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Neutral Citation No: [2024] EWCA Crim 413

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2024/00520/A4



Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 11th April 2024

B e f o r e:

LORD JUSTICE SINGH

MR JUSTICE HOLGATE

THE RECORDER OF SOUTHWARK

(Her Honour Judge Karu)

(Sitting as a Judge of the Court of Appeal Criminal Division)

ATTORNEY GENERAL'S REFERENCE

UNDER SECTION 36 OF

THE CRIMINAL JUSTICE ACT 1988

R E X

- v -

ALFIE BAKER

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Mr B Holt appeared on behalf of the Attorney General

Miss E Heath appeared on behalf of the Offender

J U D G M E N T
(Approved)

Thursday 11th March 2024

LORD JUSTICE SINGH:

Introduction

1. This is an application on behalf of His Majesty's Solicitor General, under section 36 of the Criminal Justice Act 1988 ("the 1988 Act"), for leave to refer sentences to this court on the ground that they were unduly lenient.

2. On 16th February 2024, in the Crown Court at Maidstone, the offender was sentenced by His Honour Judge Branston to a total of 46½ months' detention in a young offender institution.

3. There were five matters for which the judge had to sentence the offender. He imposed a sentence of 46½ months' detention on the most serious offence, which was one of aggravated burglary, and ordered the other sentences to run concurrently, or, in respect of one, imposed no separate penalty.

4. The offender was born on 2nd July 2004. He was aged 18 at the time of the offences and 19 at the date of sentence.

5. The principles to be applied on an application under section 36 of the 1988 Act are well established and were summarised in *Attorney General's Reference (R v Azad)* [2021] EWCA Crim 1846; [2022] 2 Cr App R(S) 10, at [72], in the judgment of the Chancellor of the High Court, as follows:

1. The judge at first instance is particularly well placed to assess the weight to be given to competing factors in considering sentence.

2. A sentence is only unduly lenient where it falls outside the range of sentences which the judge at first instance might reasonably consider appropriate.

3. Leave to refer a sentence should only be granted by this court in exceptional circumstances and not in borderline cases.

4. Section 36 of the 1988 Act is designed to deal with cases where judges have fallen into 'gross error'.

6. In giving the judgment of this court in *Attorney General's Reference No 4 of 1989* (1990) 90 Cr App R 366, at 371, Lord Lane CJ said that even where this court considers that a sentence was unduly lenient, it has a discretion as to whether to exercise its powers. He also emphasised, as this court has done ever since, that its role is not simply to retake the sentencing decision as if it were the sentencing court; and also that mercy is a virtue and does not necessarily mean that a sentence was unduly lenient.

The Facts

7. We take the facts from the Final Reference, which is agreed for present purposes. In summary, there were three sets of offences for which the judge had to pass sentence in this case. The first offence occurred on 14th October 2022 when the offender assaulted the victim, his partner, by punching her on numerous occasions. Actual bodily harm was caused in the form of significant bruising.

8. The offender and the victim, Yasmin Boxall, had been in a relationship since January 2022 – a period of some ten months. They were living together.

9. On 14th October 2022, Miss Boxall was at her home address, a second floor flat. She was in the bath, and the offender was in the kitchen. Also present in the flat was Miss Boxall's 15 month old daughter. Miss Boxall was on the telephone to a doctor. She was put on hold. She placed the handset on the side of the bath while she waited.

10. The offender shouted, asking why Miss Boxall had put the phone down to the doctor. She replied that she had not. The offender said, "You're not messaging any men, are you?" Miss Boxall got out of the bath. The offender said "You're a cheat" – something which she denied. He continued to accuse her of having cheated on him. An argument started. By this time, both were standing in the kitchen.

11. The offender punched Miss Boxall three times in the face. Between each punch he turned and walked away before punching her again. During this time, the argument continued.

