IN THE COURT OF APPEAL
CRIMINAL DIVISION
Case No: 2023/04112/A2
[2024] EWCA Crim 574

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 10th May 2024

B e f o r e:

LADY JUSTICE WHIPPLE DBE

MRS JUSTICE FARBEY DBE

MR JUSTICE WALL

R E X

- v -

DANIEL BERRIMAN

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Ms J Butterell appeared on behalf of the Appellant

J U D G M E N T

MRS JUSTICE FARBEY:

1. On 11 October 2023, having pleaded guilty in the Doncaster Magistrates' Court to seven offences, the appellant (then aged 32) was committed to the Crown Court for sentence. On 1 November 2023, in the Crown Court at Sheffield, Mr Recorder Monteith KC imposed the following sentences for each offence, which we have re-ordered and re-numbered for convenience:

   Charge 1: racially aggravated common assault, 14 months' imprisonment;
   Charge 2: criminal damage, one week's imprisonment to run concurrently;
   Charge 3: breach of a restraining order, two weeks' imprisonment concurrent;
   Charge 4: breach of a restraining order, 12 months' imprisonment to run consecutively;
   Charge 5: common assault, two months' imprisonment consecutive;
   Charge 6: harassment, contrary to section 4A(1) and (5) of the Public Order Act 1986, two months' imprisonment concurrent;
   Charge 7: racially aggravated harassment, contrary to section 31(1)(b) and (4) of the Crime and Disorder Act 1998, four months' imprisonment consecutive.

2. The total sentence was therefore 32 months' imprisonment. The appellant appeals against sentence by leave of the single judge.

3. We turn to the facts. On 1 June 2023 Dolat Singh ("DS") was at work as a security guard at Doncaster Royal Infirmary. At around 1 pm he was made aware of the appellant who was shouting abuse. DS went to speak to the appellant who was very irate and talking over him. When the appellant appeared to calm down, DS continued on his patrol of the hospital. He approached the appellant again at about 2.30 pm, following further problems with his behaviour. He told the appellant that he was not allowed to enter the hospital and asked him to wait outside. He again continued on his patrol.

4. DS was called at 3.30 pm when the appellant was suspected of stealing a sandwich from a shop inside the hospital. He approached the appellant and told him to leave the hospital immediately. The appellant responded by saying "You need to get away from me" and threatened to harm DS. He walked towards DS aggressively, shouting "I'm gonna fuck you up, you watch, you dirty Paki". DS, concerned for his safety, took the appellant to the floor. The appellant got back to his feet. DS let him go and backed away. The appellant continued to shout at him "You fucking Paki, you've had it". He grabbed DS's arm and, with his other hand, punched DS in the face, so that his glasses were damaged.

5. A member of the public tried to help by standing between the appellant and DS but to no effect. The appellant's aggression and racist insults continued. At one point he grabbed DS's body worn camera and threw it into bushes. He caused damage to DS's earpiece connected to his radio, which was rendered useless. When one of DS's colleagues arrived, the appellant called the colleague a "faggot". He left the grounds of the hospital but was located by the police who had been called. Those are the facts of charge 1. In his Victim Personal Statement, DS referred understandably to the emotional scars that he bears from the appellant's bigotry.

6. While at the police station the appellant was allowed to make a telephone call to his solicitor. During that call he became increasingly agitated and threw the telephone to the floor, causing damage to it. That incident formed the basis of charge 2.

7. Turning to charge 3, Doncaster Magistrates' Court had in 2021 imposed an indefinite restraining order against the appellant in order to protect his former partner whom we

shall call PS. On 8 August 2023 the appellant breached the order by being with PS in Doncaster city centre (charge 3). The appellant breached the restraining order again on 13 August 2023 (charge 4), when he contacted PS by telephone. She was pregnant. The appellant said to her that he hoped she would lose her baby. He told her that he had her bank card which she had left behind in premises where she had met him but had not collected because she was afraid of what might happen.

8. The remaining charges related to a further incident at Doncaster Royal Infirmary. On 17 August 2023 the appellant was taken to the A&E Department by police officers. He was verbally abusive to staff and to another patient. The appellant went to the exit of the department but was approached by a security guard, Cameron McHale. The appellant made racist comments relating to another security guard whom he called "that turban wearing one". He said that he would "smash that turban wearer" and that he would "smash" Mr McHale's camera in the same way that he had smashed DS's camera. Mr McHale believed that the appellant would be physically violent. The appellant also aggressively waved his hand in Mr McHale's face, which made Mr McHale take a step backwards to protect himself from what he feared would be physical force. The police arrived and the appellant was arrested. These facts form the basis of charges 5 to 7.

9. At the date of sentence the appellant had 52 convictions accrued over many years, including for offences of violence and public order offences.

