NCN: [2022] EWCA Crim 1060

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Thursday, 7 July 2022

Before:

LADY JUSTICE WHIPPLE
MRS JUSTICE CUTTS
HIS HONOUR JUDGE MICHAEL CHAMBERS QC, RECORDER OF WOLVERHAMPTON

REGINA
V
CHRISTOPHER SHAUN HALE
JORDAN STEPHEN LEWSLEY

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MR T. A. WILKINS appeared on behalf of the First Appellant.

MR C. GABB appeared on behalf of the Second Appellant.

J U D G M E N T

LADY JUSTICE WHIPPLE:

1 On 13 September 2021 the appellants pleaded guilty to two offences of inflicting grievous bodily harm contrary to s.20 of the Offences Against the Person Act 1861, charged as Counts 3 and 4 on the indictment. No evidence was offered on the remaining counts, in relation to which not guilty verdicts were entered.

2 On 21 January 2022 at Portsmouth Crown Court, HHJ Tim Mousley QC sentenced the appellants to identical terms of five years' imprisonment, made up of a sentence of two years on Count 3 and three years on Count 4, the terms to be served consecutively. By the commission of these offences, Hale was in breach of the operational period of a suspended sentence order for an offence of battery and the suspended sentence of four months was activated in full to be served concurrently. Lewsley was in breach of a community order. The appellants appeal against sentence by leave of the single judge.

3 The facts in summary are these. The complainants, Christopher Morris and Thomas Walker, were serving members of the Royal Navy. On 17 April 2021 they had been for a night out in Portsmouth and as they made their way back towards the Gosport Ferry, they came across the appellants. They exchanged a few words and there was no aggression or any problem at that point. However, the attitude of the appellants changed and they appeared to want to fight. Hale grabbed Mr Morris around the legs, but failed at that stage to take him to the grounds, but he did it a second time and on that second occasion Mr Morris ended up on his back. Mr Walker had initially tried to walk away, but on seeing his friend on the ground, he returned and saw the appellants punch and kick Mr Morris. Mr Walker intervened and tried to pull the appellants away. He then tried to get away, but the appellants went after him and he was taken to the ground and punched and kicked also.

4 A witness saw what was happening and heard Lewsley say to the complainants, "If you say anything we know who you are and will come and find you". Another member of the public intervened and things calmed down a little before Lewsley, once again, stepped forward and

punched Mr Morris to the face. Police then arrived on the scene and the appellants were arrested. The complainants were taken to hospital where their injuries were treated.

5 In passing sentence, the judge noted that both complainants had sustained serious injury. Mr Morris had a broken nose and a broken bone near his sinus, lacerations to his head, a deep cut to his nose and severe concussion, which was examined by CT scan because the doctors feared it might be worse than a concussion. Mr Walker had a broken nose and a seriously broken thumb. The judge noted that the effect on both complainants of these attacks had been profound.

6 Mr Morris had become anxious. He had undergone surgery to re-break and set his nose. The injury to his cheekbone was potentially serious. He was undergoing physiotherapy and had had that physiotherapy for a period of around four months and his career in the Royal Navy had been affected with promotion delayed. A lengthy period of rehabilitation was required.

7 Mr Walker had a plaster cast on his lower arm and needed dental treatment for a fractured upper incisor. He had an operation to his hand in May 2021 and required more surgery in September 2021. He had a course of physiotherapy. He had not regained full use of his arm or his hand. He feared the loss of his career in the Navy. His injuries had caused him to be medically downgraded in the Navy, with a setback to his career of around five months. He was having ongoing treatment with steroids for the hand injury.

8 The judge took account of a psychiatric report on Lewsley prepared by Dr Gauruv Malhan. That report was dated 5 October 2021. Dr Malhan identified the past history of depression, anxiety and emotionally unstable personality traits and PTSD because of tragic past life events. In addition, Lewsley's aunt provided personal support and information to seek to explain his actions.

