

NCN: [2019] EWCA (Crim) 1135

No: 201901596 A4

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 7 June 2019

B e f o r e:

LORD JUSTICE SIMON

MR JUSTICE LAVENDER

HIS HONOUR JUDGE EDMUNDS QC

REFERENCE BY THE ATTORNEY GENERAL UNDER
S.36 OF THE CRIMINAL JUSTICE ACT 1988

R E G I N A

v

STEPHEN MICHAEL UNSWORTH

Ms S Przybylska appeared on behalf of the **Attorney General**

Mr P Treble appeared on behalf of the **Offender**

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J U D G M E N T

LORD JUSTICE SIMON:

1. The Solicitor General seeks leave to refer sentences passed on 1 April 2019 at the Crown Court at Bolton under section 36 of the Criminal Justice Act 1998, as being unduly lenient. We grant leave.

2. The offender is now aged 36. He was charged and sentenced for five offences. For the robbery of a purse belonging to Sharon Ashcroft, count 1, 4 years and 6 months' imprisonment. For the robbery of cash from Alexandra Leyland, count 2, 4 years and 6 months concurrent. For the robbery of alcohol, cigarettes, tobacco and cash, count 3, 4 years and 6 months concurrent. For an offence of wounding with intent to resist arrest, contrary to section 18 of the Offences Against the Person Act 1861, count 4, 4 years' imprisonment consecutive to the sentences on counts 1 and 3. For an offence of having a bladed article, count 5, 12 months' imprisonment, concurrent to the sentences passed in respect of counts 1 to 4. The total sentence was therefore a term of eight and a half years. Forfeiture of the knife was also ordered. The sentencing judge was the Recorder of the Bolton, His Honour Judge Walsh.

3. In summary, shortly before 10.00 pm on 7 October 2018, the offender took a knife with a 6-inch blade to a convenience store. He threatened the two female shop assistants with the knife and robbed them of personal possessions. He then robbed the store of cash, alcohol and tobacco. When he left the shop he was pursued by police officers. One officer grabbed hold of him and the offender resisted him by stabbing him repeatedly with a knife. The officer's body armour was punctured and he suffered superficial puncture wounds to the elbow, stomach and under his arm.

4. It is unnecessary to set out the details of the robberies more fully, other than to note six points. First, the offender said to one of the victims, Ms Ashcroft, "I don't want to hurt you. I've seen the cash, I want the cash". Second, he held the knife to the back of the other victim, Ms Leyland, and said, "I don't want to stab you but I will if I have to". Third, when Ms Ashcroft said she would switch the alarm off, the offender screamed at her not to press anything and that he wanted the cash. The two women then opened the tills and gave the offender the cash that had been left in each till overnight. The total taken was approximately £150.
5. Fourth, while still holding the knife to Ms Leyland's back, he asked for her purse and took the small change from it. Fifth, in desperation, Ms Leyland told him to take the cigarettes and alcohol. Ms Ashcroft opened the cigarette kiosk at his request and he filled a crate with cigarettes and bottles of alcohol. The value of the stock taken was of the order of £650.
6. Sixth, having seen Ms Ashcroft's handbag, he took her purse. She told him that there was no cash inside. He opened the purse and gave her back her bank cards, then put the purse in his pocket. He then walked quickly out of the shop.
7. The robbery was captured on the shop's CCTV and was reported to the police by a neighbour.
8. Police Constable Lamb and Police Constable McCoombes received a call to go to the stop, and as they drove up the offender was seen coming out of the shop heavily laden. The

two female shop assistants were pointing and saying, "It's him!" Police Constable Lamb got out of the car and ran after the offender, while Police Constable McCoombes followed in the car. Police Constable Lamb, who was in full uniform, shouted "Police!" in order to identify himself. He grabbed the offender from behind and as he did so he saw a silver flash. The offender swung his arm and began to strike Police Constable Lamb to the right side of his body with the knife he had produced at the store six or seven times.

