IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2020] EWCA Crim 1427

CASE NO 202000899/A2

Royal Courts of Justice

Strand

London

WC2A 2LL

Wednesday 14 October 2020

LORD JUSTICE DAVIS.

MR JUSTICE SPENCER

MR JUSTICE WALL

REGINA

V

JORDAN LEE SMITH

Computer Aided Transcript of Epiq Europe Ltd,
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MR A AMER appeared on behalf of the Appellant

J U D G M E N T

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1. MR JUSTICE SPENCER: This is an appeal against sentence brought by leave of the single judge.
2. On 12 February 2020, in the Crown Court at Merthyr Tydfil, the appellant, who is now 28 years old, pleaded guilty to an offence of causing grievous bodily harm with intent contrary to section 18 of the Offences Against the Person Act 1861. He was sentenced by Her Honour Judge Nicola Jones to a term of seven-and-a-half years' imprisonment.
3. The principal ground of appeal is that the judge placed the offence in the wrong category under the relevant Sentencing Council Guideline and that in consequence the sentence was manifestly excessive.
4. The victim of the offence was a 45-year-old man, John Hamer. He and the appellant both lived in Rhayader. Mr Hamer had been drinking in Rhayader on the evening of 2 August 2019. He knew the appellant, who was friendly with his son, a friendship of which Mr Hamer did not approve. Mr Hamer had seen the appellant during the course of the evening. As Mr Hamer left the public house and was making his way home at about 1.00 am, it was he who approached the appellant on seeing him in the street. They engaged in conversation. A witness heard raised voices. However, there was no physical aggression from Mr Hamer.
5. The incident was captured on CCTV, which we have studied, as did the judge. Mr Hamer was smoking a cigarette and standing passively with his hands by his side talking to the appellant on the pavement. Suddenly, and without warning, the appellant punched Mr Hamer to the face. It was a full force blow which caused Mr Hamer to fall headlong to the floor. It is likely that he lost consciousness during the course of the attack which followed because whilst Mr Hamer was lying on the floor the appellant walked round him and kicked Mr Hamer with force to the head on four occasions in quick succession.
6. The quality of the CCTV footage is not sufficient to show clearly the nature of the appellant's footwear but the appellant produced to the police the shoes he was wearing which in fact were a pair of trainers, which we accept. The appellant then calmly walked away from the scene leaving Mr Hamer lying on the pavement unconscious, mainly on the pavement itself but with his lower legs dangling over the kerb into the roadway. The CCTV shows that within a minute or two an elderly male walked up to Mr Hamer, who had by now had come round and was sitting up on the pavement. That gentleman spoke to Mr Hamer and then walked off. Mr Hamer himself got up a minute or so later and staggered off up the road out of sight of the CCTV camera.
7. As chance would have it Mr Hamer's father-in-law, Graham Morris, had heard the disturbance. His house overlooked the street. He had been asleep in bed but was woken by the sound of arguing. He went to the window and saw the appellant kicking a man in the head and walking off. It was only when Mr Hamer struggled to his feet that Mr Morris recognised him as his son-in-law. He quickly got dressed and went down to help him.
8. Mr Hamer's right eye was closed and there was a lot of blood over his face. He was clearly badly injured. Mr Morris drove Mr Hamer to hospital at Llandrindod Wells but

they discovered it was closed. They went to Llandrindod Wells police station to report the assault. Photographs were taken there by the police officer on duty. We have seen the photographs which tell their own story. These were very nasty injuries.

