IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202301425/A3
[2023] EWCA Crim 647

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 25 May 2023

Before:

LORD JUSTICE COULSON

MR JUSTICE HILLIARD

MR JUSTICE CONSTABLE

REX

V

JOHN LEROY FERNS

Computer Aided Transcript of Epiq Europe Ltd,
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MR H WILLIAMS appeared on behalf of the Applicant.

J U D G M E N T

LORD JUSTICE COULSON:

Introduction

1. The appellant is now 56. On 18 January 2023 he was convicted at the Crown Court at Preston (HHJ Lloyd) and a jury, of one count of assault occasioning actual bodily harm contrary to section 47 of the Offences Against the Person Act 1861. On 18 April 2023 he was sentenced by Judge Lloyd to 9 months' immediate imprisonment. His application for permission to appeal has been referred to the Full Court by the Registrar.

The Background Facts

2. On 1 June 2020, at about 10.00 pm, the complainant, Mr Patrick Ruch, left his flat in Naventis Court in Preston to go to the shops. The applicant lives in another block of flats nearby, and there had previously been tension between the two. Mr Ruch returned to his flat, opened the door to the communal entrance to his building and walked into the hallway. It appears that the applicant tailgated Mr Ruch into the hallway behind him. As Mr Ruch turned and saw the applicant, the applicant struck him hard, with his fist, to the right side of his face. The impact caused Mr Ruch to fall onto the floor and knocked out a number of his teeth.

3. Mr Ruch called 999 shortly after midnight. PC Quinn attended the scene and observed a tooth on the floor of the hallway. The applicant also spoke to PC Quinn and told him that he (the applicant) had not punched Mr Ruch. That was the start of a defence, based entirely on lies, which the applicant put forward throughout these lengthy proceedings. Despite the fact that part of the incident had been captured on CCTV, and the applicant accepted that he was the person shown entering Naventis Court, he maintained his denial of punching Mr Ruch until after he was convicted.

4. The injuries to Mr Ruch's mouth were later assessed by a dentist. The upper bridge was completely detached from his mouth and the teeth underneath had broken away from the bridge.

5. Doubtless as a result of a combination of the pandemic, the various lockdowns and the action by the Bar, there were delays in bringing the case to court. It is the reality that over the last three years, criminal cases where the defendant is on bail, have been accorded a lower priority than those cases where the defendant is in custody awaiting trial.

The Sentencing Exercise

6. The applicant had three convictions for seven offences spanning from 1984 to 2002. He served short prison sentences in 1984 and 1989, the first for a section 47 actual bodily harm and the second for robbery. His most recent offence in 2002 was a driving offence. It did not appear that the judge accorded any great weight to those previous convictions.

7. The sentencing exercise was, of course, undertaken by the judge who had presided over the trial. In addition to the information about the applicant's previous convictions, the judge had a pre-sentence report and a victim personal statement.

8. During the course of her sentencing remarks, the judge went through the applicant's lies in some detail: the lies he had told to the police, and then the lies he had told to the jury when giving evidence. Although the judge noted that, in the pre-sentence report following conviction, the applicant accepted that he had caused the injury and that he was at fault, the judge thought that the reason that he had not admitted his guilt at the earlier stage was "either that you thought your victim might not turn up to give evidence at court, or that the jury might believe you rather than the rather obviously chaotic Mr Ruch, whom you called in interview a drunken fool".

9. In consequence the judge said that the case "could and should" have ended three years earlier by admission in interview and a guilty plea at the Magistrates' Court, and that, whilst it was the applicant's right to elect Crown Court trial and have a jury determine his guilt or innocence, it meant that "all credit has gone, and you are to be sentenced with no credit for any plea and very little mitigation as a result."

10. The judge referred to the Sentencing Guidelines. She said that this was a category 1 harm and category C culpability. Such offences have a recommended starting point of 36 weeks' custody (broadly speaking 8½ months) with a range from a high-level community order to 18 months' imprisonment. The judge identified a number of aggravating factors, including the fact that Mr Ruch had reached the corridor into his block where the applicant should not have been able to enter, and where Mr Ruch should have felt safe. She also took into account the fact that Mr Ruch was clearly a man who had social problems and was incapable of fleeing once the applicant had found him. She said these aggravating factors raised the starting point to 12 months' imprisonment.

11. The judge then took into account mitigating factors, including the fact that the applicant was a carer for his mother. Those mitigating factors, in the judge's view, reduced the term to 9 months' imprisonment. The judge then went through the various factors identified in the Sentencing Guidelines as to whether or not the sentence should be suspended. Having considered those, she concluded that the only appropriate sentence was one of immediate custody.

The Appeal

12. On behalf of the applicant, in her written submissions, Ms Williams's principal point was that the judge was "wrong not to exercise her discretion to impose a suspended sentence of imprisonment". That was also the focus of her oral submissions this morning.

13. In her advice, she added a second ground, to the effect that the judge was wrong to aggravate the starting point from 36 weeks to 12 months' imprisonment. However, she realistically accepted this morning that there was little in that ground. We deal with it out of completeness, but we consider that that concession was correctly made.