9. The officer felt his body armour moving with the force of the blows. He realised that the offender was stabbing him and shouted for help. He pulled the offender to the ground, where he continued to struggle violently. Police Constable McCoombes dived on the offender's back. He realised that Police Constable Lamb had been attacked but was reluctant to use his taser as he would have to release the offender to do so. He made attempts to subdue him with blows to the back of his head, and activated the emergency button on his radio to summon help. The offender continued to struggle and Police Constable McCoombes, fearing for his and Police Constable Lamb's safety, drew his taser. He was too close to discharge the cartridges, so he activated the "arc" mode, sending an electric charge across the front of the taser, which made a loud crackling noise. He shouted, "Taser", at which the offender stopped struggling and the officers were able to handcuff him.
10. Police Constable Lamb immediately recognised the offender, having dealt with him on several previous occasions. He arrested him on suspicion of robbery and cautioned him. The kitchen knife with the 6-inch blade lay on the ground where they had detained the offender. The blade was broken in two. He was further arrested on suspicion on

wounding with intent to resist arrest and cautioned. He was searched and found to have approximately £150 of cash on him.

11. Police Constable Lamb suffered three small puncture wounds to his elbow, stomach and under his arm. There were also perforations to his body armour and clothing.

12. While awaiting interview the offender asked how the officer was and said, "Tell him I'm sorry. I didn't know he was the police". He was interviewed under caution. When asked for his address he said that he was living on the streets but otherwise gave no comment answers to all questions asked. At the end of the interview he was asked about his record for violence, including resisting arrest, and said, "What and your police don't assault me ... your police fucking assault me all the fucking time". He was asked when he had been assaulted and said:

Fucking loads of times, I got beat up last night off them, so I'm going to protect meself ... I was punched repeatedly at the back of the fucking head ... I was stamped on, on my back ... I was stamped on me fucking head, so you can go on all about that, your cops are fucking corrupt as fuck ...

13. When the accounts of Police Constable Lamb and Police Constable McCoombes were put to him, he said, "Yeah well I want assault on them as well". He was asked about resisting arrest and said:

I didn't know he was a policeman and he's fucking punched me in the fucking eye ... I'm not trying to fucking deny the job, I'm banged to rights on it. Someone has attacked me, I didn't know who it was, so I protected myself.

14. He denied that the officer had identified himself. He said he was punched repeatedly and grabbed from behind. He had not realised the man was a police officer. He said he had

only produced a knife after he was punched and stamped on.

15. The offender was aged 36 and had 40 previous convictions for 77 offences. He began to commit non-dwelling burglaries in 1995 at the age of 12, progressing to dwelling burglary in 2000 at the age of 17. He received a conditional discharge for resisting or obstructing a police officer in 2000. He was convicted of robbery in 2001 at the age of 17 and was sentenced to 30 months' imprisonment consecutive to a sentence imposed earlier the same year on other offences. He was convicted of escaping from custody in 2004 at the age of 21 and was sentenced to 6 months' imprisonment consecutive to a sentence previously imposed for other offences. He was convicted of burglary and common assault in 2008 at the age of 25 and was sentenced to a total of 35 months' imprisonment. In 2015, he was convicted of having a bladed article in a public place and sentenced to 4 weeks' imprisonment consecutive to a sentence previously imposed for other offences. On 6 March 2018, he was convicted of having a bladed article in a public place and sentenced to 6 months' imprisonment. He was on licence for this matter at the time of these offences.

16. There was a report from the probation service dealing with the offender's sentence imposed in March 2018 for having a bladed article. The writer reported that the offender's compliance had been poor. He has been recalled five times for non-engagement and was at the point of being before the court for breaches. He had shown no inclination to comply with the requirements of his licence and did not avail himself of the help offered. He had asked to be referred to mental health services but failed to attend the appointments offered. He was prescribed treatment for substance misuse and failed to attend his

medical appointments.