9. The officer advised Mr Hamer to go to the Accident & Emergency Unit at Bronllys Hospital, Aberystwyth. There a scan of Mr Hamer's head revealed a fracture to the right eye socket. It was thought initially that he would require surgery but it was not possible immediately to perform an operation because of the degree of swelling. He was therefore sent to another hospital, at Abergavenny, to see an eye specialist, who confirmed that his vision had not been affected. He was referred from there to Morriston Hospital, Swansea, where he was seen by an oral and maxillo-facial surgeon. These trips to hospital from Mr Hamer's home in rural Mid Wales involved travelling long distances and took place over the course of a very full day.
10. Mr Hamer took further photographs himself of the injuries to his face. The bruising and swelling and pain persisted for a week or so during which time he was unable to work. He was a farmer. He had to pay others to do the work for him that week. He was unable to sleep properly for a week. He had been on anti-depressants before the assault but had managed to wean himself off them. Following the assault he had to resume the medication. He was fearful of repercussions because Rhayader is such a small town.
11. Fortunately Mr Hamer seemed to have made a good recovery from the physical injuries by the time of the sentencing hearing. A statement from the oral and maxillo-facial surgeon confirmed that when Mr Hamer was seen in the clinic a week after the injury there was no evidence of double vision and no restriction of eye movement. He was discharged from hospital care two weeks later.
12. The appellant had only one previous conviction but it was a particularly relevant conviction: in 2014 (aged 22) he committed a similar offence of inflicting grievous bodily harm in a street attack but this time the offence was charged as section 20 rather than section 18. He received a suspended sentence of 10 months' imprisonment, with a requirement of 150 hours' unpaid work. That offence arose through an argument over a girlfriend. The appellant struck the victim to the face, knocking him to the floor unconscious. The victim's jaw was fractured in two places necessitating surgery to insert four metal plates and there was some permanent nerve damage.
13. There was no pre-sentence report nor was any such report necessary in the circumstances. The offence was plainly so serious that only a significant period of custody was appropriate.
14. The judge was however provided with a number of glowing testimonials from those who knew the appellant through his work and through his social activities including his involvement with the local rugby club, both on the field and supporting it with fundraising.
15. Following the assault the appellant had moved away from Rhayader and was living and working in the Telford area. He had a partner who was expecting their child. We have seen the letter which she wrote to the judge before the sentencing hearing and we have seen a letter she has written more recently. Sadly she lost the baby a week or so after the appellant was sentenced.
16. In opening the case the transcript reveals that prosecuting counsel suggested that the offence probably fell within category 1 of the relevant Sentencing Council Guideline, in that there was a sustained or repeated assault - a punch followed by a series of kicks to

the head whilst the victim was on the floor.

17. Mr Amer, who represents the appellant before us today and settled the grounds of appeal, did not represent him at the sentencing hearing. We do not know for sure what submissions were made to the judge on the appellant's behalf as to the appropriate category under the guidelines, but we assume and infer that it would have been submitted to the trial judge that this should be treated as a category 2 case because there was no sustained or repeated assault.
18. In passing sentence, the judge observed that the appellant could easily have killed Mr Hamer. He left him lying unconscious without knowing how bad his injuries were and with his legs hanging over into the road. She accepted that the appellant expressed remorse, although from her assessment she was concerned that this was more remorse from the impact of the offending on himself than upon Mr Hamer, the victim. His previous conviction was several years ago and his character references, the judge said, spoke of someone very different from the man who was kicking an unconscious and defenceless victim in the head in the early hours of the morning. She accepted that it was an isolated incident. The judge placed the offence in category 1 because, in her judgment, it was a sustained attack, one punch followed by four kicks when the victim was already unconscious or nearly unconscious on the ground. There was higher culpability because the kicking was with a shod foot.
19. The starting point under the guideline for category 1 was 12 years' custody with a range of 9 to 16 years. The judge identified a number of aggravating factors: the location, the assault taking place in the street. She regarded it as a seriously aggravating factor that the appellant had left Mr Hamer unconscious with part of his body hanging over into the road. The CCTV showed a vehicle driving past him very close by. There was every likelihood, the judge said, that Mr Hamer would not have been found and would not have been able to seek help himself in the early hours of the morning. It was fortunate indeed that his father-in-law had seen him and come to his assistance. It was also an aggravating factor that the appellant had committed the offence in drink.
20. The judge considered that the appropriate sentence, before credit for plea, was 10 years which she reduced by 25% for his plea. She also imposed a restraining order in appropriate terms for a period of 5 years, as to which there is no complaint.
21. The principal ground of appeal is that the judge wrongly categorised the offence. Mr Amer, in admirably succinct submissions, contends that, although serious, the injuries did not prove to be as bad as they might have been and this was not a sustained attack. For greater harm the guideline requires that injury which is serious in the context of a section 18 offence must normally be present. We accept that was certainly not the case here. Mr Amer submits that the assault was not sustained or repeated in the sense that the guideline envisaged. There was, therefore, lesser harm but higher culpability (having regard to the kicking with a shod foot), putting the offence in category 2 rather than category 1. For category 2 the starting point is 6 years under the guideline, with a range of 5 to 9 years. We observe that 9 years is also the bottom of the range for category 1.
22. Mr Amer accepts and acknowledged in his written submissions that there were aggravating factors which would inevitably increase the starting point in category 2, but there were also mitigating factors including: a degree of provocation; the fact that this was an isolated incident; the appellant's genuine remorse; a lack of premeditation; and the personal mitigation of the appellant's excellent references and his family circumstances.

