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Neutral Citation Number [2023] EWCA Crim 1567

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202301719/A2

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday, 8 December 2023

Before:

LORD JUSTICE EDIS
MR JUSTICE JEREMY BAKER
SIR ROBIN SPENCER

REX
V
MARK GREEN

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MR P FORBES appeared on behalf of the Appellant
MISS E MARSHALL KC appeared on behalf of the Crown

J U D G M E N T

SIR ROBIN SPENCER:

1. This is an appeal against sentence brought by leave of the single judge.
2. On 2 May 2023 in the Crown Court at Canterbury, the appellant, who is now 42 years of age, was sentenced by His Honour Judge Simon James to a term of eight years' imprisonment for an offence of manslaughter. He had pleaded guilty to that offence some two months earlier.
3. The man who died was Anthony Armstrong, aged 49. The offence arose out of an altercation in the street in Folkestone on 6 October 2022 when the appellant punched Anthony Armstrong to the face with such force that he broke his nose, rendering him unconscious, with the result that he fell backwards to the ground already unconscious and struck the back of his head on the road surface. He suffered a massive skull fracture and a catastrophic brain haemorrhage. He died from his injuries three days later.
4. The principal grounds of appeal in short are, first, that the judge wrongly categorised the offence under the relevant Sentencing Council guideline and consequently took too high a starting point. Second, it is said that the judge made insufficient allowance for the fact that it was a single punch and for the appellant's personal mitigation. Third, it is said that the judge may have given insufficient credit for the appellant's guilty plea because he simply allowed a global reduction of one-third to include personal mitigation and an unspecified level of credit for plea.
5. We are grateful to Mr Forbes on behalf of the appellant for his written and oral submissions and to Miss Marshall KC on behalf of the Crown for her written submissions in the respondent's notice.

The facts

6. The incident took place at around 1 pm on 6 October outside a food bank in the centre of Folkestone. A number of people had congregated there to collect food. The appellant arrived on the scene with a young man aged 18, Ruben Smith, and Smith's mother. Anthony Armstrong (the deceased) made a flippant comment about the skirt that Smith's mother was wearing, which prompted Smith to punch Armstrong in the face. The appellant then joined in and punched Armstrong in the face with such force that it broke his nose and caused both eyes to blacken almost immediately. On the pathologist's evidence there were fractures both of the cartilaginous part of the nose and the nasal bone itself. So forceful was the blow that it rendered Armstrong unconscious, leaving him then to fall completely unprotected onto the concrete road surface where the back of his head hit the ground with what witnesses described as a sickening thud. The massive skull fracture and brain damage that he sustained were unsurvivable.
7. It was immediately obvious that he was very seriously injured. Not only was he unconscious, he was also bleeding profusely from the nose and the ears. The appellant and others dragged Armstrong onto the pavement. Someone tried to revive him by pouring water over him. The appellant and others who had been involved in the incident made out that Armstrong had tripped and fallen, telling one of the eyewitnesses who had seen what really happened to "shut her mouth". No ambulance was called.
8. The appellant left the scene for a few minutes. When the police arrived the eyewitness gave the police the names of the appellant and Smith. The appellant was arrested soon afterwards. He told the police that Armstrong had tripped and fallen back onto the kerb hitting his head and that he, the appellant, had picked him up and mopped up the blood which explained the blood which was evident on his hands. The appellant maintained

that same lie throughout interview next day, 7 October. He adamantly denied assaulting Armstrong.

9. Meanwhile, Anthony Armstrong had remained unconscious in hospital. He never regained consciousness and died on 9 October.

10. The appellant had by then been charged with section 18 wounding with intent and appeared in the magistrates' court on 8 October. It was already known that Anthony Armstrong had not regained consciousness and was unlikely to survive. At the hearing on 8 October the appellant made no admission of any kind that he had punched Armstrong. We shall return to the detail of what was entered on his behalf on the relevant Better Case Management form that had to be completed at that hearing. He was sent that day to the Crown Court for trial.

11. We should explain that there was also at that stage, or soon afterwards, a charge of affray against the appellant, the young man Smith, and a third man, all arising from a separate incident at the same location only minutes before Armstrong was punched. That charge was also sent to the Crown Court.

