IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202303859/A1
[2024] EWCA Crim 772

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 20 June 2024

Before:

LORD JUSTICE MACUR

MR JUSTICE BRYAN

MRS JUSTICE TIPPLES

REX

V

DUANE WALKER

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MS R PENFOLD appeared on behalf of the Applicant.
MR K LISTON appeared on behalf of the Crown.

APPROVED J U D G M E N T

MR JUSTICE BRYAN:

1. On 13 September 2023, the applicant pleaded guilty to an offence of affray contrary to section 3(1) of the Public Order Act 1986. On 25 October 2023, in the Crown Court at Chester (Mr Recorder McDonald), the applicant was sentenced, on an accepted basis of plea, to a community order for 18 months with three requirements, a Thinking Skills programme, a Rehabilitation Activity Requirement for up to 20 days and an Unpaid Work Requirement for 180 hours. The applicant was also sentenced to an ancillary order of compensation in the sum of £100 to Dale Kennerley and £1,000 to Jack Williams.

2. The applicant's co-accused (on the count of affray), Kai Dodd, was sentenced on a full-facts basis to 12 months' imprisonment in relation to the affray (Count 1). He was also sentenced in relation to his guilty plea in respect of an assault to Jack Williams (Count 2). Mr Dodd received a concurrent term of 12 months' imprisonment for Count 2 and no ancillary orders were made in his case.

3. The applicant applies for permission to appeal against the sentence, the Registrar having referred the application to the Full Court. The grounds of appeal relate solely to the compensation orders made, it being said that the orders were manifestly excessive and/or wrong in principle.

4. Turning to the facts of the offending. On 31 March 2022, the complainants, Jack Williams and Dale Kennerley, had been drinking in the Cheshire Cheese Public House in Sandbach, Cheshire. The applicant and Kai Dodd had also been present in the public house in a larger group which included several males. During the evening, Jack Williams had been in the smoking area of the public house when the group containing the applicant and Kai Dodd appeared to circle around Jack Williams. Prior to that having taken place, the applicant and several of his group placed the drinks they had been holding on either tables or the floor.

5. Jack Williams was subsequently punched by an unidentified male, causing Jack Williams to fall to the floor. Kai Dodd then picked up a glass and threw it at Jack Williams, hitting him in the forehead. Dale Kennerley then intervened in order to protect his friend and he was subsequently knocked to the floor, where he was punched and kicked several times by multiple individuals, including the applicant, and struck over the head with a sign by Kai Dodd. The incident had been captured on CCTV.

6. During the offending, Jack Williams sustained cuts to the face and a bruised eye. First aid treatment had been administered at the scene. Dale Kennerley had a lump on the back of his head, a cut to his lip and a cut to his ear. No medical treatment had been sought or provided. The applicant was arrested by the police and in interview he made "no comment" to questions asked by the police.

7. The applicant was aged 36 at sentence (born on 23 January 1987. He had 21 convictions for 94 offences spanning from 29 July 2004 to 13 September 2022. His relevant

convictions included four offences against the person and five public disorder offences.

8. The applicant pleaded guilty to affray on 13 September 2023 at the PTPH, on a basis of plea in the following terms, which was accepted:

> (1) The defendant relies upon the CCTV footage which shows his involvement.
> (2) The defendant will say that he did not instigate the violence. He became involved initially in an attempt to break up the fight. Within the melee he fell to the floor. He specifically denies any kicking/stomping.
> (3) The defendant did not arm himself with any weapon/weapon equivalent.
> (4) The defendant accepts that towards the end of the incident he threw three punches as seen on the footage.
> (5) The defendant does not accept that he caused any injury to anyone involved during the incident.

9. At the sentencing hearing, the Crown confirmed that no victim impact statements had been made. There was no medical evidence as to injuries suffered, save for that set out in initial witness statements that were on the DCS, as supported by photographs of injury to Mr Williams. In support of mitigation, the applicant relied upon a Pre-Sentence Report and employer's reference.

10. In the Pre-Sentence Report, and in the context of his finances, the applicant is recorded as telling the author that he was able to budget effectively and "he received around £480 per week from his employment. In addition to his usual living expenses, he pays £50 per week to stay at his mother's home and is reducing court fines at the rate of £13 per week."

11. In the Agreed Note as to the Learned Judge's sentencing remarks, it was recorded that he stated in relation to the applicant that:

> "While you were part of this crowd you have pleaded on a basis accepted by the Crown that didn't instigate, became involve initially in attempt to break up, did not kick or stomp. No weapon used, no injury caused but accept as is clear from CCTV footage that… 3 punches towards end of incident and part of the group that set upon these 2 gentlemen."

Later in the Agreed Note the Learned Judge is recorded as stating that:

> "... on count of affray I must and do sentence on basis of plea rather than full facts of case, not challenged by Crown. Must therefore be true to it. You did not use weapons or inflict injury. Part was being a part of the group and 3 punches."

