NCN: [2023] EWCA Crim 941
IN THE COURT OF APPEAL
CRIMINAL DIVISION
CASE NO 202301746/A5

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 20 July 2023

Before:

LADY JUSTICE MACUR DBE

MRS JUSTICE COCKERILL DBE

MR JUSTICE MURRAY

REFERENCE BY THE ATTORNEY GENERAL UNDER S.36 CRIMINAL JUSTICE ACT 1988

REX
V

MICHAEL HANNAN

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MR J SMITH appeared on behalf of the Attorney General.
MR B SASTRY appeared on behalf of the Offender.

J U D G M E N T

1. LADY JUSTICE MACUR: On 24 April 2023 Michael Hannan ("the offender") pleaded guilty to the manslaughter of James O'Hara. He was sentenced on 29 April 2023 to 5 years and 4 months' imprisonment. This is an application by His Majesty's Solicitor General, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer the sentence which he regards to be unduly lenient.

The Facts

2. On 19 October 2021, the offender and a friend had been drinking in a public house. As they left the premises and were walking on the street away from the public house, they encountered Mr O'Hara walking in the opposite direction. Shortly after they passed each other, Mr O'Hara turned around and said something and he and the two males physically confronted each other. The offender punched Mr O'Hara to the face, once, and he fell back towards the ground. The offender and his friend then ran from the scene.
3. Mr O'Hara sustained comminuted displaced fractures of the floor of the left orbit and the nasal bone as a result of the punch, which indicated to the pathologist a blow of considerable force. Mr O'Hara also fractured his skull in several places as a result of the striking of his head upon the pavement. Unfortunately, he died six days later from acute bacterial meningitis, which infection had infiltrated his brain through the skull fracture.
4. Following the assault, the offender sent a series of messages to associates which included a photograph of him bare chested, flexing his muscles in a boxing stance, and containing sickening commentary, glorifying the assault and the obvious facial injuries he had inflicted and the fact that he had 'floored' Mr O'Hara. Understandably, these messages were extremely upsetting to the family, and we do not repeat them here.
5. On 31 October 2021, the offender voluntarily attended at a police station, where he was

arrested and interviewed. He acknowledged that he had punched Mr O'Hara but claimed that he had done so in the defence of his friend. In a second interview, he stated that the messages that we have referred to above were examples of drunken bravado.

Proceedings

6. The matter was listed for trial on 24 April 2023. The offender changed his plea after the jury was sworn. His basis of plea was that:
    (a) The parties passed each other in the street and Mr O'Hara said words to the two men.
    (b) Mr O'Hara then stopped and turned around, approached the offender and his friend, whilst saying: “Who are you growling at?” He then tried to square up to the offender's friend.
    (c) The offender then struck the deceased once to the face. He did not shout at Mr O'Hara whilst he was on the ground as he ran off immediately.
7. A victim personal impact statement was read out to the court which revealed the devastation caused to the O'Hara family by the death of their loved son, brother and grandson, exacerbated by the manner of his death and indicating distress at learning of the contents of the offender's messages to which we have referred above.
8. Prosecution counsel submitted that the offence fell within category C of the relevant Sentencing Council Guideline “because of the... substantial blow was intended to cause some harm though clearly not harm of the range that would take it into category B”. The defence agreed with the categorisation although sought to mitigate the starting point of 6 years by reference to the offender's personal circumstances and the implications of the basis of plea.

9. The judge accepted that this was a medium culpability case in which substantial force had been used. Although it did not justify the use of force, the judge noted that Mr O'Hara's squaring up to the offender's friend reduced culpability somewhat. He regarded the offender's previous convictions to be an aggravating feature, as was the fact that the offender had been drinking and the location of the offence. The judge bore in mind the offender's personal circumstances and unfortunate early life experiences. He found the offence to be mitigated by a lack of premeditation and the offender's voluntary surrender when he became aware that the police were hunting him. He discounted the sentence of 6 years, which he reached accumulating aggravating circumstances and then discounting for mitigation, by 10 % resulting in the sentence of 5 years and 4 months' imprisonment.
10. Mr Smith, on behalf of His Majesty's Solicitor General, submits that the sentence passed was unduly lenient. In the written Reference, it is argued that the offence fell into category B of the Sentencing Guideline, on the basis of the offender's intention to cause harm falling just short of grievous bodily harm as demonstrated by the forceful blow struck by the offender which caused significant facial injuries rendering the victim unconscious. One of the offender's previous conviction for an assault which caused similar injuries, demonstrates, he submits, the offender’s awareness that he could cause such serious injuries. The offender's messages after the incident demonstrated that he did not believe that the victim presented any real threat.
11. In oral submissions today Mr Smith somewhat changes the thrust of his submissions and now argues that the offending should have been categorised at the very top of category C and therefore falling on the cusp between category C and category B because of the unprovoked nature of the assault and the harm that was caused. A significant uplift should have been applied to reflect the aggravating features, most particularly, the

