing grievous bodily harm with intent contrary to s.18 of the Offences Against the Person Act 1861. That was the subject of Count 2. Count 3 was an offence of causing grievous bodily harm contrary to s.20 of the 1861 Act. The judge imposed a sentence on Harper of four months' imprisonment made concurrent and a sentence of four months on Kehoe. Count 4 was an offence of assault occasioning actual bodily harm contrary to s.47 of the 1861 Act. The judge imposed a sentence of six months on each defendant made concurrent. Count 5, as we have said, concerned only Harper. This was an offence also under s.47. The judge imposed a concurrent sentence of six months. Count 7 was another offence of assault occasioning actual bodily harm. The judge again imposed concurrent sentences of six months on each defendant.

### The Facts

- 5 In summary, the case arose from a violent incident in a public house during the early hours of Sunday, 13 May 2021. A number of people were assaulted, including the landlord, Mr John Lunt. He suffered, amongst other injuries, a fractured skull. That assault was the subject of Count 2. A Mr Gledhill suffered a dislocated shoulder. That was the subject of Count 3. A Mr McSweeney-Forrester suffered a cut on his head which required stitches. That was the subject of count 4. A Mr Anthony received a black eye. That was the subject of Count 5. Finally, a Mr Clark-Royal was also assaulted and suffered concussion. That was the subject of Count 7.

- 6 The facts are set out in more detail in the final reference at para.12 to 41 and we will summarise the essential facts.
- 7 On the evening of Saturday, 29 May 2021 the landlord of the Manor Farm Public House in Rainhill Hill, Merseyside had arranged for a party to take place. There were no incidents during the course of that evening. The offenders arrived in the company of a third man, who did not get involved in the violence which ensued, shortly after 11.00 pm. They were dressed in a way which was consistent with their being door staff. They spoke with Mr Lunt, the landlord of this pub, and said they had been working the door at an event at Rainhill Hall. They asked if they could work the door at this pub in future. Mr Lunt told them that he was happy with his present door staff and did not require their assistance. The conversation was amicable.
- 8 Later on a disagreement ensued. It is not necessary for present purposes to go into the details of that. It should be noted, however, that this led to Kehoe being told to leave, but he stood his ground. He made various threats. He said to Mr Lunt that he would "terror" the pub. He said that he was "Going to do [him] in". A member of staff, Sarah Bowers, approached Kehoe. She put her arms around him. She said "Just come with me and we can talk about it outside," but Kehoe continued to shout. However, he did go with Ms Bowers and left the pub. The assistant manager, Scott Carter, a friend of Mr Lunt, Stephen Gledhill and Harper also left the building. Mr Gledhill stood in the doorway. Mr Lunt joined them. They were observing to see if Kehoe and Harper would leave the premises. Kehoe walked over to Mr Lunt. Mr Lunt said that he was going to check the CCTV. If it showed that nothing had been taken [that was a reference to their earlier argument], he would apologise. Kehoe replied, "Just give me £500". Harper walked over to Mr Gledhill and said, "Do you want a fight?" Kehoe then punched Mr Gledhill, but the punch missed. However, he threw a second punch, which struck Mr Gledhill's left ear. Mr Gledhill fought back, head-butting his attacker in the face. Both Mr Gledhill and Kehoe threw punches at each other. Harper tried to grab Mr Gledhill who was able to fend him off. However, he was then overpowered and forced to the floor. He was punched and kicked. This was inside the pub close to the office and was the subject of Count 3.
- 9 Mr Lunt tried to intervene. He pinned Kehoe against a wall. Harper elbowed him in the left temple. Mr Lunt was stunned and let go of Kehoe. Harper then targeted a Mr Jack Anthony, who was a customer of the pub. He described Harper as "snarling". Harper threw a flurry of punches, hitting Mr Anthony in the face and causing his glasses to fall off. Mr Anthony thinks that he may have been concussed. He recalled at one moment being at the top of the stairs and subsequently at the bottom. That was the subject of Count 5.
- 10 Kehoe and Harper then left the building. Kehoe was escorted by a Mr Jake Clark-Royal. This part of the incident was captured on CCTV footage, which we have viewed, as we have the rest of the CCTV footage which is available. Mr Clark-Royal let go of Kehoe. At that point, Kehoe punched him in the face. This caused him to fall to the floor. Kehoe kicked him twice in the vicinity of his head. Harper crouched over Mr Clark-Royal and punched him once. This was subject of Count 7. Mr Lunt was shouting, "Leave him alone".
- 11 Kehoe and Harper then forced their way back into the pub. Mr Carter tried to close the door. However, they forced it open. The offenders left Mr Clark-Royal apparently unresponsive on the floor outside the building. At that point, we should mention, as we have said, that we have viewed the CCTV footage of events on the night of the incident. The violence shown on it would shock any reasonable person. For example, in the incident which we are currently describing the offenders hit Mr Clark-Royal while he was on the ground, leaving him prone and still. They showed a callous disregard for his welfare as they returned to the pub to carry on assaulting other people.