17. The court also received a report from a consultant psychiatrist instructed by the defence. He referred to the offender's long history of substance misuse, most recently heroin and crack cocaine, and to the offender's account that he was feeling "paranoid" at the time of the offence and had used heroin, crack cocaine and pregabalin, (a prescription medication used in the treatment of epilepsy and anxiety, sometimes taken by drug users in combination with opiate drugs). The prosecution evidence indicated that the offender had exhibited aggressive and violent behaviour. However, there was otherwise no evidence of disturbed or abnormal behaviour, speech or thoughts that would suggest a mental disorder.
18. The psychiatrist commented that it was likely that the offender's illicit drug use had resulted in his 'having a degree of suspiciousness and what he described as paranoia', and that these symptoms become more severe when the offender was under the influence of drugs, particularly cocaine. Based on the offender's description of his drug use at the time of the offences he considered that it was more likely that the offender was experiencing the transient mental effect of intoxication rather than suffering a psychotic episode.
19. There was further evidence of the impact on the victims of the offence. Ms Leyland still worked at the shop but now had to be helped to lock up at night because she was so nervous. She was frightened to be in her house alone and would stay at her mother's if her partner was away. She had been prescribed antidepressant medication to help with her anxiety and had problems sleeping. Ms Ashcroft said that since the offences she had taken to wearing a panic alarm around her neck at all times. She still worked at the shop

but was unable to stop watching the door. She was concerned for Ms Leyland and would visit the shop to reassure her when they were working different shifts.

20. Police Constable Lamb's statement described how he was now wary of being injured at work and was hesitant when dealing with conflict. He and his partner were both worried that he could have been seriously injured or killed. Police Constable McCoombes' statement was in the following terms:

When you go to a robbery you expect weapons, but you don't expect to be attacked in that way. There was the realisation that not only had a colleague - a friend, someone I have worked with for years, socialised with, laughed and joked with - been injured, not only that I could have been stabbed, but that either of us could have been seriously injured or worse ...

21. On 5 November 2018, the offender pleaded guilty to counts 1 to 3, robbery and count 5, bladed article. He pleaded not guilty to count 4, wounding with intent, and the case was adjourned to 25 March 2019 for trial. On 12 March, a plea to an offence contrary to section 20 of the Offences Against the Person Act 1861 was offered on behalf of the offender. This was considered by the prosecution and rejected. On 19 March, the offender was re-arraigned on count 4, wounding with intent, and changed his plea to guilty.
22. The sentencing hearing was first listed on 29 March when submissions were made as to the applicability of the section 18 Sentencing Council Guidelines; and the matter was adjourned to 1 April for the Judge to reflect on the appropriate sentence. It is clear that he did so.
23. Prior to 1 April, the prosecution provided a sentencing note and two authorities: *Smith*

(*Craig William*) and *Cheetham*, to which we will refer later, which indicated that the definitive Guideline on section 18 wounding was relevant to the court's consideration of count 4.

24. In passing sentence, the Judge gave credit of 25 per cent for the guilty pleas to counts 1 to 3, robbery and count 5, bladed article entered at the PTPH, and 20 per cent credit for the guilty plea to count 4, entered 6 days before trial. He referred in general terms to the offender's previous convictions, including the two convictions for possession of weapons and the fact that he was on licence following release from a custodial sentence for the more recent of those convictions. He commented that the previous convictions were largely the result of his drug addiction.

25. He considered the imposition of an extended sentence but was satisfied that the gravity of the offending could be dealt with by a significant determinate sentence. In relation to the robbery offence, some physical violence was used and the knife had been produced, placing the offence in category A for culpability, and the victims were traumatised, although they suffered no serious enduring physical or psychological harm, placing the offence in category 2 for harm, it was therefore a category 2A offence under the Guidelines. The vulnerability of the victims was an additional aggravating factor. He concluded that the appropriate sentence after trial would have been a term of 6 years' imprisonment concurrent on each count of robbery and, applying a reduction of 25 per cent, reduced the sentence to four and a half years' imprisonment concurrent on each count.