23. In his oral submissions this morning Mr Amer has told us, and we accept, that his clear impression on speaking to the appellant in conference is that whatever the position may have been at the date of sentence, the appellant now fully understands the seriousness of what he did and is genuinely remorseful. To his great credit the appellant has whilst in custody been studying on an Open University environmental course. All that is encouraging.
24. We have however to consider the matter in the light of the serious aspects of the case identified by the sentencing judge and acknowledged by Mr Amer, who used the word "disgraceful" himself in describing the way in which the appellant had left the victim unconscious in the early hours of the morning after this brutal attack.
25. We have considered the submissions in relation to category. We think that the offence should properly have been placed in category 2 rather than category 1 of the guideline. The interpretation of "greater harm" in a case such as this has been the subject of a number of appeals before this Court. In R v Xue [2020] EWCA Crim 587; [2020] 2 Cr App R (S) 49 this Court reviewed some of those authorities and gave further helpful guidance. We should emphasise that the judgment in that case was given on 30 April 2020, some two months after sentence was passed by Judge Nicola Jones in the present case.
26. In Xue, this Court confirmed the approach to the assessment of greater harm in R v Grant Smith [2015] EWCA Crim 1482; [2016] 1 Cr App R(S) 8, where the Court had said this, at [14]:

    i. "It is axiomatic that all violence within the context of a s.18 offence is serious, but some violence is more serious than others. The purpose behind the words 'which is serious in the context of the offence' in the guidelines is to distinguish between that level of violence which is inherent or par in a standard section 18 offence and that which will, by definition, go beyond what may be viewed as par for the course. In our view, given that there is such a marked disparity in the starting point between categories 1 and 2, the sorts of harm and violence which will justify placing a case within category 1 must be significantly above the serious level of harm which is normal for the purpose of section 18."

27. In relation to the question of sustained or repeated assault the Court said in Grant Smith, at [18]:

    i. "The phrases 'sustained' and 'repeated' may imply different things. An assault may be sustained because it continued over the course of a significant period of time, even though it did not necessarily involve a substantial number of blows. An assault may be repeated because it involves multiple blows over a short period of time... We have doubts whether a difference between one blow and two blows could justify moving the starting point from a category 2 (6-year) level to a category 1 (12-year) level. If this were so, there would be very few attacks that were not category 1. The concept of

> sustained or repeated, in our view, imports some degree of persistent repetition. These concepts must be read in the light of the major difference in starting point between the two categories. In order for a sentence to be compliant with the test of proportionality, the facts warranting the higher sentence should reflect the difference in the guidelines. In our judgment, two blows, one of which is not said to amount to a section 18 offence, would not at least normally amount to a sustained or repeated assault. We do not wish to be more specific or precise than this because we acknowledge that each case will entail a very fact-specific assessment."

28. In Xue itself the defendant had stabbed and slashed at the victim's face and body, with a knife or razor, at least four times, in an assault lasting a couple of minutes, causing nasty disfiguring wounds. The sentencing judge had treated it as a sustained attack within category 1. This Court, allowing the appeal, considered it was not a case of greater harm. The Court said, at [32]:

    i. "But it was not, in our view, a sustained or repeated assault that was so prolonged or persistent as to take it out of the norm for s.18 offences and therefore to constitute greater harm, justifying a starting point of 12 years', rather than 6 years', custody."

29. We note in the present case from the CCTV timings that the attack lasted only 10 seconds from the infliction of the punch to the last of the four kicks. We agree with the analysis of the single judge in the present case in granting leave, that this was a short brutal attack which involved four kicks but cannot be regarded as a sustained or repeated assault sufficient to elevate it to an offence of greater harm as well as higher culpability, calling for a starting point of 12 years in category 1 rather than a starting point of 6 years in category 2.
30. That said, however, like the sentencing judge, we regard this as a particularly serious offence of its kind. The previous conviction for a very similar offence of inflicting grievous bodily harm, albeit 5 years earlier, was a seriously aggravating factor. So was the conduct of the appellant in leaving the victim unconscious with his legs partly in the road, at risk of being struck by a passing car, and/or suffering very serious injury or worse from being left unattended without medical treatment in the early hours of the morning.
31. There was some continuing effect on the victim, psychological as well as physical; location and timing of the offence were aggravating factors: a street attack at 1 o'clock in the morning. It was an aggravating factor that the offence was committed in drink. All those factors merited an uplift to the very top of the range for category 2. There was limited personal mitigation. The judge was sceptical about the degree of true remorse although, as we say, we accept that that position may well now have changed. It was an isolated incident, as the judge accepted. The appellant had excellent character references. It was not premeditated.
32. Balancing the aggravating and mitigating factors, we think that the appropriate sentence

here, before credit for plea, was 8 years' imprisonment. With a reduction of 25% credit for plea the appropriate sentence is therefore 6 years.

33. Accordingly, we allow the appeal. We quash the sentence of seven-and-a-half years' imprisonment and we substitute a sentence of 6 years' imprisonment.

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