IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NOS 202401789/A4 & 202401791/A4

[2024] EWCA Crim 1099

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday, 27 June 2024

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
LORD JUSTICE HOLROYDE
MR JUSTICE DOVE
HER HONOUR JUDGE NORTON
(Sitting as a Judge of the CACD)

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

REX
v
SHAUN BROWN
KENNETH BROWN

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground Floor, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR B HOLT appeared on behalf of the Attorney General
MR C LANDER appeared on behalf of the Offender Shaun Brown
MR P KILTY (Solicitor Advocate) appeared on behalf of the Offender Kenneth Brown

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J U D G M E N T
(Approved)

1. THE VICE-PRESIDENT: Shaun Brown and Kenneth Brown, who are brothers, pleaded guilty to an offence of attempting to cause grievous bodily harm with intent, contrary to section 18 of the Offences Against the Person Act 1861 and section 1 of the Criminal Attempts Act 1981. On 18 April 2024 in the Crown Court at Carlisle they were each sentenced by Recorder Shaw to two years' imprisonment suspended for two years, with requirements of 300 hours of unpaid work, alcohol abstinence and rehabilitation activity. Other ancillary orders were made.
2. His Majesty's Solicitor General believes the sentencing to have been unduly lenient. Application is accordingly made, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer the case to this court so that the sentencing may be reviewed.
3. The charge arose out of a very ugly incident captured on CCTV in the early hours of 30 October 2022. Shaun Brown was then aged 23, Kenneth Brown 25. They had spent several hours drinking in a public house, during which time they had been seen to be loud and aggressive. They left some time before 2.00am and walked through the city centre, singing and chanting songs in support of Liverpool Football Club and derogatory to Manchester United Football Club.
4. They came across Kyle Bowman-Rogers, a young man walking home on his own. There was an initial exchange in which Kyle Bowman-Rogers said that he was a Manchester United supporter. One of the offenders demanded to know what his problem was and told him to walk on. Kyle Bowman-Rogers started to move away but was pushed up against a wall and threatened. He said that he had a knife, although in fact he did not. Both offenders then began to punch him and he fell to the ground, where he was repeatedly punched and kicked. He managed to get up, but lost his balance in trying to kick out at his attackers and was again taken to the ground. He was pinned on the ground

and the attack continued, despite Kyle Bowman-Rogers saying he could not breathe. Kenneth Brown kicked him several times to the head. Shaun Brown then knelt on him and Kenneth Brown stamped on the victim's head about five times. The offenders stood up, leaving their victim on the ground. Shaun Brown then delivered a powerful kick to the head which appeared to render him unconscious. A passer-by shouted that the police were being called and the offenders walked away, leaving their victim lying motionless on the ground. CCTV footage tracked their movements. They appeared wholly unconcerned about what they had done.

5. Kyle Bowman-Rogers suffered fractures of his dominant right hand and his nose. There were cuts to his face and his head, which was swollen, and extensive bruising of his body. In a victim personal statement written about nine months later he said that he was still unable to use his right hand, and so had to use his left. He did not know whether he would be able to work in the future in manual labouring. He had stopped socialising with friends since the incident and felt apprehensive if he was alone in a street.
6. Both brothers were arrested on 3 November 2022. When interviewed under caution, each made no comment. Months passed before they were charged by postal requisition on 13 February 2024.
7. At their first appearances before a magistrates' court, both indicated guilty pleas. They entered those pleas when they first appeared before the Crown Court. They were entitled to full credit for their guilty pleas.
8. Neither offender had any previous convictions. At the sentencing hearing the recorder was assisted by a pre-sentence report in each case, and a number of references and testimonials which were favourable to the offenders. It is apparent that until this incident both offenders had been hard working and law-abiding. Both were in committed

relationships. Shaun Brown's partner was due to give birth soon after the hearing. Both men displayed genuine remorse for what they had done. We are told in this regard that when shown the CCTV footage during their interviews under caution each was visibly shaken by what they saw and felt unable to continue viewing.

9. Submissions were made as to the Sentencing Council's definitive guideline for sentencing in completed offences contrary to section 18 of the 1861 Act. Counsel then appearing for the prosecution submitted that culpability was on the border between categories A and B of the guideline and harm at level 3. Counsel for the offenders submitted that the appropriate categorisation was 3B.

