Neutral Citation Number: [2023] EWCA Crim 280

Case No: 202201637 A2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM WOLVERHAMPTON CROWN COURT
His Honour Judge Gosling
T20217147

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 March 2023

Before :

LORD JUSTICE GREEN
MR JUSTICE SWEENEY
and
HER HONOUR JUDGE SHANT KC

- -

Between :

DAVID DIXON	**Appellant**
- and -	
R	**Respondent**

- -
- -

Mr J Rose for the **Appellant**

Hearing dates : 19 October 2022

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APPROVED JUDGMENT

Her Honour Judge SHANT KC:

Introduction

1. On 24 January 2022, at the conclusion of his trial before His Honour Judge Gosling and a jury in the Crown Court at Wolverhampton, the appellant (then aged 42) was convicted of an offence of wounding with intent, contrary to section 18 of the Offences Against the Person Act 1861 (Count 2). He was acquitted of attempted murder (Count 1).

2. On 29 April 2022 he was sentenced by the judge to imprisonment for life. A minimum term of 10 years, less 331 days spent on remand, was specified under section 323 of the Sentencing Act 2020 ("the 2020 Act").

3. He now appeals against that sentence by leave of the single judge**.**

Facts

4. The appellant and Marie Hughes (we will refer to her as Ms Hughes) became friends while he was serving a custodial sentence. She would often visit him, and they spoke regularly on the telephone. The appellant was released on 20th May 2021 and moved in with his mother. Ms Hughes lived alone nearby. The couple saw each other every day. They discussed their relationship. They were not intimate as Ms Hughes wanted matters to progress slowly.

5. The appellant attempted to contact Ms Hughes during the evening of 26 May 2021, but she did not answer his calls. He became suspicious that she was with another male. Ms Hughes returned home the following morning. The appellant, under the influence of alcohol and cocaine, arrived soon after to confront her. Ms Hughes let him into her house. She told the appellant that she had been with someone else. He made her call the male, who confirmed that, not only had they been seeing each other, they had slept together the night before. The appellant completely lost his self-control. He punched Ms Hughes repeatedly in the face, fracturing her eye socket. He then dragged her to the kitchen by her hair, pulling out a clump of hair as he did so. The appellant grabbed a small knife. The 2 struggled with the weapon which snapped. The appellant picked up a larger knife and stabbed Ms Hughes several times, aiming towards her head and upper body. She sustained 2 wounds to the head, 2 to the shoulder and upper back, and 1 through the upper neck which penetrated behind her throat and above her voice box. Throughout the incident Ms Hughes, who thought she was going to die, begged to be allowed to talk to her children. The appellant walked her upstairs at knife point and showered her head in an attempt to wash off the blood. He then took her to the bedroom and told her to change her clothes.

6. A neighbour called the police. Seeing officers arrive, the appellant jumped from an upstairs window. Ms Hughes was taken to Queen Elizabeth Hospital in Birmingham where she remained until 4 June 2021.

7. The appellant was arrested shortly before 23:00 on 27 May 2021. After he was returned to custody, he began telephoning Ms Hughes to persuade her to tell police that she did not believe that he had tried to kill her.

Medical evidence

8. Mr John Pracy, a consultant ear nose and throat surgeon, made a statement based on the medical notes in relation to Ms Hughes. He confirmed that she had:

(1) A stab wound to the anterior neck under the jaw.
(2) A stab wound in the back of the base of the neck.
(3) A stab wound on the back of the left upper shoulder.

9. An examination with a flexible camera revealed evidence of a perforation in the upper part of her throat with air bubbles in the mucus around her voice box and some fresh blood. The source of the air bubbles appeared to be the perforation. As touched on above, she also had a fracture of the floor of her right eye socket.

10. Her wounds were sutured, 1 stitch to the shoulder, 2 stiches to the left of the neck and 3 to the right of the neck. The perforation of her throat and the fracture of her eye socket were treated conservatively, without the need for surgery. She discharged herself on the 4 June 2021 and was treated in outpatients until the 5 July 21. She was then discharged to the care of her general practitioner.

11. The consultant's opinion was that the throat perforation, though managed conservatively, was a very severe, potentially life threatening injury indicative of a

significant degree of force. The knife would have had to enter a significant distance to enter the pharynx. He went on to add that if she had not been treated appropriately, or if medical treatment had been delayed, she could have developed a severe infection possibly resulting in her death.

12. Ms Hughes' general practitioner reviewed her regularly throughout 2021 and into 2022. The general practitioner confirmed that Hughes still had pain in her cheek and eye socket for which she was receiving treatment. She was also in need of regular pain relief for her shoulder. She received counselling for depression and anxiety, and the general practitioner opined that Ms Hughes will suffer lifelong physical and psychological consequences.