offender's previous convictions, the fact that the offence was committed under the influence of alcohol, the location of the offence and the messages sent by the offender 'celebrating' his violent conduct. He further submits that there was limited mitigation available to the offender. That which the judge regarded as mitigation, namely that the offender had not gone looking for trouble and that the attack was not premeditated was in effect, double counting the same issue, and the fact that the offender had attended the police station voluntarily was as a result of the police making clear that he was being sought. Further, Mr Smith submits that the judge should have found the offender to be dangerous for the purpose of section 279 of the Sentencing Act 2020. The nature of the offence and the offender's antecedents indicated a significant risk to members of public of serious harm, occasioned by commission of further specified offences. Consequently, the court should have imposed an extended sentence.

12. The offender, represented by Mr Sastry, submits that the judge correctly identified the category within the Guidelines, that there was no evidence from which it could be inferred that the unlawful act involved an intention by the offender to cause harm, falling just short of grievous bodily harm, which would put the case into category B, and referring to the prosecution concession as to categorisation of the offence in the court below. Whilst noting that this 'concession' does not bind the law officers or this Court, as Davis LJ made clear in *Attorney-General's Reference (R v Stewart) [2016] EWCA Crim 2238* at paragraph [34] et seq , there should be a proper and substantial justification for doing so. The fact that counsel for the prosecution in the court below made a concession as to the appropriate categorisation, which the judge accepted and acted upon, may be a powerful indication that it was properly made as a concession.
13. Mr Sastry argues that the judge was best placed to assess the necessary uplift to the

starting point because of the aggravating features and then the appropriate discount for mitigation. The Guidelines do not assist with the quantification and weighting of these matters and that falls within the discretion of the sentencing judge. Equally, the judge was best placed to consider the issue of dangerousness. He obviously considered the issue, as is clear from his sentencing remarks, and what is more, on the material that was available to him there was nothing to suggest that this offender did fall within the definition of dangerous as provided by section 279 of the 2020 Act.

14. However, Mr Sastry realistically concedes that if there were indicators which should have alerted the judge to the necessity to obtain a pre-sentence report, and the judge failed to do so, then this does constitute an error of procedure. (See *R v Johnson [2021] EWCA Crim 1683*, paragraphs [26] to [29].) Nonetheless, even if we were to find that the judge had erred in that respect and, on the basis of the post-sentence report that we now have , determine that this offender met the criteria of dangerousness, it does not follow that it is necessary to impose an extended sentence .

Discussion

15. It is trite to say that there is no sentence which could ever effect any sense of emotional reparation to Mr O'Hara's family. The judge recognised this fact and was at pains to explain the process during the sensitive sentencing remarks following the difficult sentencing exercise that he conducted. We reject Mr Smith's submissions that this judge was wrong in his categorisation of the offence , and note that he was fortified in his analysis by the prosecution submissions. We conclude he was entitled to consider the offender's lack of premeditation and single blow as negating any intention to cause harm, falling just short of grievous bodily harm, or that the act carried a high risk of death

which should have been obvious to the offender. We reject the submission that the consequences of the offender's previous convictions would necessarily alert the offender to that risk; although they have indicated an obvious tendency to violence, notably these offences have never been charged as other than battery or assault occasioning actual bodily harm. We are satisfied, that the blow to the face was forceful and determined, as the judge found, and was certainly causative of the death of Mr O'Hara, but that does not predicate that the offender would or should have been aware of an ensuing high risk of death .