26. He did not refer to any mitigating factors. In particular, he made no finding that the offender had shown remorse. He observed that the section 18 offence did not fit easily into the guidelines as the intent was not to cause grievous bodily harm, but the offender had nevertheless used a knife repeatedly in an attempt to stab a police officer. He added this:

Although only minor injury was actually inflicted you attempted to stab a police officer with a knife in order to resist arrest. ... the fact that serious injury or worse was avoided was because the officer was wearing body armour at the time.

27. Having regard to totality and applying a reduction of 20 per cent for the later guilty plea to this charge, he imposed a sentence of 4 years' imprisonment on count 4. The notional sentence before the reduction for guilty plea was therefore 5 years. He ordered forfeiture and destruction of the knife.

28. The total sentence was, as we have noted, a term of eight and a half years' imprisonment.

29. The Solicitor General submits that this sentence was unduly lenient. She accepts that the sentences for the robbery and the bladed articles cannot be said to be unduly lenient; but she argues, by Ms Przybylska, that the aggregate sentence failed adequately to reflect the seriousness of the offending. More particularly, in relation to the section 18 offence, the starting point of 5 years was too low and the credit of 20 per cent was too high.

30. We will refer to the count 4 offence as the "arrest offence". It is common ground that the arrest offence is not covered by the Sentencing Council definitive guidelines on section 18 assault. However, it is clear from a number of cases that a sentencing court may have

regard to these Guidelines, although it is not bound to apply them.

31. Ms Przybylska submits that there were a number of relevant aggravating factors: the offender's previous convictions; the fact that the offences were committed while on licence; the vulnerability of the victims (the victims of the robbery were two women alone in a shop at night, the victim of the arrest offence was an unarmed officer) and the ongoing effect on the victims. She submits that there were no mitigating factors, in particular the Solicitor General did not accept that the offender's statement that he did not realise that Police Constable Lamb was a police officer and thought that someone was attacking him was either genuine or reasonable, nor that it afforded any mitigation.

32. Mr Treble makes a number of points on the offender's behalf. First, the judge was entitled to have regard to the section 18 guidelines and did so. However, second, the material distinction between the arrest offence and other section 18 offences is that the intent is to resist arrest and not to cause really serious harm. Third, he accepts that the use of a knife is a factor indicating higher culpability under the guideline; however, he submits that the offender lashed out in panic, his intention was not to cause serious injury but to escape. Fourth, the victim was a police officer acting in the course of his duty, but he argued that this is mitigated by the offender not knowing that he was police officer. This and the expressions of remorse amounted to substantial mitigation. Fifth, Mr Treble points out that the injuries were "mercifully" minor and most of the cases on the arrest offence involved significantly more serious injury. Sixth, in the case of *Smith (Craig William)*, the injuries were comparable but the court regarded the starting point of 6 years and a sentence of four and a half years as severe - see [12]. Finally, the 20 per cent reduction

was justified by delays caused by negotiations taking place between the parties.

33. We have considered these submissions.

34. So far as material, section 18 of the Offences Against the Persons Act 1861 reads as follows:

Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person ... with intent to resist or prevent the lawful apprehension ... of any person, shall be guilty of an offence, and being convicted thereof shall be liable ... to imprisonment for life.

35. As was pointed out in *R v Haywood* [2014] EWCA Crim 2006 at [20] - [21], although the Sentencing Council Guidelines for causing grievous bodily harm with intent and wounding with intent to cause grievous bodily harm - page 3 - do not specifically cover the arrest offence, those offences carry the same maximum penalty - life imprisonment; and it was for this reason that the court indicated that a sentencing judge is entitled to have regard to the guidelines, although he or she is not bound to apply them.

