IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2022] EWCA Crim 1093

Case No: 2021/03465/A1

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 5th July 2022

B e f o r e:

LORD JUSTICE GREEN

MR JUSTICE SPENCER

SIR NIGEL DAVIS

R E G I N A

- v -

AARON MICHAEL SMITH

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Mr N Robinson appeared on behalf of the Applicant

J U D G M E N T

MR JUSTICE SPENCER:

1. This is a renewed application for leave to appeal against sentence, following refusal by the single judge.

2. On 5th October 2021, in the Crown Court at Bournemouth, the applicant, who is now 24 years old, was sentenced by His Honour Judge Fuller QC for offences of arson, criminal damage and assault. The applicant had pleaded guilty to three counts of arson, all committed within a short space of time on the same day. One of them (count 2) was an offence of arson being reckless as to whether life was endangered. The others (counts 3 and 4) were offences of simple arson. On count 2 the judge imposed an extended sentence of eight years, comprising a custodial term of four years and an extended licence period of four years. Concurrent sentences of one month were imposed on counts 3 and 4. There was also a concurrent sentence of three months' imprisonment for an offence of criminal damage to the applicant's cell at the police station.

3. Some months prior to those offences the applicant had committed three offence of assaulting emergency workers when he was an inpatient at a mental hospital. He pleaded guilty in the magistrates' court to those offence and was committed to the Crown Court for sentence. For those offences the judge imposed a total consecutive sentence of 12 months' imprisonment. In addition, the offences of arson were committed in breach of a suspended sentence of nine months' imprisonment imposed by the magistrates' court only three months earlier for two further offences of assault. The judge activated the suspended sentence in full and consecutively, making a total determinate sentence, with the sentence for the committal offences, of 21 months' imprisonment. The judge directed that the determinate sentence be served first, followed by the extended sentence. Thus the custodial term to be served was five years and nine months in total.

4. There is no challenge to the determinate sentences totalling 21 months. The appeal is directed solely against the extended sentence of eight years on count 2. It is said that the judge took too high a starting point for that offence under the relevant Sentencing Council guideline, and that it was wrong in principle to impose an extended sentence, having regard in particular to the applicant's mental health issues.

5. Although it is only the sentence on count 2 that is challenged, it is necessary to set out briefly the facts of the other offences as well, because the judge's assessment of the need for an extended sentence was based on the applicant's whole offending history. We shall deal with the offences in chronological order.

6. The first of the offences for which the suspended sentence was imposed was an assault occasioning actual bodily harm committed in October 2019. The applicant was being transported in a prison vehicle. In the course of a violent struggle he deliberately elbowed a woman prison officer in the eye. She had to go to hospital for treatment. He pleaded guilty. The sentence was three months' imprisonment, suspended for 18 months.

7. The other offence for which the suspended sentence had been imposed was an assault on an emergency worker committed in June 2020. Regrettably, no further details were available, but the offence was serious enough to receive a sentence of six months' imprisonment, which was ordered to run consecutively to the other sentence, again suspended for 18 months.

8. The next offences in time were the three offences on hospital staff. The applicant was an inpatient at Ravenswood House Hospital in Fareham, Hampshire, which is a medium secure

psychiatric unit. He was there from September 2020 to January 2021, having been transferred there from prison during the sentence he was serving for an earlier offence of section 20 wounding. On 14th October 2020 a mental health nurse was walking through the ward. Without any warning, the applicant lashed out at him and began to throw punches which connected with the victim's face and groin. When another member of the nursing staff came to his colleague's assistance, the applicant adopted a fighting stance and swung a punch at him too, which missed. The nurse who was punched had to be treated at hospital and experienced some temporary hearing problems. For those two offences the total sentence was six months' imprisonment.

9. The applicant was still an inpatient at the hospital on 12th January 2021 when the third assault on an emergency worker took place. The applicant's emergency alarm went off during the afternoon. When staff arrived to investigate, he threatened them with violence. He punched one of the male members of staff in the face and bit his arm, causing a wound which bled. The victim had to have a tetanus injection, which in turn prevented him from receiving his Covid vaccination promptly. He subsequently contracted Covid and was absent from work. The sentence for this third offence was a consecutive term of six months' imprisonment.