9 The judge referred to the pre-sentence reports on both appellants. He noted that both appellants had extensive previous convictions, including convictions for violence. The judge referred to the guidelines for s.20 and concluded that this attack was prolonged and persistent. That put the offending into Category A. Alternatively, if it was Category B, the aggravating features were so serious as to elevate it to Category A anyway. The harm in relation to Count 3, which concerned Mr Morris, was Category 3 and the harm in Count 4, which concerned Mr Walker, was category 2. That meant in the judge's assessment that the starting point for Count 3, on the basis that it was a Category 3A offence, was two years in the range of one to three years. The starting point for Count 4, on the basis that it was a Category 2A offence, was three years in a range of two to four years.

10 The judge maintained that the previous convictions served as aggravation. Hale was in breach of a suspended sentence order at the time of this offending and Lewsley was in breach of a Community Order at the time. There was some mitigation in the form of remorse, although the judge did not consider that to be profound in Hale's case given his behaviour in court. Lewsley had mental health issues to take into account, but the judge concluded that they were not of the most severe kind.

11 Each appellant had pleaded guilty at trial and the judge said that that would lead to a ten per cent discount, but that "the discount I do in fact impose is slightly more than that". His notional sentence after trial, before discounting for totality or plea, was 32 months' imprisonment on Count 3 and 42 months' imprisonment on Count 4. The judge concluded his sentencing remarks in this way:

> "There were two separate assaults, each of them serious, and it seems to me on that basis the sentences should be consecutive, making a total of 74 months. However, I have to consider the totality of the sentence, having made them consecutive. So the sentence so far as Count 3 is concerned for each of you will be a sentence of two years' imprisonment and on Count 4

a sentence of three years' imprisonment, making a total sentence of five years' imprisonment."

12 In grounds of appeal Mr Wilkins for Hale argues the following points:

(a) The total sentence was manifestly excessive.

(b) It was wrong in principle to impose consecutive sentences for offences committed during the same incident.

(c) The judge's approach to sentencing was opaque in that he failed to state the court's starting point before giving credit for guilty pleas.

(d) The judge failed to state how much credit he had applied for the guilty pleas.

(e) It was wrong to put the offending within category A for culpability, even allowing for the aggravating features of the case. The offending was properly within category B.

13 In his grounds of appeal, Mr Gabb for Lewsley advances the same points. He suggests that Count 4 was miscategorised as band A when it should have been band B. In addition, for his client, he suggests that there was personal mitigation which should have carried more weight, notably his client's substantial progress towards rehabilitation in light of the matters stated in the psychiatric report of Dr Malhan.

14 In oral submissions, both counsel have maintained the points made in their written grounds of appeal, but in helpful submissions, for which we thank them, they have concentrated in particular on the challenge to consecutive sentences and on their overarching point that the sentences passed were manifestly excessive.

15 The first issue for this court to address is the categorisation of both Counts 3 and 4 within band A of the Sentencing Council's guideline. This was on the basis of the attacks being prolonged and persistent, one of the factors listed in that guideline as pointing to category A.

On the papers, we were referred to the case of *R v Xue* [2020] EWCA Crim 587, and we note para.31 and 32 of that case in particular, where the court emphasises the fact-specific nature of the assessment and in that case concluded that the attack, which involved repeated blows, was "sustained and repeated" to reflect the words of the s.18 guideline which was in issue in that case. We are satisfied that the judge was entitled on the evidence before him to reach the conclusion that these were prolonged and persistent attacks. The incident continued for some time. This was clear from the witness evidence of both complainants, as well as from other witnesses present for all or part of the time. Mr Morris was kicked and punched repeatedly while he was on the ground. A witness spoke of him being punched to the face several times. Mr Walker tried to intervene to help his friend and said he was then pursued by the appellants who were swinging punches at him, some of which connected, and then he remembers being on the ground and being kicked and punched. In our judgment, this was properly categorised as Category A offending in relation to both counts.

16 The second issue is the challenge to the judge's imposition of consecutive sentences. The appellants argue that the sentences should have been concurrent. We have had regard to the Sentencing Council's guideline on totality. It states in terms that there is no inflexible rule governing whether sentences should be structured as concurrent or consecutive. The overriding principle is that the overall sentence must be just and proportionate. We note in particular paragraph B under the heading "Consecutive sentences will ordinarily be appropriate where", which goes on to state that, "offences that are of the same or similar kind, but where the overall criminality will not sufficiently be reflected by concurrent sentences". Examples are then given, none of which is particularly close to this case, but which demonstrate the principle that consecutive sentences can be imposed, even for associated offending, where it is necessary to do so to reflect the overall gravity of the offending. In this case, it was reasonable to impose consecutive sentences to reflect

the overall criminality. As the judge said, these were two separate assaults on two separate individuals, represented by two separate counts on the indictment.

