IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT WARWICK

HER HONOUR JUDGE CAMPBELL 23S51159823

CASE NO 202401727/A2

NCN [2024] EWCA Crim 1642

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday, 9 July 2024

Before:

LORD JUSTICE EDIS
MRS JUSTICE MAY DBE
HER HONOUR JUDGE NORTON
(Sitting as a Judge of the CACD)

REX
V
CONNOR WOOD

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 C CHARVIL appeared on behalf of the Appellant

J U D G M E N T

1. MRS JUSTICE MAY: On 9 February 2024, having pleaded guilty before Leamington Spa Magistrates' Court to an offence of assault occasioning actual bodily harm, the appellant was committed for sentence pursuant to section 14 of the Sentencing Act 2020. A co-defendant, Dean Mawby was also committed for the same offence.
2. On 24 April 2024 the appellant and Mawby were sentenced at the Crown Court at Warwick. Mawby received a sentence of eight months suspended for 12 months with conditions and ordered to pay £1,000 compensation to the complainant. The appellant was given a sentence of 12 months' immediate imprisonment. The appellant now appeals that sentence with leave of the single judge.

Facts of the offending

3. On 2 September 2023 there was a boxing event at the Crown Plaza Hotel in Stratford upon Avon. One of the people fighting was Robbie Warner, the son of the complainant Barrie Warner. The complainant was watching, along with some other family members and friends. The appellant, then aged 24 and Mawby, aged 28, were also in attendance together with the appellant's brother and a friend.
4. After the event had ended, as everyone was leaving, the two groups, who had not previously known each other, became involved in some sort of argument in the car park. It was not entirely clear how or why anything started but the words, "What the fuck are you looking at?" were overheard coming from the appellant and Mawby's group. During the exchange of words Mawby punched the complainant. The complainant went to the ground where Mawby punched him again before the appellant kicked him twice, once to his side and once to the side of his head. The second kick, which was delivered from behind, rendered the complainant unconscious. His breathing seemed to stop for about 10 seconds. A 999 call was made. The complainant recalled coming round in the recovery position. His head was pounding, he was bleeding from the back of his head, his right elbow was bleeding and painful, the right side of his face felt swollen and painful. He described that his left shoulder was stiff and painful like whiplash. He was taken by ambulance to hospital but decided not to stay for a full assessment. He had been told that the cut to the head required gluing and he also had a loose tooth but he did not stay for any treatment.
5. The appellant and Mawby ran off to a nearby multi-storey car park and were arrested

within minutes. The appellant resisted arrest and PAVA spray had to be used before he was taken to the ground.

6. In interview the appellant denied having been involved in any altercation. He said he had been involved in a "misagreement" with someone but denied that anything physical had taken place. He said he had drunk six to seven pints and eight Jaeger bombs. He was shown the CCTV footage but denied that he could be seen on it.
7. Mawby said that there had been some verbal back and forth with two men who had asked them to be quiet. He said the appellant had been the person who started it. Someone he thought to be the complainant's son approached them with a clenched fist, he felt threatened and so threw a punch at him. He denied seeing any kicks. Mawby accepted that his punch was not justifiable. He accepted he was intoxicated. He added that had he not been drunk he would likely have just walked away. When shown the CCTV footage he identified himself and the appellant. At the conclusion of his interview he offered his apologies.

Sentence

8. There was a pre-sentence report concerning the appellant available to the judge for the purposes of sentence. The author of the report referred to the appellant's poor problem solving, exacerbated by his alcohol consumption on the night in question. Taking account of the appellant's home circumstances, lack of offending history and full time employment, she assessed him as being at low risk of further offending.
9. The judge described both Mawby and the appellant as having leading roles in group activity. She placed both young men's offending in Category 2A of the applicable Sentencing Council Guideline where there is a starting point of 18 months and a range of 36 weeks to two-and-a-half years. She found that the appellant's behaviour was the more serious. She aggravated his offending by reference to his actions in kicking the complainant in the head with a shod foot, concluding that balanced against his mitigation the appropriate sentence before discount was one of 18 months which she reduced to 12 months to take account of his plea of guilty before the Magistrates.
10. The judge then addressed the matter of suspension in these terms:

> "What I then have to do is to apply the sentencing guidelines in

> terms of the imposition of a community order and there are a number of matters I have to take into account. I accept that, for both of you, there is strong personal mitigation. I accept that there is a realistic prospect of rehabilitation, but I have to weigh that up with the other element which is whether appropriate punishment can only be achieved by immediate custody."

11. In the case of Mawby she went on to suspend his sentence but in the case of this appellant she held that appropriate punishment could only be achieved by an immediate sentence.