10. As we have indicated, the applicant received his suspended sentence at the magistrates' court on 3rd March 2021. We now come to the arson offences committed three months later, on 9th June 2021 in Poole in Dorset. It seems that the applicant had been sleeping on the streets, but had secured local employment. He was working that day, but left earlier than he should after an argument, and was drinking heavily and smoking cannabis. He set fires at three locations in the town centre in Poole. The first was in a clothing recycling bank in the Chapel Lane car park area (count 3). The Fire Brigade attended. The applicant was later to tell the probation officer that he had discarded a barbecue in the bin, still hot after use. A witness saw the Fire Brigade arrive and then noticed a second fire in the courtyard behind the NatWest Bank in the High Street, where some bags had been set alight (count 4). The Fire Brigade was still in the vicinity. The witness ran back to report what she had seen, but in fact a second fire engine attended to deal with that.

11. The same witness then became aware of a further fire next to a residential property in Langland Street, Poole (count 2). It was a two storey flat. The fire was started in an adjacent storage area. It spread to the flat itself, causing substantial damage. Fortunately, the householder was out at the time. She lived there with her four year old daughter. The property was rented. They had left home only half an hour or so earlier, at around 6 pm, to go for something to eat. Shortly before 6.30 pm she was contacted by a number of people to tell her that her property was on fire. As she drove back into Poole, she could see smoke in the distance. She and her daughter were unable to stay at the property that night. In the event, as a result of extensive damage to the building, they lost their home and had to move elsewhere. The damage to the property was estimated at £25,000, but there was also further damage of £14,000 to an adjacent commercial property.

12. After setting this fire the applicant climbed up onto the roof of a car park and had to be talked down by a police negotiator.

13. Whilst he was held in custody at the police station, he smeared faeces over the wall of his cell, which required specialist cleaning. That was the offence of criminal damage in count 5. He had also urinated into an empty crisp packet and a cup, apparently with the intention of throwing them at police staff.

14. In interview the applicant admitted causing the fires in the first two arson offences, but he did not accept responsibility for the fire at the flat. However, he did plead guilty to that offence

at an early stage.

15. In addition to the previous offences we have outlined, the applicant had another relevant conviction. In March 2019 he was sentenced to 29 months' imprisonment for offences of section 20 wounding and possession of a knife. On that occasion the victim was known to him. They had been drinking and taking drugs together but had fallen out. The applicant stabbed the victim 10 to 12 times. It was while he was serving that sentence that he was transferred for a while to Ravenswood House Hospital, as we have explained.

16. There was a psychiatric report which addressed principally the issues of fitness to plead and the appellant's mental state at the time of the offences. There was also an addendum report prepared at the request of the court, which addressed potential alternatives to custody. The applicant had started to smoke cannabis at the age of 14 for a year or so, and had then started again at 18. He also then began to abuse cocaine, ecstasy and amphetamines, and to drink alcohol to excess. There are indications that the applicant had suffered from ADHD, dyslexia and autism, but the medical reports did not support any positive diagnosis. There were recurrent features in his history of a link between the abuse of illicit drugs and alcohol and the subsequent deterioration in his mental state. On occasions there was a diagnosis in the past of drug-induced psychosis. The conclusion of the psychiatrist was that the applicant was fit to plead. There was no indication of a psychotic illness. A hospital order was not appropriate in the view of the psychiatrist. Nor was there any clear diagnosis such as would justify a mental health treatment requirement if a community order were to be considered. A rehabilitation activity requirement could address lifestyle and associates, alcohol and drug misuse, emotional management, attitudes and thinking behaviour. That was as far as the psychiatrist's recommendation could go.