12. In that context, the Learned Judge accepted that the applicant's offending fell within Category B3, under the Assault Guidelines (no weapon, use of violence), the harm in respect of the affray being part of a group that did cause harm.

13. During the course of sentencing remarks the Learned Judge remarked that the applicant would be subject to a compensation order in the sum of £2,000 for Mr Williams and £500 to Mr Kennerley. The Learned Judge proceeded to sentence Mr Dodd before inviting further submissions from counsel for the applicant as to compensation.

14. Submissions were made that the imposition of compensation was inappropriate as the applicant was not responsible for any injury. The court was referred to the Sentencing Council Guideline on Compensation and submissions advanced as to consideration of all factors, including lack of victim impact statements and lack of medical evidence.

15. In dealing further with the particular issue as to compensation, the Learned Judge stated as follows:

> "Having considered submissions and guideline will make compensation order in less amounts. While it is correct DW sentenced on basis of not causing injury himself accepts that part of a group that caused an affray as a consequence two people injured, injuries to Mr Kennerley minor, injuries to Mr Williams more significant. Mr Walker part of the group that caused it. Starting point in guideline is £1,000.
>
> Will impose £1,000 for Mr Williams, for Mr Kennerley starting point of £100.
>
> In light of means, no order for prosecution costs, paid at £25 per week first payment due 25th November. Victim surcharge applies but costs do not."

16. The applicant seeks leave to appeal against the compensation order imposed and submits that it should be quashed. No complaint is made as to the substantive sentence imposed. Ms Penfold submits, on behalf of the applicant, that the imposition of a compensation order is manifestly excessive and/or wrong in principle in that:

    (1) The Learned Judge erred in imposing the award for the injury to Mr Williams as the applicant was clearly not responsible for inflicting those injuries. Mr Dodd faced that allegation alone at Count 2.
    (2) The Learned Judge erred in imposing an award in the sum of £1,000 to Mr Williams. This amount is manifestly excessive and
    (3) The Learned Judge erred in imposing the award for the injury to Mr Kennerley, as the applicant was sentenced as per his basis of plea in which he denied causing any injury.

17. The applicant refers to the case of *R v Stafford (Roy) Derby* (1990) 12 Cr App R(S) 502, at pages 502 to 503. In that case the appellant pleaded guilty to affray. Together with his co-defendant, he went to the home of a man who he thought was having an affair with the appellant's girlfriend. The appellant threatened the man with a knife: his co-defendant attacked the other man with a piece of wood and caused him serious injuries. The co-defendant pleaded guilty to unlawful wounding. The case for the Crown was that the

appellant had taken part in a frightening situation but that he did not inflict actual violence. He was sentenced to 12 months' imprisonment suspended and ordered to pay £4,000 compensation.

18. He appealed against the compensation order. His plea to affray was on the basis that nothing which he did caused the victim's injuries and that the order for compensation was not justified within the language of section 35 of the Powers of Criminal Courts Act 1973 (as amended), which stated that:

> "A court... before which a person is convicted of an offence ... may... make... a compensation order,... requiring him to pay compensation for any personal injury, loss or damage, resulting from that offence or any other offence which is taken into consideration".

19. The Court of Appeal (Criminal Division) quashed the compensation order. Tudor-Evans J, giving the judgment of the court (Mustill LJ, Tudor-Evans J and Mr Thorpe) stated as follows at page 504:

> **"…the Crown were saying that the appellant went for the purpose of frightening… We accept the submission of Mr Newton that the plea was put forward on that basis only and that the appellant's conduct was not the cause of the damage.**
> **…**
> **There is authority in this Court that the strict views of causation in tort and contract are not to be applied by a judge when discharging his duty under section 35. But it is also entirely clear that there must be evidence of causation before the order can be made. That was not the case here for the reasons we have given. It must follow for those reasons that the order of compensation cannot stand."**
>
> **(emphasis added)**

20. See also in this regard the case of *R v Boardman* (1987) 9 Cr App R(S) 7 which is to like effect.
21. The current provision to be found in section 133 of the Sentencing Act 2020 is in immaterial respects in similar terms providing, together with section 134, as follows:

> "**133 Compensation order**
> In this Code 'compensation order' means an order under this Chapter made in respect of an offender for an offence that requires the offender—
> (a)to pay compensation for any personal injury, loss or damage resulting from—
> (i)the offence, or
> (ii)any other offence which is taken into consideration by the court in determining the sentence for the offence, or...
>
> **134 Compensation order: availability**
> (1)A compensation order is available to a court by or before which an

offender is convicted of an offence."