10. In the course of the hearing, the recorder referred to the need to sentence by reference to the harm which the offenders intended to cause, not to the less serious injuries which the victim in fact sustained. He did though accept the submission that category 3B was the appropriate level.

11. In his sentencing remarks the recorder described what had happened as a:

> "... cowardly, brutal, sustained attack on a drunk and ultimately utterly defenceless young man. Two onto one, one of you restraining the other so that the brother could kick him repeatedly as he lies prostrate on the floor utterly unable to defend himself."

12. The recorder went on to say that it was "nothing short of a miracle" that the victim did not sustain life-changing injuries or indeed lose his life as a result of the repeated full-bodied kicks and stamps directed at his head.

13. The recorder referred to the significant mitigation which was available to each of the offenders. He expressed his conclusion that the appropriate category for a completed offence would be category 3B with a starting point of four years' imprisonment. Taking

account of the mitigation, but not explicitly mentioning any of the aggravating factors, the recorder came to the conclusion that that guideline sentence could be reduced to three years, that decision reflecting also the fact that the offence was an attempt rather than the completed offence. The three years were reduced to sentences of two years' imprisonment by reason of the guilty pleas. The recorder went on to address the factors relevant to suspending those sentences, and did suspend them with the requirements which we have described.

14. His Majesty's Solicitor General, in making this application, submits that the sentence should have been substantially in excess of two years' imprisonment, with the result that no prospect of suspending the sentence should have arisen.

15. It is a feature of the application that the Solicitor General seeks to depart from the submissions made by prosecuting counsel below. Mr Holt submits that it was an error for counsel then appearing to invite the recorder to treat this as a case in which harm was at level 3 and culpability on the border between levels A and B. Mr Holt argues that culpability was not only in category A, but merited an initial upwards adjustment from the starting point because no fewer than four high culpability features were present. The intended harm, he submits, was in category 1 or at least category 2 of the guideline. On that basis, helpfully developed in writing and orally, Mr Holt submits that the sentences were unduly lenient.

16. On behalf of the offenders, counsel acknowledged that the sentences could well be regarded as lenient, but submit that they were not unduly so. Mr Lander and Mr Kilty argue that in truth only one high culpability factor was present. In categorising the notional completed offence the recorder had to weigh in the balance the presence of one medium culpability factor, namely the use of a weapon equivalent which did not fall into

high culpability, and it is suggested that a lower culpability factor may also have been present.

17. Further, they submit in their written and oral submissions that the recorder had well in mind the potentially much more serious consequences of the attack, but was entitled to conclude that the completed offence would have resulted in category 3 harm. Counsel emphasised the considerable personal mitigation available to both offenders, including their evident remorse and positive good character prior to this incident, and emphasised also the long period of time which passed between offence and arrest and then their being charged.

18. In Shaun Brown's case, we are told by way of helpful update that the child expected at the time of the sentencing hearing has now been born, and has been able to go home from hospital; but the pregnancy was a difficult one, and the child unfortunately needed to stay in hospital for some time. We recognise that on a human level this will be a matter of great concern to Shaun Brown.

19. We are grateful to all counsel for their very helpful submissions. Reflecting upon them, we come to the following conclusions.

20. Prosecuting counsel in the court below was wrong to make his submissions as to category on the basis of the harm actually caused. As all counsel accept and as the recorder recognised, the correct approach to sentencing for this offence of attempt was to determine, in accordance with the guideline, what sentence would have been appropriate for the completed offence of causing grievous bodily harm with intent, and then to discount that sentence to reflect the fact that the attempt had not succeeded: see, for example, R v Laverick [2015] EWCA Crim 1059 and R v Muthuraja [2019] EWCA Crim 1740.

21. Adopting that approach, our views are as follows. One high culpability factor was undoubtedly present: this was plainly a "prolonged/persistent assault". Although the victim shouted that he could not breathe, we are unable to accept the submission on behalf of the Solicitor General that we should make a finding, which the recorder did not feel able to make, that the high culpability factor of "strangulation/suffocation/asphyxiation" was proved. That factor requires a deliberate act of strangulation, et cetera. Here, the CCTV footage does not exclude the possibility that the victim's difficulty in breathing was caused by the position in which he was pinned on the ground rather than by any such deliberate act. The fact that his breathing was obstructed is of course a clear indication of the potential for much more serious injury to have been caused.