12. Following Anthony Armstrong's death the decision was made to charge the appellant with manslaughter. All this took some time. The appellant was remanded in custody throughout. The count of manslaughter was added to the existing indictment and on arraignment in the Crown Court on 1 March 2023 the appellant entered a plea of guilty on the basis that he punched the deceased once only to the centre of the face connecting with his nose. After some hesitation the prosecution in due course accepted that basis of plea.

13. The allegation of affray against the appellant and Smith and the other man proceeded to trial. Smith also faced the count of manslaughter on the basis of joint enterprise but at the

trial he was acquitted of manslaughter at the close of the prosecution case. He pleaded guilty to section 47 assault occasioning actual bodily harm in respect of his earlier punch to Armstrong. At trial the appellant was acquitted of affray but Smith was convicted.

14. This is all relevant because the trial of those matters had taken place before Judge Simon James, and in the trial evidence of the whole incident had been given. The judge was therefore well-placed to make an assessment of the level of the appellant's culpability and to assess what had really happened.

The sentencing hearing

15. Following the trial the appellant was sentenced on 2 May. There was a victim personal statement from the victim's mother who spoke eloquently of the dramatic and permanent impact of the loss of her son.

16. There was no pre-sentence report, nor was any report necessary: a substantial sentence of imprisonment was inevitable.

17. The appellant had previous convictions for violence, albeit some of them many years earlier. In 2001 he pleaded guilty to assaulting a police officer and received a community punishment order. In 2009 he pleaded guilty to affray and was sentenced to 12 months' imprisonment. He was involved on that occasion with his brothers in kicking and punching someone on the ground in Folkestone town centre. In 2015 he received a suspended sentence for an offence of battery. In 2019 he was sentenced to 20 months' imprisonment for two offences of assault occasioning actual bodily harm arising from an attempt to gain access to the cellar of a public house; when challenged he and others had attacked two employees with a metal pole.

18. At the sentencing hearing, the judge heard submissions as to the appropriate

categorisation of this offence of manslaughter under the Sentencing Council guideline and as to the appropriate level of credit for the guilty plea.

19. The prosecution contended that this was Category B high culpability because death was caused in the course of an unlawful act which involved an intention to cause harm falling just short of grievous bodily harm, or alternatively was caused in the course of an unlawful act which carried a high risk of grievous bodily harm which was or ought to have been obvious to the offender.

20. On behalf of the appellant, it was contended that this was Category C medium culpability where death was caused in the course of an unlawful act which involved an intention to cause harm, or recklessness as to whether harm would be caused.

21. The prosecution contended that credit for plea should be 25 per cent because there had been no indication at the magistrates' court of any admission that he had punched the deceased causing the injuries which were to prove fatal. Although at that stage he was charged with section 18 wounding with intent, there had been no indication, as there could have been, of a willingness to plead guilty to section 20 unlawful wounding.

22. It was contended on the appellant's behalf that he should receive full credit of one-third for his guilty plea to manslaughter because it had been entered at the first available opportunity when that count was added to the indictment and he was first arraigned.

23. In his sentencing remarks the judge described the injuries sustained by the deceased and the force of the appellant's punch. The judge was sure on the evidence that the blow had knocked the deceased unconscious and that it was the sheer force of the blow which caused him to fall back unprotected onto the road, sustaining the fatal injuries. He was sure that although the appellant had tried to pull the victim to his feet, that was not in an altruistic effort to provide him with assistance but was a panic reaction in an attempt to

absolve himself of responsibility. That was compounded, the judge said, by the false account the appellant gave to the police in interview. The judge regarded that as a significant aggravating feature.

24. The judge made it clear that he was sentencing the appellant on the basis of a single blow but one administered with substantial force, falling just short of grievous bodily harm. Striking this blow with such force was, the judge said, an unlawful act which any reasonable and sober individual would have realised carried a high risk of causing grievous bodily harm. Consequently the judge was satisfied that this was Category B high culpability.

25. The judge identified aggravating factors. There were the appellant's previous convictions for violence; although some of them went back a long time, the judge said they demonstrated that throughout his adult life the appellant had been willing to resort to serious violence. There were other aggravating factors. First, the false account he had given of how the injuries were caused, including pressure on eyewitnesses to go along with that false account; second, the fact that the offence was committed whilst the appellant was to some degree at least under the influence of alcohol.