Antecedents

13. The appellant had 10 convictions for 36 offences spanning from December1995 to June 2017. These included robbery in 1995 and 1996, and threats to kill in 1998. Significantly, on the 19 December 2000, when the appellant was aged 21, he was sentenced to concurrent terms of imprisonment of 15 years for attempted murder, 10 years for another attempted murder and 10 years for robbery. The facts of the first attempted murder were that the appellant had approached a man, told him he was going to kill him, and then fired multiple shots at him, hitting him in the leg. The other attempted murder and associated robbery involved the defendant and another entering a shop brandishing a handgun. When the shopkeeper confronted them, one of them shot him in the chest before both fled from the scene.

14. On the 4 August 2006, for possessing heroin with intent to supply whilst still serving his 15 year sentence, the appellant received a consecutive sentence of 6 years' imprisonment. In 2015 he was sentenced to 6 months' imprisonment for an attempt to pervert the course of justice whilst he was on licence. On the 26 June 2017, he received a 27 month prison sentence for conspiracy to sell or transfer prohibited ammunition. He was apprehended by the police in a car, with several bullets concealed in a disposable glove.

Pre-sentence report

15. The court had a report dated the 4th of April 2022

16. The court had asked for an assessment of risk, and it was described by the author of the report in the following way:

> "Based on the severity of the index offence and the speed at which Mr Dixon capitulated following his release from custody, risk to the general public, future partners and known adults would be imminent if released into the community. Whilst in custody, however, the protective qualities of imprisonment reduce the risk he poses by limiting opportunity. Mr Dixon is therefore assessed as posing a high risk of causing serious harm to the public, future partners, and Ms Hughes. The nature of the risk posed to these groups is excessive violence, involving the use of weapons, resulting in serious injury and emotional harm and psychological trauma."

17. The report raised concerns about the appellant's gang affiliations, which had featured in his previous convictions. It also raised the issue of a personality disorder stating: "Whilst not a diagnostic tool, a personality disorder screening has been completed, indicating that Mr Dixon presents with associated traits of such

disorders." However, the author of the report went on to observe that: "It should be noted that people with personality disorders are not pre disposed to violent behaviour, therefore the nature of the frenzied attack is extremely concerning, and further evidences Mr Dixon's propensity to use weapons with a blatant disregard for the harm caused"

Victim personal statement

18. In her victim personal statement Ms Hughes stated that she continued to have pain to her neck and shoulder. She was embarrassed about her scars and continued to suffer from flashbacks and anxiety for which she took medication. A number of things in ordinary life triggered her, causing her to panic and become breathless.

Sentencing remarks

19. The judge placed the appellant's offending on Count 2 in category 1A of the relevant Guideline, with a starting point of 12 years and a range of 10-16 years. He determined that the notional determinate sentence would have been 15 years imprisonment. He found that the criteria set out in section 283 of the 2020 Act were met, was satisfied that it was not unjust to impose a life sentence, and did so. He then determined that the appellant would have served two thirds of the notional determinate term and therefore imposed a minimum term to one of 9 years and 34 days (i.e. 10 years less 331 days for time already served).

Grounds of appeal

20. The appellant criticises the judge's sentence on the following bases:

1. The notional determinate sentence of 15 years was too long.
2. A life sentence should not have been passed.
3. If a life sentence was correct, the minimum term was too long.

Notional determinate sentence

21. In assessing that there was high culpability, the judge concluded that the attack was prolonged and persistent (the appellant having used two knives), and that since the appellant was aware that Ms Hughes had previously been in a violent relationship which had impacted upon her, he knew her to be obviously vulnerable because of her circumstances. On behalf of the appellant it is accepted (in our view correctly) that, applying the relevant Guideline, the judge was entitled to conclude that the instant offence fell into culpability A,

22. However, it is submitted that the judge was wrong to conclude that the instant offence involved category 1 harm, as he should not have found that "particularly grave or life threatening injury [was] caused."

23. It is emphasised that the consultant's opinion was that: "If medical treatment had been delayed and she had not received appropriate antibiotics she could have developed a severe infection possibly resulting in her death."

24. In dealing with categorisation, the judge concluded that the injury caused was "particularly grave or life threatening" by reference to section 63(b)(ii) of the 2020 Act, which required him to have regard, when assessing the seriousness of the

offence, to the defendant's culpability for the offence and "to harm which was caused, intended or might foreseeably have been caused"

25. The judge concluded;

> "Now looked at through that lens, life threatening injury or death were risks which would have been obvious to the defendant when he stabbed her with a knife through the neck. The fact that she received timely help, and the fact that she did not require extensive treatment does not alter the threat to her life to which the attack gave rise**"**

Interpretation of section 63 of the 2020 Act.