14. We also note that the Registrar has referred this application to the Full Court on an entirely different point, namely whether the judge's comments in respect of delay could have been contrary to the Overarching Principles on Delay outlined in the Sentencing Guidelines. So we deal with those points in that order.

Suspension of the Sentence

15. We think that, with respect, Ms Williams was wrong to say in her advice that the judge did not exercise her discretion as to suspension. She plainly did. She had regard to the applicable guidelines as to whether or not to suspend and concluded that suspension was inappropriate in this case. So, Ms Williams's complaint must be that the judge erred in law in exercising her discretion in not suspending the sentence.

16. That is a difficult hurdle to surmount. Another judge, on another day, might have suspended the sentence in this case, but that does not make Judge Lloyd's exercise of her discretion wrong in principle, or lead to a manifestly excessive sentence. Furthermore, we must not lose sight of the important point that Judge Lloyd presided over the trial and was therefore in the best possible position to assess the applicant's culpability.

17. As we have said, the judge did not ignore the Guideline as to suspension: she identified the various factors applicable in this case. For example, she accepted that there was personal mitigation because the applicant had not been convicted of any offence for 20 years or more. She also accepted the point that he was a carer for his mother, so that immediate custody would result in significant harm to her. She did make the point on that issue, however, that the applicant had had plenty of time, in the three months between conviction and sentence, to arrange for others to undertake that task.

18. The judge did not consider that there was a realistic prospect of rehabilitation. That was because of the lying nature of the defence that had been put forward so persistently over so many years. In our view, the judge was entitled, on the facts of this case, to reach that conclusion. The most important element of the judge's balancing exercise was her conclusion that only a sentence of immediate custody would serve as an appropriate punishment. In our view, again, the judge was entitled to come to that conclusion.

19. Although this could be referred to as a single punch case, and Ms Williams referred to it as such, it was a single punch that came without any warning, thrown at a relatively vulnerable old man. What is more, it did huge damage. We note that Mr Ruch has been left without front teeth, which he cannot afford to replace. This has affected his eating and his general confidence as a result. He has been prescribed antidepressants. In those circumstances, it is easy to see why the judge concluded that it was only a sentence of immediate custody that would serve as an appropriate punishment.

20. We should make one final point on that topic. On a number of occasions, Ms Williams said that the judge had been wrong to say that immediate imprisonment was "the only

option". That is not what the judge said, and that is not the test. There are always options that makes the issue as to whether or not to suspend a sentence one of the most difficult issues that a sentencing judge has to undertake. What matters is whether, in all the circumstances, the only appropriate punishment, regardless of what the other options might be, is immediate imprisonment. Those are very different things. The judge applied the right test and reached a conclusion she was entitled to reach.

21. Accordingly, we reject the first and principal ground of appeal.

The Uplift

22. We deal briefly with the uplift despite, as we have said, Ms Williams's realistic concession. Because of the aggravating factors, the judge uplifted the starting point from 36 weeks to 52 weeks, before reducing it back down to 9 months by way of mitigation. The difficulty with any argument about those aggravating factors is that those arose out of the evidence that the judge had heard at the trial. It is all but impossible to expect this court to adopt a different view.

23. There were two in particular. First, there was the fact that Mr Ruch had entered the hallway of his building, where the applicant had no business to be and where Mr Ruch was entitled to feel safe. So this was akin to an attack in Mr Ruch's own home. That was plainly an aggravating factor. Secondly, the judge took into account all that she knew about the chaotic Mr Ruch and the social problems that he had. He was therefore more vulnerable than many, particularly vulnerable to a physical attack that came without warning. Again that was a clearly aggravating factor.

24. By reference to those two aggravating factors, the judge was entitled to go up to 12 months before considering the mitigating factors and coming back down to 9 months. We note that the notional term was still well within the recommended range which has an upper limit of 18 months' imprisonment. There is no sustainable criticism of that part of the sentencing exercise.

Delay

25. As we have noted, the judge took into account the question of delay. She made plain that because, in her view, the applicant should have pleaded guilty three years before, there was no credit and very little mitigation. The Registrar has raised the question of whether that was contrary to the Overarching Guidelines on Delay.

26. The Guideline reads as follows:

> "Where there has been an unreasonable delay in proceedings since apprehension which is not the fault of the offender, the court may take this into account by reducing the sentence **if this has had a detrimental effect on the offender.**
>
> Note: No fault should attach to an offender for not admitting an offence and/or putting the prosecution to proof of its case."

27. In our view, the judge's remarks in her sentencing observations did not go outside that guidance. She attached no fault to the applicant for not admitting this offence. She simply said that in consequence of his decision to fight the charge, "all credit has gone". She did not double count any factors, which is what the guidance on delay is primarily concerned to avoid. There was no evidence that the delay had a detrimental effect on the offender, and nor was that suggestion made either to the judge or in Ms Williams' clear advice on appeal. For those reasons therefore, we do not consider that the judge went outside the guidance given in the Sentencing Guidelines in respect of delay.

28. For all those reasons, we consider this sentence, although stern, was neither wrong in principle nor manifestly excessive. We therefore refuse permission to appeal.