26. The judge accepted that whilst in custody on remand since his arrest the appellant had made efforts to rehabilitate himself. The judge accepted that once the appellant had come to terms with the consequences of his actions he had expressed genuine remorse. The judge noted the appellant's significant and longstanding struggles with addiction and homelessness. However, the judge concluded that overall this mitigation could have only a limited impact when sentencing for an offence of such seriousness.

27. The judge did not consider that the appellant fulfilled the requirements of a sentence for dangerous offenders. He said:

> "... despite the tragic, devastating and life ending consequences of your drunken violence, I am satisfied that you did not intend or set out to kill or indeed really give any thought as to the likely really serious injury your violence would cause. Indeed the truth is that you simply gave no thought to the potential consequences of your actions."

28. The judge did not indicate what conclusion he had reached in relation to the level of credit for plea. He did, however, say this:

> "Although it is correct to say that you pleaded guilty to manslaughter when it was first placed on the indictment, up until that point there was no clear indication of your accepting responsibility for Mr Armstrong's injuries or that you accepted that the account you gave in interview of him falling was untrue."

29. As we have already indicated, the judge instead decided to make a global reduction of one-third to reflect all the mitigation including the guilty plea.

The parties'submissions

30. On behalf of the appellant, Mr Forbes submits first that the judge was wrong to find Category B high culpability. Mr Forbes accepts that the judge was entitled to find on the evidence that the blow had been struck with such force as to render the deceased unconscious before he hit the ground. However, he submits that the judge was wrong to find that the appellant intended to cause harm falling just short of grievous bodily harm and wrong to find in the alternative that the unlawful act carried a high risk of grievous bodily harm which was or ought to have been obvious to the appellant. Mr Forbes relies in particular on the passage we have quoted from the sentencing remarks in relation to the judge's rejection of dangerousness. Mr Forbes submits that the conclusion the judge

expressed there is inconsistent with the findings which led to his assessment of Category B culpability.

31. Second, Mr Forbes submits that even if Category B was appropriate the judge should have reflected the fact that it was a single punch by reducing the sentence below the starting point, before considering aggravating and mitigating factors.

32. Third, and importantly, Mr Forbes submits that there should have been full credit of one-third for plea because, as he argued in the court below, it was entered at the first opportunity in the Crown Court.

33. Finally, Mr Forbes submits that the judge failed to give sufficient credit for the mitigation which he had identified in his sentencing remarks.

34. On behalf of the Crown we have a helpful respondent's notice settled by Miss Marshall. In short, it is submitted that the judge was entitled to find Category B high culpability and that this finding is not inconsistent with what the judge said about dangerousness. It is submitted that although the judge did not make clear what view he took of the level of credit for plea, a proper reduction was in fact only 25 per cent.

35. Miss Marshall draws our attention to the Better Case Management form completed at the magistrates' court hearing on 8 October, the day after his interview and the day before the deceased died, which required an answer to the question: "Insofar as known: real issues in the case." The reply on behalf of the appellant on the form states:

> "The defendant will say he did have contact with Mr Armstrong but at no point during that contact was there any intent to cause him the serious harm suggested within the charge."

Miss Marshall submits in the respondent's notice that in the light of guidance of a general nature from this court in the leading case of R v Plaku [2021] EWCA Crim 568; [2022] 1 Cr App R (S)7, and applying the relevant Sentencing Council guideline, the appellant

was entitled to no more than 25 per cent credit for plea. He was not entitled to a full one-third.

Discussion and conclusion

36. Prior to the hearing this morning, we drew counsels' attention to the report of a recent case on facts very similar to this, in which this Court allowed the appeal against sentence: R v Pool [2023] EWCA Crim 946, [2024] 1 Cr.App.R (S) 9. Judgment was given on 25 July 2023, several weeks after sentence was passed in the present case.

37. It was a case from Winchester Crown Court where there was a single punch thrown by the defendant which had caused the victim to be knocked off his feet and fall back and crack his head on the ground, with very similar results to those in the present case. The argument there was whether it was properly to be regarded as a Category B or a Category C case. This Court upheld the conclusion of the judge that it was correct to categorise the offence as Category B on the basis that the force of the punch had been so great as to knock the victim off his feet and therefore it was an unlawful act which carried a high risk of causing grievous bodily harm which ought to have been obvious to the defendant.