26. Section 63 of the 2020 Act is identical to section 143 (1) of the Criminal Justice Act 2003.

27. Para. C 1.11 of the Overarching Principles: Seriousness Guideline provides guidance as to the effect of section 143 (1) in relation to harm, namely:

> "In some cases no actual harm may have resulted, and the court will be concerned with assessing the relative dangerousness of the offender's conduct; it will consider the likelihood of harm occurring and the gravity of the harm that could have resulted".

At para. D 1.19, the same Guideline further provides that:

> " If much more harm or much less harm has been caused by the offence than the offender intended or foresaw, the culpability of the offender, depending on the circumstances, may be regarded as carrying greater or lesser weight as appropriate"

28. Based on this guidance it was open to the judge to conclude that since the attack with a knife to the neck area carried the risk of life threatening injury, and that that

was foreseeable, that that should increase the appellant's culpability and therefore sentence. However, he concluded that, because of section 63 of the 2020 Act, he could regard this as a case "where particularly grave or life threatening injuries [were] caused." The medical evidence was that death could have been possible if (1) medical treatment had been delayed and (2) Ms Hughes had not received appropriate antibiotics.

29. In our view, this was a case where the judge would have been assisted by a further medical report setting out the likelihood of the contingent events occurring. As the report stood, it was difficult, without further information, to reach a conclusion as to whether this was a case where there were "particularly grave or life threatening injuries [were] caused" within the meaning of the Guideline.

30. Category 1 requires that there should be "particularly grave or life threatening injury caused". In this case the injury could possibly have become life threatening if certain contingent events had occurred. In other words there was a risk they could become "life threatening injuries." As stated already, the fact they were potentially life threatening should have led to a significant increase in culpability.

31. Like the judge, we have been referred to a number of authorities that relate to the former Guideline (introduced on 13 June 2011) in relation to section 18 offences, which required the injury to "be serious in the context of the offence." The words used in the present Guideline to place an injury into category 1 harm are different

and the injury caused has to "to be particularly grave or life threatening." So those authorities have limited application. Nonetheless, they make clear that section 18 injuries are, by definition, serious and category 1 requires the injuries to be serious in this context.

32. The injuries in this case were undoubtedly grave, so in our view the judge should have placed them in category 2. The starting point for category 2 is 7 years with a range of 6-10 years. The serious nature of the injuries, coupled with the fact that harm included a very serious fracture of the eye socket, and that Ms Hughes' has suffered lasting physical and psychological harm, should have caused the judge to move the starting point to the borderline between Category 1 and 2.

33. There were also multiple factors that put this matter into culpability A which included the significant factor of the risk of life threatening injuries. Therefore the appropriate starting point was, in our judgement one of 11 years.

34. There were a number of aggravating features:

- This offence was committed a few days after being released from custody .
- The appellant's antecedent history of very serious offending.
- His repeated offending on licence.
- The offence had been committed under the influence of drugs and alcohol.
- The appellant had sought to "persuade" Hughes to minimise his culpability.

35. Those features significantly outweighed the mitigating features, such as they were, in the balancing exercise. Therefore an upward lift from the starting point of 11

years to a notional determinate sentence of 15 years, was entirely justified. Therefore, although we have differed in our approach, we find no merit in the ground that the judge's assessment of a notional determinate sentence of 15 years was too long.

Life sentence

36. The judge passed the life sentence pursuant to section 283 of the 2020 Act.

37. In the context of this case, a life sentence also had to be considered under section 285 of the same Act.

38. Section 283 provides that:

> "(1) Subsection (3) applies where –
>
> (a) a court is dealing with an offender for an offence ("the index offence") that is listed in Part 1 of Schedule 15,
>
> (b) the offence was committed on or after the relevant date.
>
> (c) the offender is aged 21 or over when convicted of the index offence, and
>
> (d) the sentence condition and the previous offence condition are met.
>
> (2) In subsection (1)(b), "relevant date" in relation to an offence, means the date specified for that offence in Part 1 of Schedule 15.
>
> (3) The court must impose a sentence of imprisonment for life unless the court is of the opinion that there are particular circumstances which –
>
> (a) relate to –
>
> (i) the index offence,
>
> (ii) the previous offence referred to in subsection (5), or

(iii) the offender, and

(b) would make it unjust to do so.

(4) The sentence condition is that, but for this section, the court would impose a sentence of imprisonment for 10 years or more, disregarding any extension period it would impose under section 279……..

(5) The previous offence condition is that –

(a) when the index offence was committed, the offender had been convicted of an offence ("the previous offence") listed in Schedule 15, and

(b) A relevant life sentence or a relevant sentence of imprisonment or detention for a determinate period was imposed on the offender for the previous offence…"

39. Section 285 provides that:

"(1) This section applies when a court is dealing with an offender f or an offence where –

(a) the offender is aged 21 or over at the time of conviction,

(b) the offence is a Schedule 19 offence (see section 307),

(c) the offence was committed on or after 4 April 2005

(d) the court if of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences (see sections 306(1) and 308).

