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IN THE COURT OF APPEAL
CRIMINAL DIVISION



CASE NO 202300294/A4-202300315/A4

Neutral Citation Number:
[2024] EWCA Crim 19

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 16 January 2024

Before:

LORD JUSTICE COULSON

MRS JUSTICE FOSTER

MR JUSTICE HILLIARD

REX

V

VITO DI MARCO

DARREN HATTERSLEY

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MS N BAHRA KC & MS C COLLINS appeared on behalf of the Applicant.
The Applicant Hattersley did not appear and was not represented.

J U D G M E N T

1. MR JUSTICE HILLIARD: On 10 January 2023, in the Crown Court at Warwick, Vito Di Marco (then aged 36) and Darren Hattersley (then aged 54) were convicted of attempted murder. On the same day, they were sentenced as follows. Mr Di Marco to a sentence of imprisonment for life, with a specified minimum term of 22 years and 280 days. He was in breach of a suspended sentence of 12 months' imprisonment for section 20 wounding and that sentence was implemented in full but to run concurrently. He was subsequently ordered to pay the statutory surcharge. A figure was set at £190 but it should be recorded as £181. Darren Hattersley was sentenced to an extended determinate sentence of 35 years, consisting of a custodial term of 30 years and an extended licence period of 5 years.
2. A co-accused, Nathan Odley (aged 42), was also convicted of attempted murder and sentenced to an extended determinate sentence of 35 years, again consisting of a custodial term of 30 years and an extended licence period of 5 years. An application for leave to appeal against sentence in his case was refused by the single judge and has lapsed. Pamela O'Connor was convicted of perverting the course of justice and sentenced to 30 months' imprisonment.
3. Mr Di Marco renews his application for leave to appeal against sentence after refusal by the single judge. Mr Hattersley applies for an extension of time of 10 days in which to renew his application for leave to appeal against sentence and for a representation order after refusal by the single judge. We grant the very short extension of time which is required.
4. The facts of the case were as follows. There was long-standing animosity between Mr Di Marco and Kevin Hickey. Mr Hickey lived at Grove Lane in Wishaw. There were only two other properties in the lane, one of which was inhabited by Mr Di Marco's sister.

5. On 11 October 2019, Mr Hickey reported to the police that he had been assaulted by Mr Di Marco. Mr Di Marco had previously contacted the Environment Agency, citing concerns about the welfare of some of Mr Hickey's livestock. There was a verbal exchange between the pair which escalated into a physical altercation. Mr Hickey sustained a laceration after Mr Di Marco bit him. Mr Di Marco was convicted of unlawful wounding following a trial, and on 18 June 2021, he was given a suspended sentence of imprisonment.
6. It appears that Mr Di Marco had been using the roadway at Grove Lane as a yard for his business (Treewise Tree Services). That caused more friction between the two men. Between 23 December 2019 and 18 June 2021, there were multiple calls made to the police by both Mr Di Marco and Mr Hickey alleging harassment and trespass in respect of each other. The calls were variously recorded as public order, anti-social behaviour, harassment, suspicious circumstances and incidents of concern. None of the reports resulted in a criminal charge.
7. On 21 July 2021, Mr Hickey complained to Warwickshire Council about the manner in which Mr Di Marco was conducting his business. This included an allegation of fly tipping on Grove Lane. A council worker inspected Grove Lane on 9 August 2021 and a letter, dated 13 August 2021, was sent to Mr Di Marco from the council asking him to remove wood and material from the road.
8. Following his conviction in 2021, Mr Di Marco planned to murder Mr Hickey. During the summer of 2021, Mr Di Marco contacted Mr Hattersley and offered him £10,000 to execute Mr Hickey with a firearm. Mr Di Marco insisted that a man had to be found who had no links to him and so it was that Mr Hattersley recruited Nathan Odley.
9. The plan evolved over August 2021. A Volkswagen Phaeton and cloned registration

plates were sourced. A shortened shotgun and ammunition were obtained. By 27 August, a meeting was arranged, and reconnaissance carried out. Mr Hattersley and Mr Odley went to Grove Lane again on 30 August to make sure they were familiar with the plan. The intended killing was scheduled for the weekend of 4 and 5 September. Mr Odley and Mr Hattersley travelled to the location on 4 September. They remained in the vicinity of Grove Lane with the intention of carrying out the attack on Mr Hickey at some stage on 5 September. Mr Di Marco met with his solicitor in the morning of 5 September before taking his family for a day out to Hatton Country World in order to establish an alibi.