- 12 Both offenders then targeted Mr Lunt. Kehoe punched Mr Lunt hard in the face. He continued to punch him. The attack caused Mr Lunt to fall to the floor. Kehoe stood over Mr Lunt. He was shouting, "You lot have caused this accusing me of stealing money. You now owe me £500. I want my £500 now or I am going to tear you apart." Harper was holding Sarah Bowers who was begging them to stop. Mr Lunt said, "I will get you your £500. Just get out of my face and I will go and get it for you". Mr Lunt got off the floor and walked towards the office. As he did so, he noticed a number of people, both staff and customers. He advised them to lock themselves in the toilets. Mr Lunt opened the safe and counted out £500.
- 13 Whilst Mr Lunt was in the office getting the money, Kehoe grabbed a Mr Hannon. He dragged him through the bar area and to the till. He said "Get me £500 out of that till before I stab you". Mr Hannon was terrified. He said there was no money in the till. He said he would have to go upstairs to get it. At this point, Harper got in between them. Mr Hannon left the bar area and went upstairs to the office and saw Mr Lunt. Mr Lunt told Mr Hannon to wait in the office and he would get rid of the offenders by giving them the money. Kehoe went behind the bar and took a bottle of wine from the fridges at the back of the bar area. Harper was scuffling with a customer called John Ashton who was standing at the bar. Kehoe struck Mr Ashton with the bottle. Harper threw a punch at Mr McSweeney-Forrester, who was on crutches at the time. This did not connect. Kehoe then joined in the assault, hitting Mr McSweeney-Forrester with a bottle. That was subject of Count 4.
- 14 As Mr Lunt returned, he saw Kehoe with the bottle in his hand and said "I'm the one you want. Come to me and leave the kids alone". He was holding the £500. Kehoe proceeded to strike Mr Lunt with the bottle in the face. This knocked him to the floor. Kehoe tried to grab the money. Both males then kicked Mr Lunt as he lay on the floor. That was the subject of Count 2. Mr Lunt recalls letting go of the money and losing consciousness. However, when he regained consciousness, he could see the money lying on the floor around him.
- 15 Following these assaults, the offenders left the pub, Kehoe still holding the wine bottle. A male was present outside. He can be seen on the CCTV footage with his hands up. Kehoe threatened him with a bottle. Harper punched him in the head. Both offenders then left the area.
- 16 We turn briefly to the injuries which resulted. In particular, we must note that Mr Lunt suffered a fractured skull, a fractured nose, a fractured left cheekbone and other various small injuries. Mr Gledhill suffered a dislocated shoulder that required surgery to repair. Mr McSweeney-Forrester required three stitches to a cut on his head. Mr Anthony was concussed and had a black eye and soreness to his eye socket. He had a CT scan, but did not require further treatment. Finally, we note that Mr Clark-Royal had a CT scan but required no further treatment. He felt sick and faint for a few days.

