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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

R E G I N A
v
SOLOMAN ASMELASH

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Mr N Evans appeared on behalf of the **Appellant**

Mr J Traversi appeared on behalf of the **Crown**

J U D G M E N T

MR JUSTICE LAVENDER:

On 4 February 2019, in the Crown Court at Isleworth, the appellant was convicted of violent disorder, contrary to section 2(1) of the Public Order Act 1986.

On 5 March 2019 he was sentenced to 16 months' imprisonment. The judge decided not to suspend that sentence. She did suspend the sentences of 12 months' imprisonment imposed on each of Muhammed Rai and Haben Mahari, each of whom was convicted of the same offence.

At about 12.40 am on Monday, 10 July 2017, the appellant, who had been drinking, was outside the Bell public house in Hounslow demanding to be let in and persisting in his attempts to get inside, despite being refused entry. The doorman, Gani Gjeta, called the manager, Chital Shah. She asked Mr Rai for help. Mr Rai was someone who worked in the pub, but who was off duty that night. He went outside to speak to the appellant.

There is a dispute about precisely what happened next. Only parts of the incident were caught on CCTV. However, there soon developed a violent episode in which over 20 people were involved. Punches were thrown. Belts were removed and used as whips. Bottles, bricks and other objects were thrown. Members of the public were put in fear. One customer of the pub suffered fractures to his left wrist and hand and had to have plates inserted surgically.

The police were called at 1.00 am. When they arrived, the fight was still going on. The appellant was lying on the ground. He had cuts to his head, face, arms and knees and was given first aid. He was quite seriously injured in the course of the disorder, but there was no lasting injury.

As to the personal circumstances of the appellant and his co-defendants, the appellant was 21 and of good character. He came to the UK without any family when he was only 16. He was

granted asylum. He was looked after by Children's Services and given a foster place. He lived in a flat provided by Children's Services and received an income in the form of universal credit. He was studying plumbing.

Mr Rai was 50. He had appeared before the courts on four previous occasions for seven offences between 1982 and 2009. His previous offences were for dwelling burglary, conspiracy to commit assault, carrying a loaded shotgun and carrying a firearm with intent to commit an offence, criminal damage and battery. He received non-custodial sentences for all offences save for the conspiracy to commit assault and the firearms offences, for which he was sentenced to 21 months' youth custody in 1988. The judge considered that Mr Rai had clearly moved on from that and was now a hard-working family man. Notwithstanding his previous convictions, the judge considered this offence to be out of character for him and had read excellent character references on his behalf. He was highly regarded by his colleagues. He had a teenage son who lived just with him. He was an active and committed father to a young daughter with autism spectrum disorder. Her mother said that any absence on his part because of a custodial sentence would severely affect his daughter, who would not be able to visit him in a prison environment.

Mr Mahari was 21 and of good character. He had impressed the probation officer, who described him as a hard-working, pleasant, well-spoken, respectful and extremely polite young man who showed genuine remorse for what had happened. He lived in a hostel provided by social services and had no family in this country. He was studying carpentry and worked part time to supplement his income, which was to his credit. He had a good work ethic and had given the impression to those who interviewed him that he was very sad to have got into trouble. He came to this country to escape hardships in his own country and it was clear he had worked hard since to achieve a better life. Like the appellant, he presented a low risk of

reconviction.

The judge who heard the trial was the judge who passed sentence. At trial she saw the CCTV footage of the incident, she heard the evidence of Ms Shah, Mr Gjeta, Mr Blackhurst, who had been a customer in the pub, various police officers and Mr Rai. The appellant did not give evidence.

In her sentencing remarks, the judge described the appellant's role in the incident as follows:

> "And it all started because you, Mr Asmelash wanted to get inside and you were refused entry for quite proper reasons. You persisted in your attempts to get inside and despite the patience of Mr Garney and Mr Rai, your co-defendant, who had been asked to help and who was sober, unlike you, you kept on and on and on. In the end it seems that Mr Rai having himself being struck in some way and his colleague being struck in some way, lost patience and so gave you a very hard shove to get you away. At this point you invited him around the corner, foolishly he did go around the corner, as did numerous other people. It was at this point that belts came off and you Mr Asmelash I'm quite sure was the first person to do so. From that point more and more belts came off. They were swung around and they were used as whips and from there, there was mass violence which escalated very quickly and very seriously with multiple and various missiles as I have described being used."

She went on to say:

> "You, Mr Asmelash, were under the influence of alcohol. In fact, you have very little recollection of what took place that night. You, quite clearly in my view, started the trouble. You were the first to take your belt off and struck out with it. Had it not been for that it may well be that no-one else would have done the same. You also threw punches. At various points, you could have retreated as the violence started and escalated, but you made repeated decisions not to. Your friends on several occasions tried to persuade you to leave but you did not. Mr Mahari, I note to his credit, was one of those men."

And in relation to Mr Mahari, the judge said:

> "Mr Mahari, you threw multiple missiles in the course of this disturbance and you had your belt off. At one point you also took a crate to use as a weapon, although your subsequent use of it was in defence of [Mr Asmelash] who was at that point being kicked in the way that I have described. You, yourself, did make initial attempts as I have said to make peace and to try and get others to move away. You were also not there as the violence started but as you rejoined your friends who you had left temporarily to go and buy cigarettes,

> you found yourself in a scene that was very quickly escalating and despite your unsuccessful attempts to make peace and to make others move away, you then joined in."

