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IN THE COURT OF APPEAL  
CRIMINAL DIVISION



Case No: 2022/01028/A4  
[2023] EWCA Crim 819

On appeal from the Crown Court at Leicester  
HH Judge de Bertodano

Royal Courts of Justice  
The Strand  
London  
WC2A 2LL

Wednesday 5<sup>th</sup> July 2023

**B e f o r e:**

**VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION**  
**(Lord Justice Holroyde)**

**MR JUSTICE FOXTON**

**SIR NIGEL DAVIS**

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**R E X**

**- v -**

**PAUL ELVIS FELLOWES**

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**Miss F Arshad** appeared on behalf of the Applicant

**Mr K Laird** appeared on behalf of the Crown

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**J U D G M E N T**  
**(Approved)**

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Wednesday 5<sup>th</sup> July 2023

**LORD JUSTICE HOLROYDE:**

1. On 3<sup>rd</sup> March 2010, following a trial in the Crown Court at Leicester before Her Honour Judge de Bertodano and a jury, the applicant was convicted of offences of aggravated burglary (count 1), unlawful wounding (count 2) and having a bladed article in a public place (count 7).

2. On 26<sup>th</sup> November 2010 he was sentenced to imprisonment for public protection, with a minimum term of six years.

3. The applicant's application for an extension of time of about 11 years in which to apply for leave to appeal against sentence has been referred to the full court by the Registrar.

4. The offences were committed at about 5 am on 7<sup>th</sup> June 2009. The applicant and another man, Saunders, broke into the home of Mr and Mrs Stewart, a couple aged in their 70s. The offenders had armed themselves with swords, which they had found in an outhouse. The applicant was also in possession of a lock-knife. The householders were woken from their sleep and went downstairs to investigate. Mr Stewart grappled with Saunders. The applicant, who at that point was still outside the house, struck Mr Stewart on the head with a sword, inflicting a wound. Saunders then repeatedly punched Mr Stewart. The offenders demanded money. Mrs Stewart tried to telephone for help, but the applicant shouted to Saunders to "get" her, and Saunders pursued her down the street. The applicant and Saunders then left in the Stewarts' car, using a key which they had stolen during the burglary.

5. The applicant was aged 27 at the time of the offences. He had previously been sentenced on about 20 occasions for a total of more than 50 offences, mainly involving dishonesty,

violence and disorder. He was sentenced to 21 months' detention for offences of burglary committed when he was aged 17. Aged 20, he conspired to commit robbery with an imitation firearm, for which he was sentenced to five years' imprisonment in 2002. In 2007 he was sentenced to three years' imprisonment for burglary of the home of an elderly person. He was released from that sentence in November 2008 and was on licence at the time of these offences.

6. At the sentencing hearing the judge had the assistance of a pre-sentence report and medical evidence from two psychiatrists. The applicant had had a difficult childhood. He effectively placed himself into care at the age of 12. He had abused Class A drugs from a young age. A diagnosis of paranoid schizophrenia was made when he was aged 19. Since that time he had received mental health care, most of it whilst in custody. It was apparent that he found it difficult to accept full responsibility for his actions, although he did show some awareness of the harm that he had caused and had written a letter of apology and remorse to the judge. The author of the pre-sentence report referred to the pattern of dishonesty and violent behaviour, largely whilst under the influence of drugs and/or seeking to acquire money for drugs. He assessed the risk of further offending and the risk of causing harm as high.

7. Dr Anwar, who had provided an initial report which included an assessment of the applicant's fitness to plead, diagnosed him as suffering from paranoid schizophrenia and personality disorder. By April 2010, however, she felt that the medication he had been taking whilst in custody had stabilised his condition to the extent that hospital treatment was not warranted.

8. Dr Richardson did not disagree with Dr Anwar's diagnosis, but opined that the main problem was the applicant's personality disorders and abuse of drugs and alcohol. He, too,

took the view that hospital treatment was not necessary or appropriate. Dr Richardson recommended that, when the applicant was released from custody, he should be referred to the local forensic mental health team for follow up in the community.