### The Sentencing Process

- 17 Harper was born on 27 November 1991 and was aged 30 at the date of sentence. He had no previous convictions, although he did have a previous caution for possession of cannabis.
- 18 Kehoe was born on 23 July 1993 and was aged 28 at the date of sentence. He has 16 convictions for 20 offences, including battery. There had been previous offences of violence against his mother, stepfather and a previous partner, although it should be noted that he had not previously served a custodial sentence.

- 19 The pre-sentence report in respect of Harper assessed him as posing a low risk of re-offending, but posing a high risk of harm to the public. It was noted that he had accepted responsibility for the offending, expressed regret and there had been no repeat of his behaviour in the 12 months since the offences had taken place.
- 20 The pre-sentence report in relation to Kehoe assessed him as posing a medium risk of reconviction and posing a high risk of serious harm to the public in general of physical violence. There was a psychological report on Kehoe dated 8 June 2022. This said that the offender presented with "severe symptomatology related to ADHD".
- 21 The judge also had the advantage of character references in relation to the two offenders, as well as victim personal statements, which set out the continuing impact on each of the five victims. It should particularly be noted that in the case of Mr Lunt and his partner, Samantha Casey, they lost their home as a consequence of his losing his job at the pub.
- 22 By reference to the relevant guidelines, the judge concluded that the most serious offence, Count 2, fell into Category 3 harm and Category B culpability. That led her to a starting point of four years' custody with a range of three to six years. That was of course before taking account of guilty pleas. The judge gave full credit for those, so the sentence after trial would have been six years on the most serious count, the s.18 offence. The judge made the other sentences concurrent, as she was entitled to do, although it was then necessary to have regard to the principle of totality so as to ensure that the total sentence was just and proportionate and reflected the overall gravity of the offending taken as a whole.

#### Submissions for the Solicitor General

- 23 On behalf of the Solicitor General, it is submitted by Mr Holt that the judge passed a sentence which was unduly lenient. Although the structure of a sentence is matter for the judge, it is submitted that consecutive sentences were appropriate in this case. Even if that is not accepted, it is submitted that having decided to impose concurrent sentences, the judge ought to have increased the sentence for the lead offence to reflect the overall offending. Complaint is also made that the issue of dangerousness was not addressed by the judge at all. It is recognised on behalf of the respondent offenders that it should have been, because there were a number of specified offences which had been committed.
- 24 Turning to Mr Holt's more detailed submissions, he notes that there was a statutory aggravating factor; namely, that the offences were committed against people who were providing a service to the public. In addition, Kehoe had relevant previous convictions. A further aggravating feature was that the offences were committed whilst the offenders were under the influence of alcohol and drugs. It is also submitted that although the individual assaults were relatively short lived the overall incident was prolonged and the violence was persistent and directed at multiple people who were present.
- 25 On the other side of the balance it is acknowledged that there were mitigating features, in particular Harper's lack of previous convictions and the fact that he had recently suffered a traumatic bereavement. There were also some mental health issues in respect of Kehoe. It is also acknowledged that it could be said that both offenders had shown remorse during the course of the pre-sentence report.
- 26 No issue is taken before this court that it was appropriate for there to be full credit given for the early guilty pleas in this case. It is however submitted that the judge should have placed the s.18 offence into either Category 2A or at the least the upper end of Category 2B. There was a weapon used. This indicated higher culpability. Further, it is submitted that it was a prolonged and persistent assault. It is also submitted that Mr Lunt was particularly

vulnerable because he was on the floor when he was kicked, having been struck by a bottle. The assault then continued with kicks and punches. Further, it is submitted that the injuries of Mr Lunt can properly be described as "grave". He received a fractured skull, a broken nose and a fractured cheekbone. He required a hospital stay of four days. It is also submitted that there was a further aggravating feature in that the victim was caused to move home as a result of the attack.

