

[2019] EWCA Crim 2058
2019/01466/A3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 15 November 2019

B e f o r e:

LADY JUSTICE NICOLA DAVIES DBE

MR JUSTICE JACOBS

and

HIS HONOUR JUDGE LODDER QC

(Sitting as a Judge of the Court of Appeal Criminal Division)

REGINA

- v -

SHAUN STEPHEN TOLLEY

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Miss V J Saxton (Solicitor Advocate) appeared on behalf of the Appellant

J U D G M E N T
(For Approval)

LADY JUSTICE NICOLA DAVIES:

1. On 18 March 2019, in the Crown Court at Sheffield, the appellant pleaded guilty to an offence of assault occasioning actual bodily harm (count 1) and, upon re-arraignment, to causing grievous bodily harm with intent (count 2). He was sentenced on count 1 to twelve months' imprisonment and on count 2 to ten years' imprisonment. The sentences were ordered to run consecutively, making a total of eleven years' imprisonment.
2. The appellant now appeals against sentence with the leave of the single judge.

The facts

3. On 28 October 2018, the appellant had been drinking alcohol in a public house in Barnsley. At some point a disagreement broke out. CCTV footage shows the appellant speaking with a number of people. He had been outside and appeared to be attempting to return to the pub but was blocked from doing so. A few minutes later, together with two companions, the appellant walked away from the pub to another public house further along Barnsley Road. It was around midnight.
4. Grant Darley was standing in the street outside the second public house when the appellant and his friends walked past. CCTV footage showed the appellant approach Darley, speak to him in an aggressive manner, and strike two blows to his face in quick succession before being pulled away. The appellant walked towards his home address. There was a further disturbance which appeared to have involved people who had followed the appellant from the first public house. The appellant was injured in the course of the disturbance.
5. Christopher Wilmot had been out with family and friends. He was walking along Barnsley Road carrying takeaway food when the appellant approached from the opposite direction. Seeing that there was blood on the appellant, Mr Wilmot asked if he was all right. The appellant struck Christopher Wilmot hard towards the lower jaw, which knocked him backwards. He inflicted further blows, and there was an attempted kick. Following the assault, the appellant walked away. Christopher Wilmot sought help from people and the police were called.
6. Mr Wilmot was taken to hospital where he received treatment and underwent surgery, during which metal plates and screws were inserted to the right side of his head, cheekbone and jaw. Initially, there was swelling to the back of the head and depression to the right side of his face, with facial fractures. He was seen by a maxillofacial surgeon who described a fracture of the right zygomatic complex and orbital floor. He was treated with open reduction and internal fixation in a further operative procedure. The injury extended from the jaw to the orbital structure. Initially, there were difficulties with his vision. A possibility of further operative procedures was offered, but Mr Wilmot has been warned that they carry the risk of partial or complete loss of sight, and, understandably, is reluctant to take that risk.
7. As to count 1, Grant Darley had limited movement of his jaw for about two weeks. He was unable to eat solid food and could not speak.
8. On 1 November 2018 the appellant was arrested. When he was interviewed, he declined to comment, save to say "I got kicked to bits".

