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IN THE COURT OF APPEAL
CRIMINAL DIVISION
ON APPEAL FROM THE CROWN COURT AT
NORTHAMPTON
MR RECORDER KHANNA 34NA0278223
CASE NO 202402390/A3
NCN:[2024] EWCA Crim 1139

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday, 30 July 2024

Before:

LORD JUSTICE BEAN
MRS JUSTICE FARBEY DBE
HER HONOUR JUDGE MUNRO KC
(Sitting as a Judge of the CACD)

REX
V
ZOLILE NDIWENI

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MR D GREEN appeared on behalf of the Appellant

J U D G M E N T

MRS JUSTICE FARBEY

1. On 20 January 2024, having pleaded guilty before the Northampton Magistrates' Court, the appellant (then aged 24) was committed for sentence in respect of one offence of inflicting grievous bodily harm, contrary to section 20 of the Offences Against the Person Act 1861.
2. On 7 June 2024, in the Crown Court at Northampton, he was sentenced by Mr Recorder Khanna KC to 8 months' imprisonment. He appeals against sentence by leave of the single judge.
3. The offence took place at just after 5.00 am on 19 November 2022 in Gold Street in Kettering. The victim, Joseph Mwangi, had been drinking in various bars. He then went to a chicken shop to get some food. A woman with whom he had danced earlier in the night came into the shop and asked him to buy her some food. The appellant was in the shop and warned the victim not to buy the woman any chicken. He called to his friends and told the victim to go outside. The victim did so.
4. CCTV footage showed the appellant grappling with the victim outside the shop. Others became involved. The appellant and the victim were separated but the victim was taken to the ground by others. He managed to get up. The appellant then lunged towards the victim's head and upper body, before the victim again fell to the ground. The appellant was repeatedly pulled away by others but, ignoring their attempts to keep him away from the victim, he made deliberate and determined efforts to attack the victim who was still on the ground with others on top of him. The appellant eventually got into a position from which he kicked the victim with force, taking some steps back before kicking him again twice. Although the appellant was again pulled away, he went back again, trying to get to the victim on the ground.
5. Others helped the victim to get up from the ground and protected him from further attack from the appellant until the police arrived.
6. The victim went home that night without medical treatment, not appreciating the severity of his injuries. His mother persuaded him to go to hospital, where he was diagnosed with a fractured jaw, a chipped tooth and a burst blood vessel in his eye. He required surgery to fit two metal plates into his jaw and eight screws, which will remain in place permanently.
7. The appellant was arrested not far from the scene. He replied after caution that the victim had in fact hit him. However, in interview, when he saw the CCTV, he accepted in full his actions as vividly captured on the footage. He acknowledged that he had had multiple opportunities to walk away and that matters would have been different had he not been intoxicated. He appeared to be genuinely remorseful and asked about the victim's welfare. He acknowledged that he was 100% in the wrong.
8. The appellant had no previous convictions.
9. The Recorder had the benefit of a pre-sentence report which described the appellant's serious

health problems. He suffers from inflammatory bowel disease affecting his liver, from sclerosing cholangitis affecting his intestines, and from Type 1 diabetes. He has sleep problems and is prone to swollen legs which reduces his mobility. His medical conditions require specialist treatment and occasional hospitalisation when his symptoms flare up. Most importantly, the pre-sentence report said that he was awaiting a liver transplant. In relation to other mitigation, the report described how he has had a difficult relationship with his mother. He was expelled from his family home at some point in 2023.

10. In his sentencing remarks the Recorder applied the relevant Sentencing Guideline. He noted that both parties accepted that the offence fell within Category 2B of the Guideline. He agreed with the parties that the offence fell within level B culpability because the appellant had used his shod foot as a weapon. Category 2 harm applied because the offence had resulted in a permanent, irreversible injury or condition. The starting point for a Category 2B offence is 2 years' custody and the category range is 1-3 years custody.
11. As regards aggravating factors, the Recorder took into consideration that the offence was persistent. The appellant was intoxicated. There had been the risk of further night-time disorder.
12. As regards mitigation, the Recorder took into consideration the appellant's health and that he was awaiting a liver transplant. He took into consideration the appellant's previous good character, his admissions and remorse, and the fact that the offence had taken place some time ago. He concluded that the sentence should be 12 months' imprisonment before discount for plea. Applying a discount of one-third, he reached the 8-month sentence that we have already described.
13. The Recorder went on to consider whether the sentence of imprisonment could be suspended. He emphasised the seriousness of the appellant's conduct, the context of nighttime violence in a town centre and the seriousness of the victim's injury. Against that background, he concluded that immediate custody was warranted.
14. In his written and oral submissions, Mr Green submits that the sentence of 8 months' imprisonment was too high in the circumstances and, as such, manifestly excessive. The sentence should have been reduced in light of the appellant's significant personal mitigation and his remorse. Mr Green says that the appellant is on the liver transplant waiting list and that he is near the top of the list. Custody will affect his chances of a transplant and so have a disproportionate effect on the appellant.
15. Mr Green further submits that the Sentencing Guideline for the Imposition of Community and Custodial Sentences ("the Imposition Guideline") was wrongly applied. Taking us in his written grounds through each of the factors in the Imposition Guideline that weighed in favour and against the suspended sentence order, he submits that there were exceptional reasons to suspend the custodial sentence, particularly because of the appellant's serious and imminent liver transplant.
16. We have watched the CCTV which shows the sustained determination of the appellant to

harm the victim. The appellant kicked the victim repeatedly to the head. The attack caused permanent injury. In these circumstances, it cannot possibly be said that the Recorder was not entitled to treat the offence as falling within Category 2B.

17. The Recorder weighed the aggravating and mitigating factors, including the appellant's need for a liver transplant. In light of what can only be the Recorder's view of the strength of the mitigating factors, he imposed a sentence at the bottom of the category range before the discount for the appellant's guilty plea. We do not accept that he was required to impose a lower sentence that would be below the category range under the Guideline. His approach to the Guideline cannot be faulted.
18. The Recorder did not refer in his sentencing remarks to the Imposition Guideline or to the factors in the Guideline that weighed in favour and against the suspended sentence order. It may have been preferable for him to do so. However, when asking himself whether the sentence could be suspended, the Recorder was not undertaking a mathematical exercise and he was not required to deal individually with every factor in the Imposition Guideline as if by rote. His sentencing remarks were detailed. Read fairly, they make plain that he considered that appropriate punishment could only be achieved by immediate custody. In our judgment, in light of the nature and seriousness of the offence, he was entitled to reach that conclusion.
19. We turn to the up-to-date situation. The court was provided with an email from HMP Peterborough about the appellant's inability to attend by video link today, stating that he was hospitalised on 15 June 2024. Having given Mr Green a chance to take instructions, we were informed that the appellant has been in hospital but that he was released home yesterday. There is no medical evidence that he has lost or will lose his place on the liver transplant list and in light of Mr Green's updated instructions there is no reason to suppose that that will happen. There is no reason for us to take a different view to the Recorder on the question whether his health requires his sentence to be suspended.
20. The sentence of eight months' immediate imprisonment was neither excessive nor wrong in principle. This appeal is dismissed.