10. In relation to charge 1, the Recorder applied the sentencing guideline for the offence of racially aggravated common assault. It was common ground before him that the offence was one of high culpability (level A) and high harm (category 1). As the Recorder recognised, the starting point for a category 1A offence is a high level community order. The category range is a low level community order to 26 weeks' custody before uplift to reflect the racial element of the offence.

11. The Recorder took the view that the aggravating and mitigating factors cancelled each other out. He placed the offence right at the top of the range so that the sentence before the uplift was six months' imprisonment.

12. The Recorder went on to consider the uplift for the racial element. He rightly placed weight on the vile, prolonged and vicious nature of the racial abuse directed towards DS. He did not deal expressly with the part of the sentencing guideline that sets out the approach to the uplift but simply stated that he would increase the sentence for this charge from six months to 21 months. Applying a one-third discount for the appellant's guilty plea, the sentence was reduced to 14 months' imprisonment.

13. In relation to charge 2, the Recorder noted that the offence was not serious and therefore warranted a concurrent sentence of one week's imprisonment in light of the principle of totality. There is no challenge before us to his approach.

14. In relation to charges 3 and 4, there is no challenge to the sentence for either of the breaches of the restraining order. In the interests of succinctness we shall say no more about them.

15. The final set of charges relates to the incident involving Mr McHale in the hospital. The Recorder treated the racially aggravated harassment as the lead offence. He noted that the statutory maximum sentence was six months' imprisonment. He stated that the overall seriousness of charges 5 to 7 would be reflected in the imposition of a sentence of six months' imprisonment on count 7, which was reduced to four months after discount

for the guilty plea. Having said that the sentence on charge 7 took account of the overall seriousness of counts 5 and 6, he imposed a concurrent sentence on count 6 (three months reduced to two months after discount for the guilty plea) but a consecutive sentence on count 5 (three months reduced to two months after discount for the guilty plea). In this way he reached the overall sentence of 32 months' imprisonment.

16. In her written and oral submissions, Ms Butterell submits that the sentence of six months' imprisonment before the uplift for racial aggravation on charge 1 was manifestly excessive. She suggested that the basic offence in itself would have warranted a community order and that moving to the top of the range could not be justified. She submits, too, that the uplift of 15 months was manifestly excessive.

17. In relation to charges 5 to 7, she submits that the imposition of a consecutive sentence for the common assault failed to respect the principle of totality. In addition, the individual sentences for the common assault and the harassment were manifestly excessive.

18. In relation to charge 1, we are in no doubt that the Recorder was entitled to impose a custodial sentence and to move to the top of the category range for the basic offence. The appellant's offending took place at a hospital. DS was doing his job as a security guard, tasked with keeping people safe and secure. In doing his job he was performing an important service for vulnerable patients, as well as for the medical staff and the general public. The attack on DS was sustained and followed DS's previous interventions earlier in the day which the appellant ignored. The appellant prevented DS from using his camera and radio which was the equipment allocated to DS to keep himself and others safe. The appellant punched DS in the face. It was only good fortune that DS was not injured on this sensitive part of his body. The Recorder's approach to the sentence before the uplift cannot be faulted.

19. As for the racial element, the Recorder was entitled to conclude that there should be a significant uplift. The sentencing guideline sets out three levels of uplift: high, medium and low. The Recorder did not specify which level he was applying. In our judgment, the racial aggravation formed at the very least a significant proportion of the offence as a whole and warranted a medium level uplift, which entitled the Recorder to consider a significantly more onerous sentence of imprisonment. The appellant could expect a severe punishment.

20. That said, we consider that the uplift was too high and should be reduced. We shall therefore quash the sentence of 14 months' imprisonment on charge 1. We substitute a sentence of 12 months' imprisonment, which takes account of a one-third discount for the guilty plea. Given the multiple charge sheets, we make plain that this relates to S20230575, charge 1.

21. In relation to charges 5 to 7, the appellant's racist abuse was again vile and the incident was prolonged. Nevertheless, the various offences overlap and the prosecution asked the Recorder to treat them as reflecting one course of conduct. We do not understand how the appellant came to be convicted of both harassment and racially aggravated harassment, which are alternative charges for the same conduct. We shall therefore quash the sentence for the offence of harassment (U20230904, charge 2) as it is wrong in principle. A sentence of no separate penalty will be substituted

22. We have considered the way in which the prosecution presented the common assault to the Recorder. In light of the way in which the matter was put, we are uncertain that the common assault charge represented any separate criminal act. In any event, we agree

with Miss Butterell that it was disproportionate for a consecutive sentence to have been imposed. We shall quash the consecutive term of two months' imprisonment for the common assault (U20230904, charge 1) and substitute a sentence of no separate penalty. The sentences on the other charges will remain unchanged. The effect is that the overall sentence is reduced from 32 months to 28 months' imprisonment. To this extent this appeal is allowed.
