NCN:[2023] EWCA Crim 1215

IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202300907/B5

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 22 September 2023

Before:

MR JUSTICE JACOBS

MR JUSTICE GRIFFITHS

REX

V

DYLAN DAVIES

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MR A WILLIAMS appeared on behalf of the Appellant.

J U D G M E N T
Approved

MR JUSTICE JACOBS:

1. On 8 December 2022, in the Crown Court at Aylesbury, the appellant (who was then aged 18) was convicted of two offences, which were committed on more or less the same occasion: wounding, contrary to section 20 of the Offences Against the Person Act 1861, and affray, contrary to section 3(1) of the Public Order Act 1986. On 21 February 2023, before the same trial judge, the appellant, who was then still aged 18, was sentenced to a period on each count of 2 years' detention in a young offender institution, the two sentences to run concurrently.

2. There were a number of co-accused in the case, each of whom received similar sentences. The appellant now appeals against sentence by leave of the single judge, who gave permission on one of the two grounds which have been advanced in the grounds of appeal. That ground was whether the judge was wrong to categorise the appellant as a "persistent offender", in circumstances where he had only one previous caution recorded against him and had only been involved in one incident which gave rise to both of the counts against him for which he was being sentenced.

3. The significance of that point arises from the fact that the appellant was aged 14 at the time of the offence although, owing to delays which it is not necessary to recount in detail, he was 18 at the time of conviction and sentence. Accordingly, some significant age thresholds were crossed between the time of the offence and conviction.

4. Paragraphs 6.1 to 6.3 of the Guideline on Sentencing Children and Young People provides 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 offence...
>
> 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."

5. The importance of those paragraphs and the section of the Guideline in which it is

contained has recently been reaffirmed in cases such as R v Ahmed [2023] EWCA Crim 281 and R v ZA [2023] EWCA Crim 596.

6. Since the appellant was aged only 14, and since the offences of which he was found guilty do not constitute what are known as "grave" crimes to which section 250 of the Sentencing Code applies, the starting point for the judge's sentence should, in accordance with the Guideline, have been the sentence likely to have been imposed on the date at which the offence was committed. In the case of a 12 to 14-year-old, the sentence likely to be imposed on the date on which these offences were committed was a youth rehabilitation order, at least unless that child or young people was deemed to be a persistent offender, in which case a detention and training order of up to 24-months duration could be imposed. Hence the significance of whether the appellant was a persistent offender, the issue on which the single judge gave leave.

7. The facts of the case were as follows. On 2 March 2019, whilst under the influence of alcohol, the appellant and his co-defendants made their way down an alleyway located close to the house of Mr Tim De Gelas and his wife, Laura De Gelas. The couple were at home with their daughters. Their son, Josh, who was known to the group, was not in but they called for him to come outside. They then shouted insults about the son. The judge found that the appellant had instigated the verbal abuse. Mrs De Gelas challenged the group from her bedroom window before going outside followed by her husband, who was dressed only in a pair of tracksuit bottoms. The couple asked what their problem was. Mr De Gelas was then attacked by the group and stabbed multiple times. There was evidence that at least one of the stabbing injuries was delivered with the force of a full punch. He was also struck over the head with a bottle. Following the attack, the group ran away, and they were heard laughing.

8. Mr De Gelas was treated at the John Radcliffe Hospital. He had three penetrating stab wounds, two to the chest and one to the abdomen. A CT scan revealed a severe laceration to the liver that caused significant bleeding. Further intervention was required after complications were detected. These injuries were life threatening.

9. None of the defendants was found guilty of a section 18 offence and this no doubt, as the judge recorded in his sentencing remarks, reflected the uncertainty as to which of them had actually carried out the stabbing. The learned judge passed sentence on the basis that it was unknown who was responsible for the stabbing and in doing so he was, as he said, being faithful to the jury's verdict. He also accepted that he could not be sure on the evidence which, if any of them, knew that there was a knife there. That too was consistent with the jury verdict.