12. Miss Boxall left the kitchen and went into her bedroom, where her daughter was in a cot. After a short time, the offender came into the bedroom. The earlier argument continued. The offender pushed the victim onto the bed. She recalled things going "blurry". She said that she recalled that the offender punched her more than 30 times. He punched her in the face five to six times, before punching her in the stomach, legs and arms. He was silent throughout. The baby remained in her cot. Miss Boxall said that her body ached, her eyes were swollen, and that she had sore arms and bruised legs.

13. The offender left the room. He returned to call Miss Boxall a "cheat".

14. Miss Boxall telephoned the offender's mother and said, "He's done it again". The offender took the handset and said to his mother, "Yeah, I've just laid into her, and I'll lay into you". The offender hit the victim a few more times before leaving.

15. Miss Boxall called 999. While she was on the telephone, she heard some banging coming from the communal hallway outside her flat. She opened the door. The offender

walked back into her flat. He hit her again and took the telephone off her. He left, initially taking Miss Boxall's telephone with him. However, she ran after him.

16. The next relevant date is 28th October 2022. On that date Mr Peter Maginn had placed his four, nine week old Doberman puppies into the heated kennels located at the rear of his garden. The garden is partitioned into three sections; each section houses different breeds of dogs. The Doberman puppies were furthest away from the home.

17. On the following morning, at approximately 7 am, Mr Maginn checked on his Doberman puppies and found that three were missing.

18. CCTV showed the offender, in company with another, in possession of the three puppies at 11.57 pm on 28th October.

19. One of the puppies was recovered, having been abandoned on the side of the road. The other dogs have not been recovered. There was some evidence of efforts being made by the offender to sell the dogs.

20. The offender was arrested for these matters on 31st December 2022. At the time of his arrest, he was found to be in possession of two bags of cannabis.

21. He was produced before the North Kent Magistrates' Court on 3rd January 2023. He indicated guilty pleas to the assault and cannabis matters. In relation to the burglary, the offender indicated that he would plead guilty to a non-dwelling burglary, but not, as the matter was then charged, to a dwelling burglary. All matters were sent to the Crown Court. The offender was subsequently granted bail on 12th January 2023. This is relevant, as will become apparent.

22. The final set of offending occurred on 15th January 2023. On the previous day, 14th January, Miss Boxall received a telephone call. The handset displayed a withheld number, but the voice was that of the offender. He said, "Get that boy out of the house. I want that boy out by half past ten. I'm gonna be there at half ten in the morning". Miss Boxall believed that this was in response to a TikTok video that she had posted which showed her in the company of her cousin and her cousin's boyfriend, Archie Young.

23. On 15th January 2023, Miss Boxall was still at her home address with her daughter, her cousin, Grace Ruddy, and Miss Ruddy's boyfriend, Archie Young.

24. From 7.30 am, Miss Boxall missed 13 calls from withheld numbers. She received an anonymous message that read: "Two and a half hours left, 10.30 remember". It was accompanied by a fist emoji.

25. At approximately 11.15 on the same morning, the offender entered the flat via a door on the balcony. Alfie Young and Grace Ruddy were together on a sofa in the living room. The offender said to Mr Young, "I told you to leave at half ten". He pulled a large knife from his waistband. He waved the knife in Mr Young's face; it nearly made contact with his nose. He shouted, "I'm going to fucking kill you".

26. Miss Boxall was in her bedroom when she heard her cousin shouting that Alfie was there. She ran into the living room and saw the offender. She saw the knife being waved in Mr Young's face. The offender said, "I told you, I told you, if you're not out the house by half ten I'm gonna fucking kill you". Miss Boxall grabbed the offender's hand which held the knife and told him to stop as there were children present.

27. He walked around the flat, apparently checking to see if anyone else was there. He returned and said to Mr Young, "I don't know why I don't just bang you". He approached Mr Young, punched him in the face once and then punched him to his head four times. The offender then left the property.