10. When Mr Hickey appeared on the drive of Grove Lane, either Mr Hattersley or Mr Odley left the vehicle armed with a sawn-off shotgun. Both barrels were loaded. The gunman wore a balaclava. Mr Hickey was shot at close range and hit in the leg. As he fell to the floor he was then shot in the right wrist, although the point of aim had been his upper body. Mr Hickey pleaded for his life. Following the second shot, he crawled away while the gunman struggled with the weapon. The judge found as a fact that the gunman had been trying to reload the weapon but panicked when unable to do so.
11. Mr Hattersley and Mr Odley left the scene. They reactivated their mobile telephones and got rid of the shotgun, spent cartridges and the clothing worn by the gunman. The vehicle was fitted with different licence plates within hours of the offence. Mr Odley went to see Pamela O'Connor and told her that she would have to say that he had been with her over the weekend.
12. Mr Hickey managed to get back inside his house and call the emergency services. He was taken to hospital where he remained as an in-patient for some time.
13. Mr Hickey had made a victim personal statement dated 9 January 2023. We do no more

than summarise it. He said he was registered as disabled and that his rehabilitation was a long, slow and uncertain process. He had reduced strength and movement in one wrist. He had no muscles in his left foot. This would be a problem for life. He could not lift it from the ground and he was in massive pain. He had a heart attack which he attributed to these events. He was having counselling for PTSD. He had thought he was going to die when the gunman shot him. He was, he said, anxious and depressed.

14. Mr Di Marco had a conviction for assault occasioning actual bodily harm in 2008, as well as the conviction for wounding in 2021. Mr Hattersley had a very old conviction for common assault and a conviction for possessing an airgun in 2000 with intent to cause fear of violence. He had no recent convictions for offences of violence. There was no pre-sentence report for either applicant before the judge. We do not think that one was necessary then or now.

15. When he passed sentence, the judge said that there could hardly have been a more terrifying experience for Mr Hickey. He had sustained huge damage to his leg and had a number of operations. He had to use crutches to walk and wore a foot brace. The judge said that he had been able to assess Mr Hickey for himself, and that the impact upon him had been grave indeed. The judge referred to the extensive planning for the shooting, which he described as staggering in amount. He said that the offence fell into category A (very high culpability) for the purposes of the applicable sentencing guidelines. A firearm was used. Financial gain for two of the offenders had been provided by Mr Di Marco. The judge said that harm fell into category 1 because the offence had resulted in permanent irreversible injury and/or a psychological condition which had a substantial and long-term effect on the victim's ability to carry out his normal day-to-day activities and on his ability to work. A category 1A offence had a starting point in the Sentencing

Guidelines of 35 years' imprisonment and a range from 30 to 40 years. He pointed out that the defence submitted that the case fell into category 2 for harm because there was serious physical and/or psychological harm, but it fell short of category 1. A category 2A offence has a starting point of 30 years' imprisonment and a range of 25 to 35 years. The judge noted the overlap between categories 1A and 2A and said that in the final analysis of the offence and the position of each accused, it might well be that the appropriate starting point fell between the two categories.

16. He was satisfied that the applicants were dangerous offenders. He said that this was a meticulously attempted execution, followed by a sophisticated cover up. Dangerousness was established by the facts of the offence alone. There was no saying when the danger would alleviate. The judge referred to Attorney-General's Reference 27 of 2013 (R v Burinskas) [2014] EWCA Crim 334, and to the factors which need to be considered when deciding whether a life sentence is appropriate, namely the seriousness of the offence, the offender's previous record, the level of danger posed and whether there is a reliable estimate of when it might cease, and the available alternative sentences. The judge said that Mr Di Marco's actions in being the instigator of the offence put him in a different category to the other offenders. His efforts to cover his tracks also aggravated his position over them by some margin. The judge acknowledged that he had otherwise led an industrious life and would be separated from his partner and young family for a very long time. However, he posed a very high risk of danger, and an extended sentence would be insufficient to meet the risk. A determinate sentence would have been one of 35 years if a determinate sentence had been the appropriate sentence. The minimum term would be set at two-thirds of that figure, less any qualifying days.