36. Doubtless one of the reasons why the court in *Haywood* adopted this approach is that what is identified as a specific aggravating factor in the section 18 guidelines - the offences being committed against those working in the public sector - is likely to be a usual, if not invariable, feature of the arrest offence.

37. The utility of the guidelines is that they identify culpability and harm factors that may be present in the arrest offence, although the nature of the arrest offence is that the violence is

usually inflicted against those charged with enforcing the law by making an arrest, which is treated as simply an aggravating factor under the section 18 Guidelines.

38. The cases to which we refer indicate a number of range of sentences depending on the seriousness of the offence.
39. In the earlier case of *R v Talbot* [2012] EWCA Crim 2322, a car was driven deliberately at an off-duty police officer, who was thrown onto the bonnet of the car and then onto the ground, hitting his head. The defendant then drove over the officer's legs. The victim suffered a laceration to the head and a broken leg. In that case a starting point of 10 years and a sentence of 8 years was not regard as manifestly excessive.
40. *Haywood* was a renewed application for permission to appeal a sentence that was refused. The facts were similar to those in *Talbot*: deliberate driving at a police officer in a getaway car causing serious injury. A sentence of 8 years and 9 months after a late plea was held not to give rise to arguable grounds of complaint.
41. In *R v Smith (Craig William)* [2019] 1 Cr App R (S) 30, the appellant charged at a police officer with a serrated knife and struck his hand near the base of the thumb, which needed to be stitched at an A&E department of the local hospital. Smith had a poor record for offences involving the police. In that case, the sentencing judge had taken a starting point of 6 years and reduced that by 25 per cent for the plea of guilty. The court considered that a sentence of four and a half years was severe but not manifestly excessive.

42. In the case of *R v Cheetham* [2019] EWCA Crim 288, the appellant was charged with a section 18 assault on a police officer while being pursued after a knifepoint robbery. The defendant punched the officer to the ground and used the officer's own handcuffs as a knuckleduster to hit him repeatedly. The officer was badly injured and was off work for 4 months and thereafter confined to restricted duties. The crime was charged as wounding with intent to cause grievous bodily harm and the court considered that it was a category 1 offence within the guidelines, for which the starting point is 12 years. The court considered that the offence by itself would have justified a starting point of 14 years.
43. These cases show the differing circumstances in which the arrest offence can be committed and therefore the range of sentences that may be appropriate depending on the seriousness of the offence.
44. The present case is marked by a number of aggravating features. The offender was fleeing from the scene of a serious offence carrying a knife. Criminals do not carry weapons as ornaments. He had already told Ms Leyland that he would stab her if he had to. He attacked a police officer with a knife in order to resist arrest. We do not accept that the offender was entirely unaware that Police Constable Lamb was a police officer as he stabbed him six or seven times, not least because he was in full uniform. He struck the officer repeatedly and forcefully with the knife and the only reason that more serious injury was not caused was that the officer was wearing body armour; it was not due to any lack of effort or intent by the offender. The intention was plain: to commit more serious harm than was in fact inflicted. This is identified as a specific aggravating factor in the section 18 Guidelines. The offender had a poor record, which included two recent

convictions for carrying a knife, and he was on licence for the most recent offence.

45. If reference were to be made to the Guidelines for section 18 offences, the offence charged as count 4 fell at the top end of the range for category 2 offences, lesser harm and higher culpability, 5 to 9 years.
46. In these circumstances, a starting point of 5 years and a sentence of 4 years was, in our view, unduly lenient, even allowing for the proper application of the principle of totality. The offence called for a starting point of not less than 8 years' imprisonment. We are not persuaded that the judge erred in giving credit for the plea of 20 per cent, issues of credit for plea are very much for the sentencing judge; and after making allowance for the principle of totality, in our view the sentence on count 4 should have been a term of 6 years.
47. Accordingly, we substitute a sentence of 6 years on count 4.
48. No issues arise on any of the other sentences and therefore the total sentence will be one of 10 years and 6 months.