28. Later that day, the offender made a telephone call to Miss Boxall. He said, "Is the boy there? Put the boy on the phone. Sorry mate, but if you grass then what happened today will happen again". He was informed that the police were already aware of the incident.

29. Subsequently, after his arrest, the offender entered not guilty pleas at the magistrates' court and the case was sent to the Crown Court for trial. The offender later entered guilty pleas at the Crown Court.

30. The offender fell to be sentenced on 12th January 2024. The judge had Victim Personal Statements, including from Miss Boxall and Mr Maginn. He also had reports in relation to the offender, including a pre-sentence report and a psychological report by Dr Emily Turton.

The Sentencing Remarks

31. After setting out the facts of each of the offences for which he had to sentence, the judge referred to the definitive guidelines issued by the Sentencing Council in relation to each of those offences. In relation to the assault occasioning actual bodily harm, he took the view that there was medium culpability and medium harm (category 2). The starting point was 36 weeks' custody, with a range up to 18 months. But the judge noted that there were aggravating features. This was an assault in the victim's own home; a young child was present; the offence was committed in a domestic context; and there was the abuse of trust between partners in an intimate relationship.

32. In relation to the offence of burglary concerning the puppies, the judge took the view that it was medium culpability and category 1 harm. The starting point was six months' custody, with a range of up to one year. Again, there were aggravating features: the offence involved essentially cruelty to very vulnerable animals; they had been removed from their home environment at a young age; one of them had been abandoned; and it was difficult to know what had happened to the other two. The offender also had a previous conviction for burglary and there was the aggravating feature that this offence had been committed with another person.

33. Finally, the judge turned to the most serious matter – the aggravated burglary. He took the view that there was medium culpability and category 1 harm. The starting point was eight years' custody for a fully mature adult, with a range of between six and 11 years. But importantly, in our view, the judge then said that he would have placed the offence in the lower bracket.

34. In relation to the assault on Mr Young, the judge took the view that culpability was high and harm was category 2. There were further aggravating features because the offender had been on bail; a young child was present; and it was a dwelling. Further, it was an offence committed in a domestic context in which the offender had abused the trust placed in him. The judge noted that the offender had also taken some steps to prevent the reporting of the offence.

35. As we have mentioned, the judge had regard to the reports before him. He noted that the offender had been known to Social Services since he was a young child, as a child in need. His behaviour needed to be understood in the context of his history, emotional instability, and his ADHD, which at times had been untreated because he had not taken his medication. The offender had self-harmed in the past. There was a high risk of re-offending, but the judge

noted that this was the offender's first experience of being in custody.

36. The judge also had regard to the psychological assessment from Dr Turton who noted the offender's extensive trauma history as a child and the profound impact that the witnessing of domestic violence will have had on him.

37. The judge gave the offender full credit for pleading guilty to the offences of assault occasioning actual bodily harm and possession of cannabis. He gave 25 per cent credit for all other matters because of the later stage at which the guilty pleas had been entered.

38. The judge made it clear that only a custodial sentence could be appropriate. But he was also very conscious of the offender's age, lack of maturity and the difficulties he had experienced in his own childhood. The judge reminded himself that reaching the age of 18 is not a "cliff edge" in sentencing terms. There was a hope that the offender would calm down.

39. The judge accordingly decided to reduce what would otherwise be the sentence for a fully mature adult by one third, and then to make further reductions to reflect the guilty pleas. The judge said that for the assault occasioning actual bodily harm, the sentence would have been one year's imprisonment after trial if the offender had been a fully mature adult, but this was reduced to eight months, and then further reduced to reflect the guilty plea, resulting in a sentence of five and a half months. The judge imposed no separate penalty for the cannabis offence.

40. For the burglary involving the puppies, the sentence would have been one of ten months' imprisonment on a fully mature adult, but this was reduced to seven and a half months, and then by a quarter to five months.