38. The judge in that case had, therefore, taken the starting point under the guideline of 12 years' custody. She had allowed an agreed reduction of 25 per cent for the guilty plea in that case and the resulting sentence was nine years' custody. On appeal, this Court took the view that because there was a single punch and because there were particular features of mitigation, including the young age of the defendant and his good character, the sentence before credit for plea should have been 10 years rather than 12 years; with a reduction of 25 per cent for plea, the outcome was that the appeal was allowed and the sentence reduced to seven-and-a-half years.

39. We have considered all counsel's submissions very carefully and have reached the following conclusions.

40. First, we think the judge was entitled and correct to find that there was Category B high culpability. This was a very hard punch to the victim's face, struck with sufficient force to cause fractures to the nose and to knock the victim unconscious before he hit the ground. At the very least it was an unlawful act which caused a high risk of grievous bodily harm which was *or ought to have been* obvious to the offender. That put it in Category B. We also observe, as Mr Forbes confirmed in answer to the court during oral submissions, that the punch which was thrown by the appellant came very shortly after the punch to the deceased delivered by Smith which the appellant had witnessed. The appellant was therefore aware that this was a man who had already been attacked.

41. We do not accept that the judge's finding in relation to dangerousness undermined or is inconsistent with his finding of Category B culpability. What the judge was saying in the passage we have already quoted in relation to dangerousness was that the appellant had given no thought to the potential consequences of the really serious injury which his violence was likely to cause. That is not at all inconsistent with his finding that the appellant's unlawful act carried a high risk of really serious injury which *ought to have been obvious* to the appellant objectively, even if he did not think about the risk.

42. Second, although it is regrettable that the judge did not express his conclusion as to the appropriate level of credit by specifying what level he was allowing, as he should have done in accordance with the relevant guidelines, we are quite satisfied that the appropriate credit here was 25%, not one-third.

43. As this Court made clear in Plaku, albeit not envisaging precisely the situation which arose in this case, the essence of the matter is that full credit requires an unequivocal

indication of a guilty plea at the earliest opportunity when the case is first in the magistrates' court. Here there was the complication of his being charged at that stage with section 18 wounding with intent. However, it is important to note that in interview the day before his first appearance in the magistrates' court he was still falsely denying punching the victim at all, maintaining that the victim had simply slipped and fallen. That is what he had been saying at the scene as well. To receive full credit he should have accepted in the magistrates' court that he had punched the deceased and caused the injuries, while denying that he intended to cause serious harm.

44. Instead the extent of the omission recorded in the Better Case Management form was that he "did have contact with Mr Armstrong" - somewhat carefully chosen words, no doubt, because the appellant was not at that stage prepared, publicly at least, to acknowledge what he had really done. It was open to him to indicate that he would plead guilty to the lesser offence of section 20 unlawful wounding, as to which there could be no defence. The appellant knew perfectly well what he had done and should have admitted it at that early stage if he was to receive full credit for his eventual plea.

45. The fundamental question in a situation such as this is whether the defendant made it unequivocally clear that he accepted responsibility for the behaviour amounting to what was to become the offence charged: in this case that meant unequivocally accepting the behaviour which amounted to unlawful wounding, which would have been the appropriate charge had the victim survived.

46. We therefore proceed on the basis that the appropriate credit here was 25 per cent. Working backwards it follows that the sentence of eight years' custody represents a sentence of 10 years 8 months before credit for plea. The starting point for Category B was 12 years' custody. The judge correctly identified the aggravating factors which could

have justified some increase from the starting point, although the judge noted that had it not been for the appellant's record for violence there might ordinarily have been some reduction from the starting point because this was a single punch. There was some personal mitigation, as the judge identified, but it was not substantial, particularly given the seriousness of this offence and his previous offending for violence.

47. The question for us, therefore, is whether a sentence of 10 years 8 months before credit for plea, which was well below the guideline starting point of 12 years, was manifestly excessive. We are quite satisfied that it was not manifestly excessive. After balancing the aggravating and mitigating factors, the judge's sentence was 16 months lower than the guideline starting point. We think that was a perfectly adequate reduction in all the circumstances.

48. Accordingly, and despite Mr Forbes' able and attractive submissions, the appeal is dismissed.