17. There was a pre-sentence report and addendum. The applicant told the probation officer that on the day of the arson offences he had walked out of work following an argument with a colleague. Stressed and frustrated, he had drunk heavily and taken cannabis. The first fire had started accidentally when he put a disposable barbecue in the rubbish bin, but he admitted deliberately starting the second fire. He denied altogether setting the third fire. He acknowledged the seriousness of the offences and the risks involved.

18. It is plain from the pre-sentence report that the applicant had a long history of abusing cocaine and amphetamine. Prior to the arson offences he had been of no fixed abode and had slept on the streets. In the past he had resided at probation-run approved premises, but his violent behaviour towards staff and other residents had resulted in his having to leave. The applicant had worked on and off as a chef and bar tender and in other jobs. He appeared to have a good work ethic. He was assessed in the report as posing a high risk of further offending of a violent and reckless nature, with the potential for serious harm to others. The risk to prison, probation and mental health service staff was very high, and the risk to the public generally was also assessed as high. The report noted that the applicant wanted to be offered rehabilitative opportunities in the secure estate (that is whilst in custody) to keep him occupied and improve his chances in the community. The author of the report noted that during previous custodial sentences the applicant's behaviour had been very poor. No community disposal could be recommended. The report's conclusion was that the applicant was currently unmanageable in the community, as there was no robust risk management plan or sentence plan in place that could monitor or manage his risk. He needs a period of stability in the community to re-engage with supportive services and prepare for his release into the community. The report pointed out that the work which could be done through a rehabilitation activity requirement in a community order can also be done in prison during his sentence. The recommendation in the report was for a period of immediate imprisonment.

19. In his sentencing remarks the judge referred to the Fire Brigade report and photographs in relation to the arson offence in count 2. The judge noted that the property did not have a rear exit. Had the householder and her child been at home when the fire was set, their only way out would have been through the front door, where the fire was burning. It had been a very frightening incident for her and the child. They had lost their home. The total value of the damage caused in count 2 was nearly £40,000.

20. The judge was satisfied that this was a category 2B offence under the relevant Sentencing Council guideline. It was culpability level B, because this was a case of recklessly endangering life rather than an intention to endanger life. It was category 2 because there was high value damage and psychological harm. The starting point was, therefore, four years' custody under the guideline, with a range of two to eight years. The judge found three aggravating factors: first, the applicant was intoxicated; second, this was one of three fires set on the same occasion – he had been determined to set fires; and third, the offences were committed when the applicant was subject to a suspended sentence. The judge concluded that the appropriate sentence on count 2 before credit for the guilty plea, but reflecting the criminality of all three arson offences, was six years' imprisonment.

21. The judge turned to the question of dangerousness. He was satisfied that the applicant presented a significant risk of serious harm to members of the public. That assessment was based on the pattern of the applicant's behaviour over recent years. He showed no regard for the safety and wellbeing of others. The fire he set in count 2 could have had devastating consequences. His engagement with drug misuse intervention had been sporadic and ineffective. There was a high risk of serious harm to the public, as well as to prison staff. Any perceived grievance could lead the applicant to act as he had done in the past, risking serious harm to others.

22. The judge addressed counsel's submission in mitigation that although the applicant could properly be found to be dangerous, an extended sentence would be unjust in the circumstances because he would not receive the intervention in prison that he needed and that had been denied to him throughout his time in the criminal justice system. But the judge noted that there was no mental health disposal recommended or required. In the main, the offences related to the applicant's abuse of alcohol and drugs.

23. The judge accepted that the applicant had expressed remorse for the offences committed against the hospital staff. He allowed the applicant full credit of one-third for his guilty pleas and then went on to impose the sentences we have explained, including the extended sentence of eight years on count 2.

24. On behalf of the applicant we have had the benefit of submissions from Mr Robinson, for which we are grateful. He appeared in the court below and has appeared today *pro bono*. He submits, first, that the judge's sentence of six years' imprisonment on count 2, before credit for the guilty plea, was too high, and that it failed to reflect the applicant's psychological difficulties, his impairments and his disordered mental state at the time of the offences. He accepts that the judge made it clear that he placed the arson offence in count 2 into category 2, with a starting point of four years' custody, but Mr Robinson submits that the judge was wrong to increase that term from four years to six. He submits that such a sentence failed to reflect factors capable of mitigating culpability, the applicant's age and immaturity, the context of the offences, and the fact that the applicant was experiencing periods of homelessness and mental ill-health.