41. The starting point for the aggravated burglary for a mature adult would have been seven and three quarter years' imprisonment, but this was reduced to 62 months, and then further reduced to reflect the guilty plea to 46½ months. This was the lead sentence. In relation to the assault, the sentence was reduced from a notional 12 weeks to six weeks. The judge said that in recognition of the offender's age and the principle of totality, all of the sentences should run concurrently. That resulted in a sentence of 46½ months' detention in a young offender institution which, as the judge noted, is a sentence of just under four years. In his judgment, this was a long sentence for someone of the offender's age. He repeated that had he been a fully mature adult, the starting point would have been nearer eight years.

42. The judge then made further appropriate orders, including compensation to be paid to Miss Boxall, and a restraining order for a period of five years.

The Submissions for the Solicitor General

43. There are several aspects of the sentences with which no issue is taken by Mr Holt on behalf of the Solicitor General. First, no issue is taken about the fact that there was no separate penalty imposed for the offence of possession of cannabis. Secondly, no issue is taken in respect of the categorisation of any of the offences by reference to the relevant guidelines, although it is not accepted that there was no evidence of planning in relation to the offence of aggravated burglary. Mr Holt submits that the text message evidence shows that the offender anticipated that the victim would be on the premises and took a knife for that precise eventuality. Thirdly, no issue is taken in respect of the amount of credit which was given for the respective guilty pleas.

44. The two main grounds which Mr Holt does advance are: first, that the judge failed to take sufficient account of the aggravating factors in this case. The consequence was that he reduced all the sentences by one third to reflect the offender's youth and lack of maturity.

Secondly, Mr Holt submits that the judge failed to have appropriate regard to the principle of totality. He submits that, in any event, such reduction needed to be balanced against the aggravating features.

45. In developing his first ground, Mr Holt submits that, for example, in relation to the lead offence of aggravated burglary, there were the following aggravating features: (a) the offender had a previous conviction for burglary; (b) the offence was committed whilst on bail; (c) a child was at home; (d) the offence was committed in a dwelling; and (e) the offender took steps to prevent the victim reporting the incident.

46. Turning to his second ground, Mr Holt submits that consecutive sentences should have been imposed, with the exception of the offence of assault by beating, for which alone a concurrent sentence was appropriate. Mr Holt submits that it will rarely be appropriate to impose concurrent sentences where offences are committed whilst on bail. The offence of aggravated burglary was committed shortly after the offender had been released on bail and was committed in breach of his bail conditions, that is, not to contact Miss Boxall.

47. Mr Holt submits that it could not be said that the three sets of offences either arise out of the same incident or facts, or were a series of offences of a similar kind, albeit the victim was the same in two sets of offending.

48. In any event, Mr Holt submits that if it was appropriate to impose concurrent sentences, there necessarily had to be an uplift in the lead sentence for aggravated burglary in order to reflect the overall gravity of the offending.

The Submissions on behalf of the Offender

49. On behalf of the offender, Miss Heath submits that the sentence was not unduly lenient,

in particular for the following reasons: first, the judge carefully considered the structure of his sentence and was entitled to impose concurrent sentences and to make the sentence for the aggravated burglary the lead sentence. Secondly, the judge did take into account all the aggravating features of the offences, as his detailed sentencing remarks make clear. At the hearing before us, Miss Heath has submitted that the judge made it clear that he would have placed the lead offence towards the lower end of the appropriate sentencing bracket (around six years' custody), before taking into account aggravating features. The fact that the judge then said that the sentence would have been close to eight years' custody for a fully mature adult (seven years and nine months' custody) discloses that the judge must have had regard to the aggravating features of these offences before embarking on the respective reductions, which he then gave to reflect the offender's youth, his lack of maturity, and his guilty pleas.