9. The judge in her sentencing remarks referred to the lasting effects of the offences on Mr and Mrs Stewart. She found the applicant to be a dangerous offender, as that term is defined for sentencing purposes. She continued:

"I then have to determine whether that risk can be answered by the imposition of an extended sentence or imprisonment for public protection. I am satisfied that in all the circumstances it would be inappropriate for me to pass an extended sentence. The inevitable consequence of that would be that the time would come when you were at liberty and unsupervised. The only appropriate sentence, in my judgment, is one of imprisonment for public protection and that is the sentence I pass."

The judge concluded that the appropriate total determinate sentence would have been 12 years' imprisonment. For each of the offences of aggravated burglary and unlawful wounding, she imposed sentence of imprisonment for public protection, with a minimum term of six years. It appears that by an oversight no account was taken of the 206 days which the applicant had spent in custody. For the offence of having a bladed article, the judge imposed a concurrent determinate sentence of 18 months' imprisonment.

10. No application for leave to appeal was made at the time. In 2022 the applicant put forward proposed grounds of appeal of his own composition and sought the necessary extension of time on the ground that more information had become available. The Registrar, noting some points of concern, very properly assigned counsel to advise the applicant. He now has the advantage of being represented by Miss Arshad.

11. As to the need for a very long extension of time, Miss Arshad has explained that the applicant initially received oral advice against an appeal from counsel who had represented him in the Crown Court, and did not realise at that stage that he could remain in custody for an indeterminate period. Miss Arshad tells us – and we of course accept from her – that her instructions from the applicant are that until about 2022 his understanding had been that he would be entitled to release at some stage, whether or not the Parole Board felt it appropriate. That mistaken understanding seems to have been corrected only when a transfer to a different prison brought him into contact with fellow prisoners who were able to explain the correct position.

12. Miss Arshad accepts, realistically, that there can be no challenge to the finding of dangerousness. Nor is there any challenge to the length of the custodial term. She submits, however, that the judge should not have imposed sentences of imprisonment for public protection.

13. In relation to the wounding offence, Miss Arshad submits that such a sentence was unlawful: at the time, a sentence of imprisonment for public protection could only be imposed for a serious specified offence; and unlawful wounding, contrary to section 20 of the Offences against the Person Act 1861, although a "specified" offence, was not for this purpose a "serious" offence. Mr Laird, who represents the respondent at this hearing, agrees. We are satisfied that counsel are correct, that the sentence on count 2 was unlawful, and that the unlawful sentence must be quashed and an appropriate lawful sentence substituted.

14. In relation to the aggravated burglary offence, Miss Arshad helpfully reminds the court of the relevant legislation in force at the time of sentencing. Given that the maximum sentence for the offence is life imprisonment, and given that the applicant had been found to be dangerous, section 225(2) of the Criminal Justice Act 2003 required the judge to impose a

sentence of life imprisonment if the court considered that the seriousness of the offence, or of the offence and one or more offences associated with it, was such as to justify the imposition of a sentence of imprisonment for life. In a case which did not fall within that subsection, section 225(3) gave the court a power to impose a sentence of imprisonment for public protection if the notional minimum term was at least two years.

15. By section 227 of the 2003 Act, the court, if not required by section 225(2) to impose a life sentence, had the power to impose an extended sentence if the appropriate custodial term would be at least four years. An extended sentence was a sentence of imprisonment comprising the appropriate custodial term and an extended period of licence of such length as the court considered necessary for the purpose of protecting members of the public from serious harm occasioned by the offender's commission of further specified offences. In the circumstances of this case, the maximum length of any extension period was five years.

16. Miss Arshad invites our attention to *Attorney General's Reference No 55 of 2008 (R v C and Others)* [2009] 2 Cr App R(S) 22, in which Lord Judge CJ referred to a sentence of imprisonment for public protection as the most draconian sentence available to the court, apart from life imprisonment, and emphasised the need for the court to have in mind "all the alternative and cumulative methods of providing the necessary public protection against the risk posed by the individual offender". At [14] of the judgment, the Lord Chief Justice said:

"... The primary question is the nature and extent of the risk posed by the individual offender and the most appropriate method of addressing that risk and providing public protection. If what we have described as the overall sentencing package provides appropriate protection, imprisonment for public protection should not be imposed."

Miss Arshad also relies on what the Lord Chief Justice said at [20] of the judgment in that

case, which included the following:

"... In short, therefore, if an extended sentence with, if required, the additional support of other orders, can achieve appropriate public protection against the risk posed by the individual offender, the extended sentence, rather than imprisonment for public protection, should be ordered. That is a fact-specific decision."