25. Mr Robinson does not challenge the finding of dangerousness, but he complains that it was wrong in principle to impose an extended sentence. In the course of his oral submissions, that

ground of appeal was modified somewhat, and in the end Mr Robinson seemed to accept that an immediate custodial sentence of some length was inevitable, but submitted that it was unnecessary to make it an extended sentence; what was required was intensive work of a therapeutic nature with the applicant whilst in custody, and then early release back into the community under supervision in order to straighten out his life.

26. We have carefully considered all of these submissions, but we are unable to accept them. The judge was prepared to view count 2 as a category 2 offence, although he noted that it was debatable whether it should be placed in category 1; it was certainly at the top of category 2, or on the cusp between the two categories. It would have been category 1 if there was a high risk of very serious physical and/or psychological harm, or if the damage caused had been of very high value. As the judge pointed out, whilst the home was unoccupied at the time, that was only good fortune. There was a manifest risk of serious harm to the occupants had they been there. The value of the damage was some £39,000. It represented very high value to the losers.

27. If it was not a category 1 case, there were multiple harm factors for category 2: significant physical and psychological harm was caused; there was a significant risk of serious physical and/or psychological harm; and the value of the damage caused was significant. The combination of those three factors for category 2 would, we think, have justified a substantial increase from the guideline starting point of four years' custody for category 2, even before considering aggravating factors. It should also be noted that the sentence passed on count 2 reflected the overall criminality of the three arson offences committed within a short space of time that day. It was a serious aggravating factor that the applicant was intoxicated and that these offences were committed so soon after the imposition of a suspended sentence.

28. The judge had well in mind the applicant's mental health difficulties and his young age. There was no clear expression of remorse for the most serious of the arson offences. Indeed, the applicant had told the probation officer that he only pleaded guilty to it as a "plea bargain" (as he put it). Even in the light of the psychiatric report, it is difficult to conclude that the applicant's responsibility for the arson offences was substantially reduced by his mental disorder or learning disability. The reason he committed the arson offences was excessive consumption of alcohol and cannabis, albeit against a troubled, emotional and psychiatric background. We consider that the custodial term of six years, which the judge imposed, before credit of one-third for the guilty plea, was entirely appropriate.

29. We turn to the second ground of appeal, that an extended sentence was wrong in principle. Mr Robinson realistically concedes that the judge was entitled to find that the applicant was a dangerous offender. There was abundant evidence to support that conclusion in view of the escalating seriousness of the applicant's offending in terms of risk to the public. The finding of dangerousness was inevitable.

30. The only remaining question was whether it was necessary to impose an extended sentence or whether some other means of addressing the risk which the applicant posed could properly have been adopted, for example a simple determinate sentence of a shorter length.

31. The difficulty with Mr Robinson's submission, as advanced in the grounds of appeal at least, is that there was no practical alternative suggested to immediate custody. There was no positive recommendation in the pre-sentence report, or in the psychiatric report for any form of non-custodial disposal. Indeed, the conclusion in the addendum pre-sentence report was that the applicant would be unmanageable in the community currently. A great deal of work will need to be done with the applicant to address his offending behaviour and all his complex problems. That work can begin during his sentence, but it will need to continue when he is

eventually released. That is ample justification for the four year extended licence period which the judge imposed.

32. We have reflected on the overall length of the sentence and considered whether its totality was excessive. We are quite satisfied that it was not. These were very serious offences of violence and risk, caused by a dangerous offender. The sentence was just and proportionate.

33. For all these reasons we are quite satisfied that there is no arguable ground of appeal. Accordingly, this renewed application for leave to appeal against sentence is refused.
