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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 5 February 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE MARTIN SPENCER

HIS HONOUR JUDGE WALL QC
(Sitting as a Judge of the CACD)

R E G I N A
v
CHRIS EBBS

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Ms K Hovington appeared on behalf of the **Appellant**

J U D G M E N T
(Approved)

MR JUSTICE MARTIN SPENCER:

1. On 31 October 2018 the appellant was sentenced to 12 months' imprisonment for an offence of affray to which he had pleaded guilty 2 days earlier. Originally the appellant had been charged with inflicting grievous bodily harm, contrary to section 20 of the Offences Against the Person Act 1861 and the count of affray was added on 29 October (the first day of trial), so as to allow the plea of guilty. The count of inflicting grievous bodily harm was ordered to remain on the file.

2. The appellant was born on 16 May 1985. He is now aged 33 and is of effective good character although he has previously been subject to a suspended sentence.

3. On 8 May 2017 he attended a football match at Stamford Bridge Football Ground between Chelsea and Middlesbrough, as part of the away support. Two Chelsea supporters, Scott Rennison and Michael Champion, watched the match, which was an evening kick off, and then went for a few drinks on the Brompton Road before walking to Earl's Court Underground station to catch a tube home.

4. The appellant, together with Peter and Wayne Minza, was in a group of Middlesbrough fans and there was some banter between the groups of supporters. However, as they approached the barriers at the station, Peter Minza (Wayne's father) took it into his head to confront Mr Rennison and then to attack him. The incident is captured on CCTV which showed that Mr Rennison tried to retreat as much as possible and in so far as he used his fists this was in self-defence. Wayne Minza and the appellant joined in. The appellant tapped his card, went through the barrier and with his raised right fist struck out at Scott Rennison. However, thereafter he desisted and played no further part in the altercation.

5. Wayne Minza (the son) had a bottle in his left hand and was trying to strike at Mr Rennison. Peter Minza, the father, who had a glass in one hand, put it to one side and formed a fist. He then struck a hard blow to Mr Rennison, which caused him to fall to the ground and sustain a serious fracture to his leg. It appears clear that all three defendants had been drinking.

6. In sentencing the appellant, the learned judge considered that no distinction should be drawn between the appellant and Wayne Minza (the son) but, on the other hand, Peter Minza, the father, was regarded as having been the "instigator" of the fight and he had struck the blow which caused the injury.

7. The learned judge, without first obtaining a pre-sentence report, stated as follows:

> "I accept entirely that your father started this, Mr Minza, but you two young men went to his aid. What you should have been doing was grabbing him and pulling him away, and you joined in, and in circumstances where I am entirely satisfied that Mr Rennison was incapable of defending himself. A full blow to the face (and I have seen the photos and the blood on his chin) would have disabled him,

> and that ghastly injury I accept unreservedly is not something that either of you foresaw at all, but fight it was.
> Again I bear in mind that there are psychiatric issues, that that you are both effectively of good character, and this is going to harm family life immeasurably, but not as immeasurably as Mr Rennison's was. In the circumstances, the starting point has to be one of fifteen months' imprisonment, and I am reducing that to twelve months."

The reduction from 15 months to 12 months was in order to give credit for the plea of guilty.

8. For the appellant Ms Hovington, who both in a cogent advice on appeal and in equally cogent and succinct submissions to us, has submitted that the judge was wrong not to order a pre-sentence report to be prepared in respect of this appellant and that the learned judge took insufficient account of the appellant's mitigation when passing sentence. She says that she made an application for a pre-sentence report before the commencement of her mitigation, on the basis that it would be the burden of her mitigation that any custodial sentence should be suspended and that it might assist the learned judge or the probation service to assess the appellant's suitability for such a sentence. However, the learned judge refused to order a pre-sentence report and she submits that he was wrong not to do so. Had he done so he would have received more in-depth information about the mental health problems of the appellant's wife and further, the appellant's role in supporting both her and their four young children. The appellant is also stepfather to two further children and there are six children involved in the family.

9. Ms Hovington submits that had the learned judge had access to a pre-sentence report he might well have been persuaded to suspend the sentence or impose a non-custodial sentence.

10. Ms Hovington submits that as well as erring in failing to order a pre-sentence report, the learned judge further erred in not suspending any custodial sentence imposed. She submits that the learned judge should have considered in terms the sentencing guideline on the imposition of community and custodial sentences and should have followed the four steps set out in that guideline. In relation to the fourth step, which is whether to suspend the sentence, she submits that he should explicitly have taken into account the factors set out on page 8 of the guideline. She refers to the appellant's personal circumstances and the fact that he has what she refers to as "a realistic prospect of rehabilitation". She submits that this appellant was on the cusp of custody and the guideline makes clear that for such offenders imprisonment should not be imposed where there would be an impact on dependence which would make a custodial sentence disproportionate to achieving the aims of sentencing.