17 Thirdly, we consider the complaint that the judge failed to state how much credit he was going to give for guilty pleas. We do not consider this ground of appeal to have substance, given that the judge stated in terms that he was proposing to allow credit of slightly more than ten per cent.

18 Fourth, however, is the complaint that the judge's reasoning as to how he reached his ultimate sentence was opaque. Here we consider that the appellants are on stronger ground. The judge's notional sentence after trial, before reduction for totality or plea, was 74 months. Then the judge came down to a final sentence of 60 months or five years, taking account of totality and the pleas. He did not explain precisely how he got to 60 months and it might have been better if the judge had stated the reduction for totality before deducting his "slightly more than ten per cent" for the guilty pleas. However, as a matter of mathematics, it is not difficult to work out what the judge intended. He came down to a total of 60 months as his final sentence. He said he was allowing a discount of 10 per cent, or a little more, for the late guilty pleas. That means that his sentence before applying credit for those guilty pleas must have been around 66 or 67 months, which, less ten per cent, gets to 60 months. We infer that he reduced the sentence by around seven to eight months for totality. This approach is not wrong in principle.

19 The fifth point is to address Lewsley's case that the judge failed to take sufficient account of his personal mitigation, which was based on background factors and mental health problems at the time of his offending. These matters were explained in the pre-sentence report, the report of Dr Malhan and a personal reference from Lewsley's aunt. We have read all these materials. The judge did not find that Lewsley's mental health problems were severe and concluded that these factors did not justify a lesser sentence or different treatment from Hale. We note the difficulties which Lewsley has experienced, largely as a consequence of

the suicide of both of his parents. He suffers from depression and low mood. He feels anxious and is reported to have suicidal thoughts at times. Dr Malhan agreed that he was suffering from depression and anxiety and also suggested a diagnosis of moderate to severe PTSD, stemming from the death of his parents. Dr Malhan suggested various types of therapy to address these difficulties. There was no suggestion that Lewsley's culpability was reduced because of these problems. The evidence was only advanced as a form of personal mitigation. The judge was entitled to conclude that these problems were not severe. Weighed against the significant offending in the context of Lewsley's repeat offending, evident from his past record, these difficulties could not have carried substantial weight in the sentencing exercise. We do not consider the judge to have been in error here.

20 Last then, we come to what we consider to be the central point in the appeal, which is whether five years on a plea, albeit a late plea, was a manifestly excessive sentence. It is important to note that both appellants have a long record of offending, including previous convictions for serious violence. At the time of sentence, Hale had 18 previous convictions for 23 offences. He had been in prison for four years in 2014 for inflicting grievous bodily harm and breached a suspended sentence order for battery by the commission of these offences. Lewsley had 17 previous convictions for 29 offences. He had been in prison for 15 months in 2018 for robbery and for five months in 2019 for racially or religiously aggravated common assault. He was in breach of a Community Order for offences of violence, namely battery and assault occasioning actual bodily harm by the commission of these offences. Further, this was a sustained and unprovoked attack or series of attacks with many seriously aggravating features, including that these offences where committed at night, in a public place and that both appellants had been drinking beforehand. These two complainants were attacked while they were on their way home. These offences caused significant personal injury, physical and mental, and led to career-threatening consequences for the two complainants. The notional sentence after trial before credit for plea and totality

was 74 months in all. That is a tough sentence, undoubtedly, but the judge explained how he got there and we are unable to fault his approach. The judge made an appropriate discount for totality. That was necessary, given that he was proposing consecutive sentences which he had to ensure were just and proportionate overall. The reduction for the late guilty pleas was appropriate and in line with the guidance.

21 We have considered carefully all that has been said on behalf of both appellants, but we are unable to accept that these sentences were manifestly excessive and we dismiss these appeals.

CERTIFICATE

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