Grounds of appeal

12. Mr Charvil, in succinct and clear written grounds, takes no issue with the judge's categorisation of the offending. He submits that as culpability fell into Category A because the complainant was vulnerable and the appellant had kicked him with a shod foot, the judge then wrongly double-counted these factors as aggravating the 18 month starting point given for Category 2A in the sentencing council guideline. He suggests that she then gave insufficient weight to the considerable mitigation available to his client, resulting in an excessive sentence even after the appropriate discount for plea.
13. Mr Charvil's main point, however, is that the judge wrongly discriminated between the appellant and the co-defendant Mawby in declining to suspend the sentence which she passed on the appellant whilst suspending the sentence which she passed on Mawby. He argues that there should have been parity in this aspect of the sentence since their roles had been similar and they shared the same positive mitigation.

Decision

14. We have seen the CCTV footage of this incident. Although short-lived it was vicious and unpleasant. The judge was justified in assessing culpability as Category A, although we differ from her in this respect: we do not think it right to regard the appellant as having a leading role in group activity simply by virtue of his following up what Mawby had started. We place culpability at A based on the appellant's kick to the complainant's head when he was on the floor and accordingly vulnerable. We accept Mr Charvil's submission that it was double-counting to treat the kick with a shod foot as an aggravating factor. But there were other aggravating factors: the appellant acted together

with Mawby, they were both very drunk and the assault was in public, in the car park where others were present. Against this were the mitigating factors of his previous good character, the fact that the appellant at 24 was still young and his evident remorse expressed both through his guilty plea and in his letter to the judge which we have read.

15. The kick to the head warranted a more severe penalty than Mawby's punch. Taking the aggravating and mitigating features together, whilst a sentence of 18 months discounted to 12 for plea was severe, we cannot say that it is manifestly excessive.

16. We turn then to Mr Charvil's main point on this appeal which is that the judge erred in declining to suspend the appellant's sentence having suspended that of his co-defendant. This court is in general disinclined to entertain parity arguments where the individual sentence is otherwise justified. The authorities show that disparity will only succeed as a ground of appeal if any right-thinking member of the public would have thought that there was something wrong in the administration of justice where two people convicted of the same offence at the same time were given quite different sentences. That will not be so if the different sentences can be explained by distinctions in the offending itself or in the circumstances of the offenders: R v Fawcett (Kenneth John) [1983] 5 Cr.App.R (S) 158; R v Saliuka [2014] EWCA Crim 1907, R v Dyer [2013] EWCA Crim 2114 and R v Hussain (Khalid) [2018] EWCA Crim 290.

17. Applying those principles here, we do not believe that right-thinking members of the public would have thought that there was something wrong in the administration of justice. As the judge explained, the difference was that whilst the co-defendant Mawby started the incident by punching the complainant, the appellant followed up by kicking the complainant twice, the second time to the head as he lay on the ground. Whilst there may have been no distinction between the appellant and Mawby in terms of their personal circumstances for the purposes of mitigation, there was a relevant distinction in the offending itself. The parity argument taken alone cannot therefore succeed.

18. Nevertheless, we consider that the judge erred in imposing a sentence of immediate custody on this appellant in the circumstances of the present case. Kicking someone in the head as they lay on the ground is undoubtedly very serious and deserving of severe punishment. But that was already reflected in the increased length of sentence given to this appellant as compared to Mawby. Looking at the relevant table of factors set out in

the guideline, each of the three telling in favour of suspension applied here with considerable force: the appellant was of previous good character, he was in work, he had expressed remorse and probation had assessed him as a low risk of further offending. The prospects of rehabilitation were accordingly more than merely realistic - they were high. The appellant had strong personal mitigation. In addition to the matters we have just mentioned he was still young and more likely to behave impulsively, as the relevant drop down section in the sentencing guideline makes clear. Finally, as indicated in the letter from his grandfather, the appellant provided much needed support to his older relative at home. The single factor on the other side of the suspension table was whether appropriate punishment could only be achieved by a sentence of immediate custody. In many cases where there is a kick to the head this factor will be capable of outweighing all others but in this particular case we conclude that the judge gave insufficient weight to the cumulative effect of the factors in favour of suspension and that she should have suspended the sentence which she imposed.

19. Accordingly, we quash the sentence of immediate imprisonment, replacing it with a suspended sentence of 12 months, suspended for a period of 24 months. Having regard to the time that the appellant has already spent in prison pending the hearing of this appeal, we do not propose to attach any conditions to the suspended sentence order. However, as to compensation we note that Mawby was ordered to pay compensation of £1,000. We see no reason why the appellant, who will return to live at home and resume full time employment, should not also be required to compensate the complainant. We order that he pay compensation in the sum of £1,000, to be paid within the next 12 months.

    Mr Wood, the effect of the suspended sentence order is this. If you commit no further offences during the suspension period of two years the sentence of 12 months will not take effect. If you do commit any further offences that sentence can be added to any sentence for any further offences. Do you understand?

    THE APPELLANT: I understand, your Honour.

    MRS JUSTICE MAY: The sum of £1,000 is to be paid, as you have heard, within the next 12 months.

    THE APPELLANT: That will be paid within six.

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

Lower Ground Floor, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400
Email: rcj@epiqglobal.co.uk