16. However, we tend to agree with Mr Smith that the judge should have increased the starting point**,** particularly to reflect the previous convictions, and which uplift would have surpassed any discount for mitigation.

17. We indicate, for the avoidance of doubt, that we are not swayed by the somewhat arbitrary figures that appear in the written Reference, but consider the least appropriate sentence after trial would have been in the region of 7 years which, reduced by 10 per cent, would have resulted in a final sentence of 6 years 4 months. However, this calculation indicates to us that the judge's sentence should be described as lenient but not unduly so and would not of itself lead us to grant leave.

18. However, we are satisfied that the judge fell into error in the way he addressed the offender's previous antecedent history. That is, Mr Sastry highlights in his written submissions, the judge's remarks that:

> "Despite his record for violence and the fatal consequence of this assault, I do not consider that he imposes a risk which would make him eligible for an extended determinate sentence. Of course with this matter on his record, if he was to commit further violent offences that assessment would most likely reach the opposite conclusion."

But, the judge subsequently found the messages sent by the offender:

> "... they set the [offender's] convictions in a highly unflattering context. They show that this defendant enjoyed violence, he believed that causing harm to people was something to be proud of. He enjoyed mocking those whom he had unlawfully injured. This, taking together with his previous convictions, is a significant aggravating feature."

19. We agree with these latter comments, which we consider to undermine the judge's earlier conclusion that it was not necessary to obtain a pre-sentence report. This error leads us to grant leave and ultimately to resentence the offender with the benefit of a comprehensive post-sentence report.

20. The post-sentence report, dated 13 July 2023, identifies and comments upon "previous convictions linked to violence and aggression of significance" between 2009 to 2018. There are ten incidents, commencing with racially abusive or insulting words or behaviour to cause fear or provocation of violence and culminating in the assault of an unknown male on a train, when the offender and another landed punches and kicks to the victim's head and body before he lost consciousness. All participants were under the influence of alcohol. The offender was sentenced to 12 months' imprisonment.

21. Overall, the author reports that:

> "In respect to his thinking around the offence and past offending, there is minimisation in his actions. He fundamentally denies being a violent person, although he accepts his current matter and antecedent record will give a different view and attributes his violent reactions as a response to provocation from others. I note from our records he has said 'I stepped in to support a friend' in reference to a past violent offence. It can be seen over the years, with several offences all following a similar pattern of varying harm to others, he has not appeared to modify his behavioural responses, attitudes or thinking that may have reduced the chances

> of the current offence occurring. He describes the current matter as self-defence although there is no indication he was under threat from Mr O'Hara. He has been dealt with by different sanctions in the past, all of which appear to have had little impact upon his behaviour, rather choosing to continue to associate with likeminded peers misusing drugs and alcohol, using intimidating and aggressive behaviours towards others. The majority of his offending appears to follow a similar pattern and this would suggest that he seems to have made little changes previously to reduce this risk of reoffending or at times, the harm caused."

22. A recent prison report reflects well on the offender, but we are driven in all the circumstances to agree with the author of the post sentence report that the offender:

> "... poses a 'significant risk' of causing serious harm to the public through the commission of further specified offences... The potential event could happen at any time and the impact would be serious ... It is clear [that the offender]... is no stranger to violence and willing to use aggression towards others. There also appears to be an ongoing pattern to his violent offending, being in the company of others, under the influence of alcohol and/or drugs."

23. In all the circumstances, we do not interfere with the custodial element of the sentence, which was arrived after due consideration by the sentencing judge, lenient though it was. but we do go on to quash the determinate sentence of 5 years 4 months and in its place substitute an extended determinate sentence of 10 years 4 months, being made up of a custodial term of 5 years 4 months and an extended licence period of 5 years. To that extent, this Reference is allowed.

24. Mr Smith, may I, through you, express this Court's very heart-felt condolences to Mr O'Hara's family, not only the manner of his death but all the sequelae would have been very, very distressing to them. We know that they come to Court today in memory of their son, grandson, brother. We pay tribute to their quiet dignity as they have displayed it throughout the course of this hearing.

25. MR SMITH: Thank you very much, my Lady.

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