Finally, in relation to Mr Rai, the judge said:

> "Mr Rai, you had for a long time tried to diffuse this situation. You were asked by others to do that very thing. Only when others took their belts off so did you, but you didn't need to do so. There were others who were there who did retreat inside the pub. Whether it was lack of judgment, a willingness to join in or an unwillingness to leave those outside the pub, you did join in and the truth is, the reality is, you did not have to. You were seen repeatedly swinging your belt around, but I accept that at no occasion can I see that the belt that you were swinging make contact. You did then, however, chase after Mr Asmelash and were at the back of the group that then started to kick him as he lay on the ground having tripped over his own trousers."

The judge said that she decided to suspend Mr Rai's sentence because of his significant personal mitigation, the role he played and the amount of time he spent trying to defuse the situation before he reluctantly became involved.

The judge decided to suspend Mr Mahari's sentence in light of his personal mitigation, the fact that he was not involved at the outset and the fact that he tried to break it up, as well as his good character.

In relation to the appellant, the judge considered the matters set out in the guidelines on imposition of community and custodial sentences and said that his sentence had to be immediate because of all the circumstances and his role. In effect, she was saying that his was a case where appropriate punishment could only be achieved by immediate custody.

The grounds of appeal are: first, that a sentence of 16 months' imprisonment was manifestly excessive; secondly, that the judge was wrong not to suspend the appellant's sentence; and thirdly, that there was an impermissible disparity in sentence between the appellant on the one hand and Mr Rai and Mr Mahari on the other hand. It is fair to say that at the hearing before us, Mr Evans did not press the first ground of appeal very far.

Underlying all of these grounds of appeal as set out in the advice on appeal was, effectively,

a challenge to the judge's assessment of the facts of this case. In his advice on appeal Mr Evans advanced a version of events which minimised the appellant's role in the disorder and maximised that of others, particularly Mr Rai.

We have not had the benefit which the judge had of hearing the evidence in this case. We have seen the CCTV footage, but we have not heard the evidence which was given about it. The interpretation of the CCTV footage was no doubt the subject both of evidence and of submissions at trial in the light of that evidence and we are not in a position to conclude that the judge's assessment of the roles played by the individual defendants was wrong.

We deal briefly with the issue of disparity. It is a ground of appeal which is rarely successful, since it requires this court to ask is: "Would right-thinking members of the public with full knowledge of all the relevant facts and circumstances learning of this sentence consider that something had gone wrong with the administration of justice?"

In the present case, we consider that the answer to that question is no. Assuming, contrary to the other grounds of appeal, that an immediate sentence of 16 months' imprisonment was appropriate for the appellant, we do not consider that right-thinking members of the public would think that something had gone wrong with the administration of justice simply because the other two defendants received shorter, suspended sentences for the reasons given by the judge.

As to the length of the appellant's sentence, the maximum sentence for violent disorder is 5 years' imprisonment. It is relevant to recall that violent disorder is committed when three or more person are present together and use or threaten unlawful violence and their conduct taken together is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety.

There are no sentencing guidelines, but this court has given guidance in a number of cases. In R v

Fox and Hicks [2006] 1 Cr App R (S) 17, Treacy J, endorsed the following statement (at paragraph 16) as setting out the correct approach:

> "In the case of public disorder it is important for the court to look at the whole picture, and although what an individual may have done by himself is of relevance, that is simply part of the whole to which he is contributing in his way, and the larger picture must be taken account of."

In R v Gilmour [2011] EWCA Crim 2458, Hughes LJ said as follows in paragraph 16:

> "It is an unavoidable feature of mass disorder that each individual act, whatever might be its character taken on its own, inflames and encourages others to behave similarly, and that the harm done to the public stems from the combined effect of what is done en masse."

In the present case there was a prolonged episode of violence in a public area in the middle of the night which involved at least 20 men punching, kicking, using belts as whips and throwing bottles, bricks and other weapons. This undoubtedly put people present in considerable fear for their personal safety. Indeed, it resulted in a broken wrist for one individual.

The appellant participated in the violence and, moreover, his role in encouraging this violent disorder was a crucial one, since it was his aggressive behaviour outside the pub, fuelled no doubt by the alcohol which he had consumed, which was the catalyst for the incident. He invited Mr Rai around the corner, he was the one who first removed his belt and brandished it as a weapon, thereby encouraging others to do so, and he threw punches. The appellant was entitled to credit for the fact that he was a young man of good character and he was himself injured in the violence. But a significant custodial sentence was clearly called for and we are not persuaded that a sentence of 16 months' imprisonment was manifestly excessive.

Finally, we consider whether the judge was obliged to suspend the appellant's sentence. The guidelines identify factors which should be weighed in considering whether it is possible to suspend a sentence. The two factors indicating that it may be appropriate to suspend

a custodial sentence which were applicable in this case were “Strong personal mitigation” and “Realistic prospect of rehabilitation”.

As we have already said, the appellant was a young man with no previous convictions. The pre-sentence report stated that a lack of maturity may have contributed to the commission of this offence. On the other hand, it also stated that he struggled to demonstrate insight into how he would prevent himself becoming involved in crime in the future and what he could have done differently. Nevertheless, he was assessed as presenting a low risk of reoffending and the pre-sentence report recommended a community order or a suspended sentence.

To be balanced against those factors, the relevant factor indicating that it would not be appropriate to suspend a custodial sentence was “Appropriate punishment can only be achieved by immediate custody”. This was a serious episode of group violence and the judge identified the respects in which the appellant not merely participated in the incident, but also instigated and encouraged violence.

The balancing exercise in the appellant's case was not an easy one, but we consider that the judge ought to have concluded that it was appropriate to suspend the appellant's sentence.

Accordingly, we quash the sentence imposed by the judge and replace it with a sentence of 16 months' imprisonment, suspended for 2 years.

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