(2) the pre-sentence report requirements (see section 30) apply to the court in relation to forming the opinion mentioned in subsection (1)(d),

(3) If the court considers that the seriousness of –

(a) the offence, or

(b) the offence and one or more offences associated with it,

is such as to justify the imposition of a sentence of imprisonment for life, the court must impose a sentence of imprisonment for life……."

Approach to sentencing

40. In AGs Ref No 27 of 2013 (Burkinskas) [2014] EWCA Crim 334, at para. 43, Lord Thomas CJ set out guidance on the approach to sentence under the similar provisions of the Criminal Justice Act 2003, as follows:

> "The order in which a judge should approach sentencing in a case of this type is this:
> i) consider the question of dangerousness. If the offender is not dangerous and s.224A(former two strikes provision) does not apply, a determinate sentence should be passed. If the offender is not dangerous and the conditions in s.224A are satisfied then subject to s.2(a) and (b)), a life sentence must be imposed;
> ii) if the offender is dangerous, consider whether the seriousness of the offence and offences associated with it justify a life sentence.
> iii) if a life sentence is justified then the judge must pass a life sentence in accordance with s.225. If s.224A also applies, the judge should record that fact in open court;
>
> iv) if a life sentence is not justified, then the sentencing judge should consider whether s.224A applies. If it does then (subject to the terms of s.224A) a life sentence must be imposed; and
> v) if s.224A does not apply the judge should then consider the provisions of s.226A. Before passing an extended sentence the judge should consider a determinate sentence".

41. In the combination of his written and oral submissions, Mr Rose, on behalf of the appellant, argues that the judge did not explicitly address section 285 in his sentencing remarks.

42. At page 5D of the transcript of the sentencing remarks the judge stated: "Now I have been taken through the leading case of R v Burinskas by Mr Rose. I have no doubt, and he does not argue it, given the seriousness of this offence and his history, given

the conclusion of the pre-sentence report, the defendant is a dangerous offender, but I make it clear I would not have imposed upon him a discretionary life sentence". However, he did not explain why he arrived at that conclusion. Nevertheless, in the context of this case, we do not need to explore that further because of the conclusions we have reached in relation to the judge passing a life sentence under the provisions of section 283.

43. As to that section, the judge stated that he had considered the guidance in R v Burinskas

44. He correctly reminded himself of the requirements that had to be fulfilled, namely that he was dealing with the appellant for an offence within Part 1 of Schedule 15 to the 2020 Act which was committed after the relevant date. The appellant was over 21 years old when convicted, and:

i) He would have imposed a sentence exceeding ten years imprisonment
ii) The previous offence of attempted murder was a schedule 15 offence and
iii) The sentence for the previous offence was over 10 years.

45. The requirements of s283 were thus fulfilled. He then correctly reminded himself that he must pass a life sentence unless he concluded that it would be unjust to do so in all the circumstances of the case, due to particular circumstances related to the index offence, the previous offence or the offender.

46. The judge considered the gap between the index offence and the qualifying offence. The judge then rightly observed that he could not see these two offences in isolation when deciding whether a life sentence was unjust, and that he had to look at all of

the offending history. The judge was undoubtedly referring to the appellant's serious offending before his sentence for the 2 attempted murders and the robbery and also the offences committed since.

47. The judge might have added the fact that the appellant had been recalled on four occasions during his licence period for the attempted murder sentence and that, according to the author of the pre-sentence report: "He demonstrated threatening and disruptive behaviour within custody and Approved premises, showing little motivation to change." He was released a matter of days before the commission of the index offence. Equally, in the past the appellant had spoken with pride about his reputation and his gang affiliation, although he now spoke about wanting to cut ties with them.

48. The judge then turned to the appellant's personal circumstances and concluded that they also did not support the submission that it would be unjust to pass a life sentence.

49. The judge was, in our view. also justified in coming to this conclusion based on the facts of this case. The appellant had on his own account taken cocaine and drunk alcohol throughout the night before the attack. Again the pre-sentence report observed that: "Furthermore the speed at which Mr Dixon turned to maladaptive substance abuse in the community is extremely concerning, indicating that he lacks the required ability to maintain stability outside of a custodial environment." It was

also obvious from the pre-sentence report that the appellant's unstable emotional personality traits did not cause or explain the violence used by him towards Ms Hughes.

50. In our view, the judge was right to conclude that there was nothing in the particular circumstances of the index offence, the previous offence or the appellant that made it unjust to pass a life sentence.

Conclusion

51. For the reasons set out above, we reject the submissions that the notional determinate term of 15 years was too long; that the judge was wrong to impose a life sentence; or that the minimum term was too long.

52. Therefore, this appeal against sentence is dismissed.