10. The appellant has four convictions for six offences spanning from July 2020 to August 2022. However, all of them postdated the offences committed in 2019 for which he was being sentenced. He had however received a caution in March 2017 for a battery committed in October 2016, when he was just 12 years old. In his sentencing remarks the judge recognised that, in accordance with the Guideline on Sentencing Children and Young Persons, he should not pass a sentence which was more severe than the maximum available at the time that the offence was committed. In the case of the appellant, he

recognised that certain sentences would only have been available if he was to find that he was a persistent offender, but otherwise the most serious sentence would have been a non-custodial youth rehabilitation order. He said that the appellant's single caution would not be enough, on its own, to make him a persistent offender, but he went on to conclude that he could treat this appellant as a persistent offender. His reasoning was as follows:

> "You had a caution at the time and that's not enough on its own, in my judgment, to make you a persistent offender, but here you committed an affray and a section 20 offence on the same day, one after the other, and I'm satisfied applying paragraph 6.8 of the sentencing guidelines on young people that I would be entitled to find you a persistent offender under those circumstances, given your course of conduct that night, especially given that I take the view that no alternative sentence to custody has any reasonable prospect of preventing re-offending and so it seems to me that a Youth Court would almost certainly have found you a persistent offender."

11. There is a reference there to paragraph 6.8 of the relevant Guideline. This provides in relevant part:

> "When a child or young person is being sentenced in a single appearance for a series of separate, comparable offences committed over a short space of time then the court could justifiably consider the child or young person to be a persistent offender, despite the fact that there may be no previous findings of guilt. "

12. The ground of appeal upon which permission was given was that this was not a conclusion which the judge could properly have reached.

13. The judge was plainly correct when he said that the caution on its own was not enough. That is clear from paragraph 6.6 of the Guideline which provides:

> "A child or young person who has committed one previous offence cannot reasonably be classed as a persistent offender, and a child or young person who has committed two or more previous offences should not necessarily be assumed to be one."

14. That paragraph reflects an earlier decision of the Court of Appeal in R v M [2008] EWCA Crim 3329, where the Court said at paragraph [9]:

> "... a person who offends for a second time cannot in any proper sense of the word be termed a 'persistent offender'. Repeat offender, yes, but not a persistent offender. We do not propose to go further than that."

15. We consider that the appellant was, at the time of the two offences of which he was convicted, a person who had only offended once. We agree with the submissions of Mr Williams on behalf of the appellant that, although there were two offences on the night in question, there was essentially a single incident with the two offences being committed as part of that overall incident. This made the appellant a repeat offender but not a persistent one. We do not accept that paragraph 6.8 of the Guideline has any application to the facts of this case. The appellant was not being sentenced for a series of separate comparable offences committed over a short space of time, where there had been no previous findings of guilt. Here there was one incident, and two offences were different aspects of that incident rather than a series of separate comparable offences.

16. We can well understand why the judge was anxious to reflect the severe criminality of this offending and the very serious injury to Mr De Gelas in a custodial sentence of the maximum length. That was permissible in the case of the other defendants who were older but, applying the Guideline, it was not permissible in the case of the appellant. Accordingly, the judge's sentence cannot stand and must be quashed. We therefore allow the appeal.

17. That gives rise to the question of what sentence the Court should substitute for the sentence that was imposed. This is not straightforward. The appellant was remanded in custody in December 2022 pending sentence. He was sentenced in February 2023, and was then in custody for a period of some 3 months or so until he was released under home detention curfew. He has been under home detention curfew since around May or early June 2023. He has therefore, in one way or another, served the majority of the custodial element of the 24-month sentence which the judge imposed, albeit that the sentence imposed by the judge would have meant that he was on licence for the second year of that 24-month term. Since the appropriate order would have been a youth rehabilitation order, probably with rehabilitation activity requirements ("RAR"), it would in theory be open to us now to impose an equivalent sentence: for example, a community order with an RAR.

18. However, in circumstances where the appellant has already served most of the custodial sentence of a sentence which, in our judgment, should not have been imposed, we do not consider it appropriate to impose further punishment by way of a community or other order. The only practical option, in our view, is to reduce the custodial sentence to a period which entitles the appellant to be released unconditionally as at of today's date, with no further orders to apply hereafter. In so doing, we are not saying that a custodial sentence of this length would have been appropriate at the time of sentence. For the reasons given, custody was not, in this case, an available option. However, we consider that it is the only practicable way forward given the present circumstances and the amount of time which has been served by the appellant. We note that a similar course was taken in the recent Court of Appeal decision in ZA, albeit on different facts.

19. Accordingly, our decision is to allow the appeal and to substitute a sentence of 5 months in a young offender institution for the 24-month sentence imposed by the judge, each concurrent.

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

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