22. There is a helpful Respondent's Notice before us that addresses the three grounds of appeal in these terms:

> "Ground 1: -
> 1. The Crown submits
> (i) The Defence submission that the Learned Judge erred in imposing a Compensation Order for the injuries sustained by Jack Williams could be viewed as valid.
> (ii) There is no causational link between the actions set out in the Applicant's uncontested basis of plea and the injuries sustained by Jack Williams.
> (iii) The facial injuries sustained by Jack Williams were encompassed in a separate and distinct count of s47 Assault Occasioning Actual Bodily Harm. The Applicant was not charged with this offence and the co-defendant, Kai Dodd, pleaded guilty to this assault on the full prosecution facts.
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> Ground 2: -
> 2. The Crown submits
> (i) In the absence of a causational link, the view could be taken that any award for compensation is manifestly excessive.
> (ii) Jack Williams did not seek any medical treatment or provide a Victim Impact Statement. Aside from his initial statement of complaint and photographs taken at the scene, there was no medical evidence to assist with quantification of compensation for the injuries.
> (iii) Consideration of the Applicant's financial means was based on the contents of his Pre-Sentence Report and information advanced orally by Defence Counsel in mitigation.
>
> Ground 3: -
> 3. The Crown submits
> (i) Dale Kennerley was the victim of an Affray in which the Applicant and the co-defendant Kai Dodd were part of a group who collectively attacked him. At various stages of the attack, Dale Kennerley was punched, fell to the floor, was kicked and struck with a plastic sign then having stood up, was further punched to the head repeatedly. As a result of the attack he sustained a lump to the back of his head, a cut lip and a cut to the ear. The injuries were set out in a statement. He did not seek medical treatment, there are no photographs of the injuries, and he did not supply a Victim Impact Statement.
>
> Consideration could fairly be given to the question of joint enterprise in relation to the imposition of compensation for the injuries sustained in the attack upon him, but it would only be appropriate to balance that consideration with the following:

(a) The Crown accepted a basis of plea which sets out the Applicant's involvement and that his direct actions did not result in injury.
(b) Dale Kennerley cannot remember how he ended up on the floor.
(c) Dale Kennerley cannot positively be certain precisely who struck him to the head on the floor.
(d) Kai Dodd accepted by virtue of his full facts guilty plea he struck Dale Kennerley with the plastic sign.

If it is accepted that compensation is not justified based on participation in a joint enterprise then any award is arguably manifestly excessive.

If it is accepted that the principle of joint enterprise justifies the imposition of compensation, then a low level figure £100, based on evidence of the Applicant's employment and means advanced by his own Defence Counsel, respectfully is not a manifestly excessive figure."

23. We consider that there is force in the submissions of Ms Penfold, as acknowledged in the Respondent's Notice.

24. The key point is that, as the Learned Judge accepted, and expressly referred to in his sentencing remarks, the applicant stood to be sentenced on the basis of his accepted basis of plea, that he did not cause any injury either to Mr Williams or Mr Kennerley.

25. Dealing first in relation to the position in respect of Mr Williams, the applicant not only did not inflict any injury upon Mr Williams, but there was no causal link between the actions set out in the applicant's uncontested basis of plea and the injuries sustained by Mr Williams, which were encompassed in the separate and distinct count of section 47 assault occasioning actual bodily harm brought only against Mr Dodd and not the applicant, and to which Mr Dodd pleaded guilty on a full-facts basis. In such circumstances, we consider that the making of a compensation order, in any amount in relation to Mr Williams, was inappropriate and as such manifestly excessive. In such circumstances, we do not need to say anything about the amount of the compensation order or whether it would otherwise have been appropriate.

26. So far as the position in respect of Mr Kennerley is concerned, Mr Kennerley was the victim of an affray, in which the applicant and Mr Dodd were part of a group that collectively attacked him and during the course of which he sustained injuries consisting of a lump to the back of his head, a cut lip and a cut to his ear, albeit there are no photographs of his injuries. He did not seek medical help and he declined to give a victim personal statement.

27. We can well see that in the context of joint enterprise offending involving violence, resulting in injury, there may be circumstances in which it would be appropriate to make a compensation order against one or more of those who took part in such violence. However, we do not consider it necessary to address in this judgment when that will or will not be appropriate as this may well depend on the particular facts of the case in

question and whether there are any bases of plea that are accepted.

28. We are satisfied that the short answer in the present case is that the Crown accepted a basis of plea which sets out the applicant's involvement and that his direct actions did not result in an injury - a plea that was accepted by the Learned Judge. In such circumstances and on the particular facts of this case, we do not consider that it was appropriate to make a compensation order against the applicant in relation to Mr Kennerley. In consequence, the making of any compensation was manifestly excessive. In such circumstances, it is not necessary to say anything about the quantum of the compensation order.

29. We would only add this. Guidance is given in the Compensation Guide in relation to the making of compensation orders to which we would draw attention. Amongst other matters it makes clear (at paragraphs 5) that the court must take into account the offender's means (and see also paragraph 9 in that regard). If it had been necessary to consider the size of the compensation ordered in the present case, we would not have considered that there had been any sufficient inquiry as to the means of the applicant or the applicant's ability to pay compensation or within what timescale (which can be over a maximum period of 3 years). Equally, it will be important for the sentencing court to have as much evidence as possible as to the nature and extent of the injuries caused to the victim. The evidence in that regard, in the present case, was itself limited.

30. In the above circumstances we grant leave to appeal against the compensation orders, allow the appeal and quash the compensation orders that were made.