50. Thirdly, Miss Heath submits that the judge was entitled to consider the offender's age and maturity, and not to treat the age of 18 as a "cliff edge". In this regard she referred in her written submissions to the decision of this court in *R v Ghafoor*, [2002] EWCA Crim 1857; [2003] 1 Cr App R(S) 84, to which we will return. However, in the course of the hearing before this court, she accepted that that was not an entirely apt authority in this context. Furthermore, she submits that there were particular mitigating circumstances in this case, including the background of the offender's childhood, his mental state at the time of the offences, and his emotional complexities, as commented on in the psychological report by Dr Turton.

51. Fourthly, Miss Heath submits that the judge took the appropriate starting point for each offence.

52. Finally, Miss Heath emphasises that the offender had not previously served a custodial sentence.

Our Assessment

53. We remind ourselves of the fundamental principles which we have summarised earlier in this judgment. In particular, it is not the function of this court, on an application under section 36 of the 1988 Act, to sentence an offender again. The question is not what sentence this court, or individual members of it, might have imposed had we been sitting at first instance, but whether the sentence in fact passed in the Crown Court falls outside the range that could reasonably be imposed.

54. We have reached the conclusion that it does not. Although it could be regarded as lenient, it was not unduly so. This was, on any view, a serious set of offences. The judge correctly said that had the respondent been a fully mature adult, the sentences that would have been imposed would need to have been considerably higher. However, in our judgment, the judge was entitled to give weight to the offender's age, lack of maturity and mental health issues so as to arrive at a total sentence which was lower than would otherwise have been justified.

55. With respect to Miss Heath – and as she fairly acknowledged in her oral submissions – we do not consider that the decision of this court in *Ghafoor* is on point. In that case this court held that where an offender commits an offence at the age of 17, but is convicted at the age of 18, the starting point for consideration of the appropriate sentence is the sentence that the offender would have been likely to receive if he had been sentenced at the date of the commission of the offence. On the facts of the present case, that principle is not relevant because the offender was already 18 at the time of all of these offences.

56. Of greater relevance is the important statement of principle made by this court in *Attorney General's Reference (R v Clarke)* [2018] EWCA Crim 185; [2018] 1 Cr App R(S)

52, at [5], where Lord Burnett CJ said that reaching the age of 18 does not present "a cliff edge for the purposes of sentencing". Full maturity and all the attributions of adulthood are not "magically conferred on young people on their 18th birthday". Experience of life reflected in scientific research is that young people continue to mature, albeit at different rates, for some time beyond their 18th birthdays. The youth and maturity of an offender will be factors that inform any sentencing decision, even if an offender has passed their 18th birthday.

57. Also of importance is what this court said in *R v PS and Others* [2019] EWCA Crim 2286; [2020] 2 Cr App R(S) 9, as to the ways in which an offender's mental health conditions may be relevant to sentencing. Two are of particular relevance in the case with which we are concerned. First, a consideration of the impact of a mental health condition at the time of an offence may be relevant to the assessment of culpability. Secondly, the offender's mental health at the time of sentence may be relevant to the decision about the type of sentence to be imposed; and where a custodial sentence is necessary, the length of that sentence.

58. Since that decision, what was then the draft guideline on Overarching Principles: Sentencing Offenders with Mental Disorders has been finalised and applies to offenders aged 18 and older who are sentenced on or after 1st October 2020. Section 2 of the guideline confirms that culpability may be reduced if an offender was at the time of the offence suffering from an impairment or disorder. In section 3, which relates to determination of the appropriate sentence, paragraph 22 confirms that where custody is unavoidable, consideration of the impact on the offender of the impairment or disorder may be relevant to the length of sentence. The court must have regard to any personal mitigation to which the impairment or disorder is relevant.

59. Returning to the present case, in our judgment the judge's sentencing remarks were both detailed and considered. He had regard to all relevant matters, including the aggravating as

well as the mitigating features of the case. At the end of the day, the total sentence at which he arrived cannot be said, in our judgment, to be one that was not reasonably open to him on the particular facts of this case.

Conclusion

60. For the reasons we have given, we refuse the application for leave made on behalf of the Solicitor General.

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

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