- 27 It is noted that there were five offences of violence committed against five different victims by Harper over the course of a ten-minute incident. Kehoe committed four offences of violence against four victims.
- 28 In relation to dangerousness, it is submitted that both offenders were assessed as posing a high risk of serious harm to the public. In the case of Kehoe in particular it was necessary for the judge to address the issue of dangerousness, because he had a relevant previous conviction for violence. He had, moreover, been responsible for the majority of the violence in this case. We are reminded that a sentencing judge has an obligation under s.52(2) of the Sentencing Act 2020 ("the Sentencing Code") to explain why they have come to the conclusion that an offender has not satisfied the criteria for dangerousness. It is acknowledged that this court will be reluctant to interfere with findings in relation to dangerousness where a judge has correctly applied the relevant principles: see *R v Johnson* [2006] EWCA Crim 2846, at para.11, in a judgment given by the then President of the Queen's Bench Division. However, it submitted that in the present case the judge failed to address the issue of dangerousness at all.

#### Submissions on behalf of Kehoe

- 29 On behalf of Kehoe it is acknowledged by Mr Duffy that the total sentence passed was lenient, but it is submitted that it was not unduly so. In relation to the first main ground of complaint, it is submitted that the offence was properly categorised as being of medium culpability and medium harm. The weapon used, the bottle, was not a highly dangerous weapon so as to elevate the culpability any higher than Category B. So far as harm is concerned, the judge was entitled to regard the harm as falling within Category 3. The victim sustained a really serious injury, but once it was treated, it did not require further surgery. The injuries were not permanent or irreversible. Mr Duffy has also emphasised at the hearing before us that in his submission the assault on Mr Lunt should not be regarded as being persistent and prolonged. Although the entire incident on the night took about ten minutes, he points out that there were several separate incidents. Even the incidents concerning Mr Lunt himself were relatively short in duration and were separated by about a minute. He accepts that there were repeated assaults on Mr Lunt, at least two, but does not accept that that was prolonged and persistent conduct.
- 30 In relation to the second ground of complaint, it is submitted that the judge in substance increased the notional sentence on Count 2 up to six years before taking account of the guilty pleas from a starting point in the definitive guideline of four years. In those circumstances, it is submitted she was then entitled to say that the other sentences should be made concurrent. In relation to the issue of dangerousness, it is accepted that the judge should have addressed this, but it is submitted that if she had considered it she would have been unlikely to conclude that the offender Kehoe was dangerous. In any event, it is submitted that the finding of dangerousness ought not to be made by this court for the following reasons:
- (1) The offender's previous convictions were comparatively less serious and do not demonstrate a propensity for serious violence. At the hearing before us, Mr Duffy has emphasised the length of time which had elapsed since those earlier offences had taken

place. He has also emphasised that in the 12 months since the offences took place and when sentence was passed Kehoe had not committed further offences.

- (2) The references that were submitted demonstrated a different more positive side to Kehoe's characters.
- (3) The offender had expressed remorse.
- (4) The conclusions in the report by Professor Hope indicate that in her opinion the defendant does not present as a perpetually violent person and his actions on the night in question were probably as a result of a combination of his consumption of alcohol and his ADHD.

31 Finally, appearing before us, Mr Duffy has submitted that even if this court were to conclude that Kehoe is dangerous, the court nevertheless has a discretion whether to impose any different type of sentence. In particular, he submits that an extended sentence is not necessary in this case.

#### Submissions for Harper

32 In relation to the first ground of complaint, it is submitted by Mr Sutton that on balance it was open to the judge to conclude that Harper's conduct fell into Category B culpability. It is accepted that there was the Category A factor present, that the attack on Mr Lunt could be considered to be prolonged or persistent. However, it is submitted that he was not vulnerable prior to the overall attack taking place and that it would be double counting to include the fact that he was placed in a vulnerable position while the attack continued. Further, the weapon used was not a highly dangerous one. Harper's role was in any event a lesser one in the activity, as the Solicitor General acknowledges. In relation to harm, it is submitted by Mr Sutton that the injury to Mr Lunt was not grave and that the injury to his nose was not irreversible.