22. Nor are we persuaded by Mr Holt's submissions that other high culpability factors were present. The fact that this was at all times an attack by two onto one does not make this a case either of the victim being obviously vulnerable due to his circumstances, or of each offender playing a leading role in a group activity. In particular, in the circumstances of this case, we do not accept the submission that the incident can be subdivided so that towards the end it became one in which the victim was particularly vulnerable. That, as it seems to us, is an aspect of the case catered for by the high culpability factor of prolonged or persistent assault. All that said, the fact that this was an assault by two onto one is plainly a serious aggravating factor.

23. We accept that the use of shod feet was in the circumstances of this case not the use of a highly dangerous weapon or weapon equivalent and that a medium culpability factor was therefore present. We are unable to accept the submissions on behalf of the offenders that any lesser culpability factor was present.

24. Balancing those characteristics and giving weight to relevant factors, as the guideline requires the court to do, we are satisfied that the recorder should have found each offender's culpability to be high.

25. As to harm, we think it clear, with all respect to the recorder, that he wrongly focused on the injuries actually inflicted rather than the harm which would have been caused if the attempted and intended offence had been completed. It was a matter of pure good fortune that the injuries were no worse. The nature and duration of the attack, and in particular the repeated kicking of and stamping on the head, give rise to a clear inference that the offenders were attempting to cause much more serious harm. Mr Holt realistically does not seek actively to pursue the argument that the intended harm would have fallen within category 1, but we accept that the recorder should have placed it into category 2. If completed, therefore, the offence would have fallen into category 2A, for which the guideline gives a starting point of seven years' custody and a range from six to 10 years.

26. We have already referred to the aggravating feature of this being an attack by two onto one. It was further aggravated by the intoxication of the offenders and by the circumstances of this being a late night attack in a public place, a type of offence which rightly arouses great public concern.

27. Like the recorder, we accept that each offender had a good deal of personal mitigation, and that the long delay before they were charged was a factor to be taken into account in their favour. Being as favourable as we can to the offenders, we are just persuaded that the balancing of aggravating and mitigating factors results in a modest reduction from the guideline starting point. In our view the appropriate sentence for the completed offence would have been not less than six years six months' imprisonment. In the circumstances of this case, only a modest further reduction is appropriate to reflect the fact that the

offence was not completed. As we have said, it was pure good fortune, and no thanks to the offenders, that their repeated kicking and stamping did not result in more serious injury.

28. For those reasons, the least sentence which was appropriate before giving credit for the guilty pleas was six years' imprisonment. Allowing full credit the Recorder should have imposed immediate sentences of not less than four years. Sentences of half that length were, therefore, unduly lenient.

29. The Recorder was in our view encouraged into error by the misguided submissions on behalf of the prosecution. The Solicitor General is entitled to disavow those submissions and to make this application on the express basis of a different approach to categorisation under the guideline. This court, being satisfied that a clear error was made in the sentencing below, is bound to intervene. Previous decisions of this court have, however, recognised that in circumstances such as these the change of approach by the prosecutor may give rise to a legitimate sense of unfairness, which may properly be reflected in some reduction from the sentence which would otherwise be appropriate: see for example Attorney General's Reference (Susorovs) [2016] EWCA Crim 1856 and R v Muthuraja. We are satisfied that in this case there is an element of unfairness in a change of approach which will result in significantly longer sentences and require men of previous good character to experience custody for the first time. We also think it right to take into account that the immediate custodial sentences will take effect at a time when prison overcrowding is a yet more serious problem than it was when the case was before the Crown Court, with the result that the sentences will be severed in difficult conditions.

30. For those reasons, we grant leave to refer. We quash the sentences imposed below as unduly lenient. We substitute for them, in the case of each offender, a sentence of

three years six months' imprisonment. They will each serve up to half of that sentence and will be subject to licence conditions for the remainder.

31. We direct that both offenders must surrender to custody at Copy Lane Police Station, Liverpool by 1.00 pm today.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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