17. In Mr Hattersley's case, the judge pointed out that he had recruited Mr Odley. The judge

noted his age, which would make the sentence harder to serve, the lack of previous convictions for some time and his work record. He said that the facts of the offence alone established him as a dangerous offender. An extended licence period was necessary to meet the risk he posed. The custodial part would be a sentence of 30 years' imprisonment.

18. It is now argued on Mr Di Marco's behalf by Ms Bahra KC that the judge made an erroneous assessment of harm, in particular because he accepted Mr Hickey's personal statement without qualification and because he erroneously classed Mr Di Marco as more dangerous than his co-accused. Consequently, the sentence passed was manifestly excessive. Counsel says that earlier, the existence of video clips had been raised in court which showed Mr Hickey moving more freely than he had done when he had been in court. The judge had said that he would not be coming to a view about harm without medical evidence. The only expert evidence was from a cardiologist who said that Mr Hickey had a pre-existing condition and atrial fibrillation from which he should make a full recovery. In the event, it is said that the medical position was not properly explored to the potential detriment of the defence. Counsel also argues that Mr Di Marco was less dangerous than his co-accused because they were prepared to shoot Mr Hickey for money without the history of a dispute with him. It is said that the gravity of Mr Di Marco's offence was not such as to justify a life sentence and that he would not pose a risk after being in custody for 20 years or so. We are grateful to Ms Bahra for her submissions.

19. In Mr Hattersley's case, it is also argued that the judge overstated the level of harm caused to Mr Hickey. It is said that the judge was wrong to find that Mr Hattersley was a dangerous offender. It is said that he was not a sophisticated offender and did not pose a significant risk.

20. We have given all these submissions careful consideration. We start by noting that the judge had the considerable advantage of having heard the evidence in the trial. As a result, he was extremely familiar with the facts of the offence, and he had seen and heard Mr Hickey when he gave evidence. Reading the judge's sentencing remarks as a whole, it seems to us that he passed sentence on the basis that harm fell somewhere between categories 1 and 2.
21. In our judgment, this was a course he was entitled to take and, in doing so, he made sufficient allowance for any issue about possible improvement in Mr Hickey's condition, lest it was less than permanent and irreversible. But, in addition, the judge was entitled to take account not only of physical consequences but of the psychological consequences too in a case where Mr Hickey believed, for very good reason, that he was going to die. The judge was also entitled to conclude that Mr Di Marco's offence was more serious than that of his co-accused. His offence encompassed everything they did and more. He had the original idea that Mr Hickey should be murdered because of his grievance with him, and he was then responsible, as part of the considerable preparation and planning, for involving Mr Hattersley and for getting him to recruit another person, Mr Odley. He paid them money for the parts they played. He sought to cover his tracks. It is not arguable that the judge made any error in arriving at a term of 35 years in Mr Di Marco's case as the basis for the minimum term. We note in passing that 35 years would in any event be within the category 2A range albeit at the top of it. But that in our judgment is where this case would fall if it had been a category 2A case.
22. We are also satisfied that not only was the judge entitled to conclude that Mr Hattersley and, for that matter, Mr Odley satisfied the test for dangerous offenders, but that Mr Di Marco had shown himself to be even more dangerous than them. He was the driving

force behind what happened. There was no saying when Mr Di Marco would cease to pose a risk and it did not follow at all that his hostility towards Mr Hickey would necessarily subside rather than fester whilst he was in custody. We have no doubt that his offence was serious enough to justify a sentence of life imprisonment, and that the judge was entitled to impose one.

23. The judge paid appropriate regard to the alternative of a determinate sentence in Mr Hattersley's case, but concluded that an extra licence period was necessary because of the danger he had shown himself to pose. This was demonstrated if only by a willingness and an ability to recruit a gunman to carry out an execution. That, in our judgment, made him dangerous at any age. The fact that he may not always have demonstrated sophistication, if that is correct, did not make him any less dangerous. The judge was well placed to make this assessment and it is not arguable that he made any error in doing so.
24. Accordingly, for these reasons, these renewed applications for leave to appeal against sentence must be refused.

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