9. The first indictment, to which the appellant entered a not guilty plea on 30 November 2018, contained one count in respect of Christopher Wilmot, namely, causing grievous bodily harm with intent, contrary to section 18 of the Offences against the Person Act 1861. The trial was fixed for 18 March 2019. On the day upon which the trial was to commence, an amended indictment was preferred, which included a count of assault occasioning actual bodily harm in respect of Grant Darley. The reason for the inclusion of the new count was that there had been enhancement of the CCTV footage and further CCTV evidence had been obtained of the assault involving Christopher Wilmot. Due to late service of this evidence by the police upon both the Crown and the defence, the judge allowed time for the material to be viewed and for instructions to be taken. Mr Darley also provided a statement in respect of the new count 1.
10. Having considered the new material and consulted with his counsel, the appellant entered guilty pleas to counts 1 and 2 on the amended indictment, upon the basis of full facts. The judge indicated that significant credit would be afforded to the appellant on the new count 1 (Grant Darley), as he had not had the opportunity before that date to consider the matter. The judge acknowledged that the defence were dealing with late served evidence and, as such, would be afforded greater credit than usual in respect of the plea to count 2 (Christopher Wilmot).
11. In opening the case on count 2, the prosecution stated that after the appellant struck the hard first blow, there were further blows, however, the Crown put its case upon the basis that it was almost certain that the first blow was the cause of Mr Wilmot's serious injuries. The Crown identified an attempt by the appellant to kick, but it was not clear to what extent the kick was successful. When a pair of trainers were found at the appellant's home following his arrest, no traces of Mr Wilmot's blood were found upon them, which the Crown accepted might be consistent with a kick not connecting. The attempted kick was aimed at the upper area of Mr Wilmot's body and head. He did not fall to the ground following the first blow. The appellant delivered a number of punches in quick succession and then walked away.
12. A Victim Personal Statement from Mr Wilmot was before the court. He is an army veteran, having been on tours of duty abroad. He describes the attack as having left him "utterly broken". His face has been shattered, he is in constant pain. As at the date of the hearing, he was still unable to return to work, the attack destroyed his confidence, he no longer goes out of the house on his own.
13. At the date of sentence the appellant was aged 34. He has a number of previous convictions, two of which are relevant to the instant offences: a conviction for battery in 2006, and assault occasioning actual bodily harm in 2010.
14. In sentencing the appellant, the judge noted that the offences occurred late at night. The appellant had been drinking heavily. As to count 1, the appellant struck a heavy, unprovoked and unexpected blow to the victim's face. The judge stated that it caused greater harm. Upon the basis of the CCTV evidence, the appellant had deliberately caused more harm than was necessary for the offence. As a result, the judge placed this offending in Category 1 of the Sentencing Council Guideline, with a starting point of twelve years' custody, and a bracket of nine to sixteen years.
15. As to the assault on Christopher Wilmot, the judge stated that the appellant had punched him repeatedly. The judge in fact stated that he had tried to kick him several times, without giving the victim a moment to defend himself. Within the Sentencing Council Guideline, the judge identified very serious harm and, additionally, an aggravating factor, namely that

the appellant deliberately caused more harm than was necessary for the commission of the offence. The judge described the assault as “high up” in Category 1 and that it was so serious that only a lengthy sentence of immediate custody could be justified.

16. The judge gave full credit for the guilty plea to count 1. As to the plea of guilty to count 2, the judge said that the evidence which turned the case was available only on the first day of trial, and therefore he increased the normal credit given for a guilty plea on the first day of trial. The judge stated that the sentence on count 2 would have been thirteen years’ imprisonment, consecutive to count 1 after trial; but by reason of the guilty plea, and taking account of the principle of totality, he reduced that figure to ten years’ imprisonment.

Grounds of appeal

17. There are three grounds of appeal:
 - i. The judge did not correctly identify the category in which count 2 should have been placed;
 - ii. The judge relied upon an aggravating feature, namely, further deliberation when the offence itself is a deliberate act of specific intent;
 - iii. The judge did not identify how he applied significant credit to reflect the late service of decisive evidence relevant to the discount for the guilty plea.
18. The submission made on behalf of the appellant is that the appropriate category would have been Category 2 of the Sentencing Council Guideline. In opening its case, the Crown identified the fact that it was the first punch which was the mechanism for the serious injury sustained. The follow-up attack was unpleasant, but it did not render any further identifiable injury to the victim.
19. As to the judge’s identified factor bringing the offending into the category of higher culpability, namely that the appellant deliberately caused more harm than was necessary, it is submitted that this was not made out on the facts. It would appear that there was discussion between the judge and counsel as to another aggravating factor, namely, an intention to commit more serious harm than actually resulted from the offence. Today, the submission is made that this is an offence of specific intent, and to take account of the intention to commit more serious harm is, in effect, double counting.

Discussion and conclusion

20. We have viewed the CCTV evidence. It is clear from that evidence that, following the initial hard punch which caused the victim to bend over, the appellant kicked at the face or head of the victim as he was bent over and he followed that up by four punches to the face of the victim. Having considered the CCTV evidence, we have no hesitation in concluding that there was an intention on the appellant’s part to commit more serious harm than actually resulted from the offence. We do not accept that such a finding would represent double counting. The intention to cause the offence of grievous bodily harm with intent was encompassed in the first punch, however, the appellant did not stop there. He continued with another kick or attempted kick and four punches. In our judgment, that comes clearly within the aggravating factor of an intention to commit more serious harm than actually resulted from the offence. As such, it would bring this offending within the category of higher culpability. It is undisputed that there were factors in this case indicating greater harm.

21. We agree with the judge, albeit for different reasons, that this offending would come within Category 1 of the Sentencing Council Guideline. This provides a starting point of twelve years' custody, and a category range of nine to sixteen years. We note that the judge would have taken as a starting point after trial of thirteen years. He reduced that to give enhanced credit for the appellant's guilty plea and to take account of the principle of totality. In our judgment, that was a proper course to take. The resultant term of ten years' imprisonment cannot be described as manifestly excessive.
22. Accordingly, this appeal against sentence is dismissed.

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