17. In the present case Miss Arshad submits that the judge failed to identify any reason why an extended sentence would not adequately protect the public. She suggests that it is not enough for the judge simply to observe that under an extended sentence a time would come when the applicant would be entitled to release and would be unsupervised because, as Miss Arshad points out, that would be the case whenever an extended sentence is imposed. Miss Arshad argues that the medical evidence before the court showed that the applicant's mental health had stabilised whilst he was in custody, and that the risk he presented had accordingly been reduced. She submits that in all the circumstances of the case there was in fact no sufficient reason why an extended sentence would not have provided adequate protection for the public.

18. Mr Laird suggested in his written submissions that no sufficient reason had been given for granting the very long extension of time which would be necessary, but he fairly acknowledges the explanation which has very recently been put before the court in that regard. Mr Laird reminds us that the role of this court is to review the sentence imposed in the court below and not to engage in a re-sentencing exercise. He submits that the judge followed a correct procedure and was entitled to conclude that an extended sentence would not be sufficient to address the risk posed by this dangerous offender. He suggests that although the judge did not specifically refer to the *Attorney General's Reference*, which we have cited, the approach she took was consistent with what the Lord Chief Justice in that

case.

19. We are grateful to both counsel.

20. As to the very long extension of time which is sought by the applicant, the explanation provided by him is not entirely satisfactory. However, we accept that he has intellectual limitations which may have made it difficult for him to appreciate the nature of his sentence. It is a feature of the case that no one advised him that his sentence was in one respect unlawful or that, in setting the minimum term for his lawful sentence of imprisonment for public protection, the judge had failed to take account of the lengthy period when he had been remanded in custody. In the circumstances we are persuaded that the extension of time should be granted.

21. Mr Laird is of course correct in reminding us that our function is one of review, rather than re-sentencing. Whilst the judge could certainly have said rather more than she did to explain the reasons for her conclusion, we accept Mr Laird's submission that she did not base her decision on the simple proposition, applicable to every case in which an extended sentence is imposed, that the offender would eventually be at liberty and unsupervised.

22. We nonetheless see force in Miss Arshad's submission that there was in fact no sufficient basis for the judge's finding that an extended sentence would not provide sufficient protection for the public. The judge described the applicant's conduct as "a really very bad example of this type of offending". That is a description with which we respectfully agree. She did not, however, regard the offending of being of such seriousness as to justify the imposition of a life sentence. Again, we respectfully agree with her. But it was then necessary to consider whether the protection of the public required the imposition of a sentence of imprisonment for public protection, the practical effect of which would in many ways be similar to a life



sentence.

23. Here, with respect to the judge, we think that she fell into error. The applicant's longest previous custodial sentence was five years' imprisonment. The appropriate determinate sentence for these offences would be 12 years' imprisonment. The effect of an extended sentence would be that the applicant would be either in custody or subject to licence conditions for a total period of up to 17 years. Having committed these offences at the age of 27, he would be in his mid-40s before he would be both at liberty and unsupervised. The regime of treatment and medication whilst in custody had already done much to stabilise his mental health by the time of the sentencing hearing, and it could be expected that those supervising the applicant in custody and on licence would be concerned to monitor his compliance with any future regime.

24. In those circumstances, whilst we well understand why the judge was properly concerned with the protection of the public, it was not open to her to conclude that imprisonment for public protection, the sentence of "last but one resort", was necessary. We are satisfied that, on a proper application of the principles stated by the Lord Chief Justice in the *Attorney General's Reference* which we have cited, the judge should have imposed an extended sentence for the offence of aggravated burglary.

25. We therefore grant the necessary extension of time. We grant leave to appeal. We allow the appeal to the following extent: on count 1 (aggravated burglary), we quash the sentence of imprisonment for public protection and substitute for it an extended sentence of 17 years, comprising a custodial term of 12 years and an extension period of five years; and on count 2 (unlawful wounding), we quash the sentence of imprisonment for public protection and substitute a standard determinate sentence of three years' imprisonment. The sentence of 18 months' imprisonment on count 7 remains as before. All those sentences will run

concurrently with each other. The period spent on remand in custody will count towards the total custodial term.

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