33 Furthermore, it is submitted there were significant mitigating factors in the case of Harper:

- (1) The absence of previous convictions and particularly any convictions for violence.
- (2) His genuine remorse.
- (3) The positive good character evidenced by references.
- (4) A recent bereavement which had contributed to his acting in a way that was completely out of character.

34 In relation to the second main ground of complaint, it is accepted that Harper faced an additional offence (Count 5) but it is not accepted that in the overall circumstances this would have resulted in any appreciable differences in the respective sentences for the following reasons:

- (1) Count 5 related to a s.47 assault.
- (2) No issue is taken by the Solicitor General that the offence was correctly placed into Category C3.
- (3) The Solicitor General accepts that it was Kehoe who was responsible for the majority of the violence.

(4) The correct starting point was adopted by the judge, namely a starting point of a medium Community Order with a range in band B5 up to 26 weeks' custody.

35 In relation to the third ground of complaint, it is accepted that the judge ought to have addressed the issue of dangerousness, but it is submitted that Harper does not meet the criteria for such a finding for the following reasons:

(1) The lack of previous convictions or any indication of having a propensity to use unlawful violence.

(2) His positive good character.

(3) His genuine remorse.

(4) His acceptance of responsibility for his actions.

(5) The absence of any recurrence of any misconduct and particularly unlawful violence in the 12 months since these offences.

(6) The fact that he was assessed as posing a low risk of reoffending in the pre-sentence report.

#### Our Assessment

36 We have reached the conclusion that the sentences passed in this troubling case were unduly lenient. We have also reached the conclusion that in the case of Kehoe a finding should have been made that he is a dangerous offender and an extended sentence imposed on him in order to protect the public.

37 We do not accept the submission for the Solicitor General that consecutive sentences were required in this case. The structure of the sentence was a matter for the judge, but having decided to make the sentences concurrent, it was then necessary to have a very substantial uplift in the sentence passed for the lead offence. Even taking that offence by itself, we are persuaded by the submissions for the Solicitor General that it was sufficiently serious that it needed to be placed in Category 2A. In our view, the harm caused to Mr Lunt was indeed "grave". Further, the culpability was high. Apart from the other factors, this was in our view a prolonged and persistent attack. That would have given a starting point of seven years' custody with a suggested range of six to 10 years. Having regard to the aggravating factors in this case, a sentence at the top of that range was possible at least in the case of Kehoe who had previous convictions for violence. An uplift was then required to reflect the fact that the other sentences were made concurrent.

38 In our judgment, the custodial term after trial should have been one of 12 years in the case of Kehoe and eight years in the case of Harper. After giving full credit for the guilty pleas, that should have led to a custodial term of eight years for Kehoe and five years and four months for Harper, but we are satisfied that in the case of Kehoe there had also to be a finding of dangerousness. This is in particular because he had previous convictions for violence, albeit nothing as serious as on this occasion. We have had regard to all of the circumstances of the case in accordance with s.308 of the Sentencing Code. We recognise that we then have a discretion whether to impose an extended sentence or even a more serious sentence in the light of that finding. In our judgment, an extended sentence does need to be imposed in the case of Kehoe. We consider that there should be an extension period of four years. That makes a total sentence in his case of 12 years, comprising a custodial term of eight years and an extended licence period of four years.



## Conclusion

- 39 For the reasons we have given, we grant this application by the Solicitor General to refer the sentences to this court under s.36 of the 1988 Act. On that reference, we substitute the following sentences for those imposed in the Crown Court. In respect of Count 2, that is the s.18 offence, in the case of Kehoe there will be an extended sentence comprising a custodial term of eight years and an extension period of four years. In the case of Harper, there will be a determinate sentence of five years and four months. We leave the other sentences as they were, since they are concurrent to the main sentence.
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**CACD.ACO@opus2.digital***

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