11. In our judgment, the learned judge should have obtained a pre-sentence report before proceeding to sentence this appellant. By section 152 of the Criminal Justice Act 2003, the court must not pass a custodial sentence unless it is of the opinion that the offence was so serious that neither a final alone nor a community sentence can be justified for the offence. By section 156 of the same Act a court "must obtain and consider a pre-sentence

report before forming any such opinion as is mentioned in section 152(2)".

12. By section 156(4) of the Criminal Justice Act 2003:

> "Subsection (3) does not apply if, in the circumstances of the case, the court is of the opinion that it is unnecessary to obtain a pre-sentence report."

These provisions were referred to in the case of *R v Ozberkcan* [2014] EWCA Crim 2377, where, also in the case of an affray, the Recorder there had refused to adjourn sentencing for the purpose of preparation of a pre-sentence report. On appeal, the Court of Appeal had no doubt that in the circumstances of that case, a pre-sentence report should have been ordered stating:

> "The appellant was facing his first custodial sentence; he had no relevant previous convictions; he was treated by the judge as of effective good character (his only two previous offences were irrelevant ones of driving with excess alcohol and failing to provide a specimen). Further, the limited information before the court which formed the subject of his then available mitigation was that he was 38 years of age, had a dependent wife and two children aged 12 and 6, was self employed and ran his own business."

13. As Ms Hovington submitted, the factors in favour of a pre-sentence report in the present case were arguably even stronger than those which had been present in *Ozberkcan's case*. Furthermore, in that other case the offence was described as "a bad case of affray" involving considerable violence, not least because the appellant had there picked up a metal chair and brought it down with force on the victim's back with the obvious risk that it could have caused serious injury. Here, the appellant's involvement was short-lived and he did not use a weapon.

14. In the present case the learned judge did not articulate in his sentencing remarks why he had refused the application for a pre-sentence report, nor why he was sentencing the appellant to an immediate custodial sentence without the benefit of such a report. If the learned judge was of the view that he did not need to have such a report because he already had all the material mitigation in front of him then, as Ms Hovington has submitted, that position is undermined by his minimal reference to the mitigation in his sentencing remarks.

15. Given our view that a pre-sentence report should have been ordered, normally this court would order such a report unless it is of the opinion that it is unnecessary to do so. However, the appellant has now served over half his sentence. It would not be in his interest to adjourn this matter further for such a report to be obtained and Ms Hovington does not ask us to do so.

16. In the recent case of *R v Ilyas* [2018] EWCA Crim 718, this court endorsed the need for a court to follow the guideline by considering the four steps set out in the guideline. First: has the custody threshold been passed? Second: is it unavoidable that a sentence of imprisonment be imposed? Third: what is the shortest term commensurate with the seriousness of the offence? Fourth: can the sentence be suspended?

17. In our view, given the circumstances of the offence, violence, in a public place, under the influence of drink and where serious injury is occasioned to the victim, the learned judge was right in relation to the first three steps. The custody threshold was indeed passed, a sentence of imprisonment was unavoidable and Ms Hovington does not urge upon us that 12 months was other than the shortest term commensurate with the seriousness of the offence. We are therefore only concerned with the fourth step: whether the sentence could and should have been suspended.

18. In our view, had the learned judge correctly considered the guideline, he would or should have suspended the sentence when all three factors set out in the guideline as indicating it may be appropriate to suspend the sentence in fact applied in this case, namely: a realistic prospect of rehabilitation, strong personal mitigation and the fact that immediate custody would result in a significant harmful impact on others.

19. Had we been sitting the day after this sentence was passed we would have suspended the sentence. However, we are where we are now with the appellant having served the equivalent of a 6 month sentence of imprisonment. In those circumstances, we do not consider it would be right, now, to suspend the sentence so that the appellant has hanging over his head the prospect of re-imposition of the sentence should he re-offend (which we consider unlikely).

20. In those circumstances, Ms Hovington, in answer to a question from my Lord, Holroyde LJ, urged upon us that the appropriate course at this stage would be instead to impose an alternative sentence, namely one of 6 months' imprisonment which, by virtue of the fact that the appellant has served half of that sentence, would enable his immediate release. We accede to that submission. We allow the appeal, we substitute a sentence of 6 months for that of 12 months and to that extent this appeal is allowed.

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