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IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202101471/A1

Royal Courts of Justice

Strand

London

WC2A 2LL

Friday 25 June 2021

LADY JUSTICE MACUR DBE

MR JUSTICE JOHNSON

HIS HONOUR JUDGE PICTON

(Sitting as a Judge of the CACD)

**REFERENCE BY THE ATTORNEY GENERAL UNDER S.36 CRIMINAL JUSTICE ACT 1988**

REGINA

V

ESA ABDI

Computer Aided Transcript of Epiq Europe Ltd,  
Lower Ground, 18-22 Furnival Street, London EC4A 1JS  
Tel No: 020 7404 1400; Email: [rej@epiqglobal.co.uk](mailto:rej@epiqglobal.co.uk) (Official Shorthand Writers to the Court)  
MR P JARVIS appeared on behalf of the Attorney General.

MR J LUCAS appeared on behalf of the Offender.

**J U D G M E N T**

1. LADY JUSTICE MACUR: Her Majesty's Attorney General, by Mr Jarvis, seeks permission, pursuant to section 36 of the Criminal Justice Act 1988, to refer the sentence of Abdi Esa (hereinafter referred to as "the offender") as unduly lenient. We grant leave.
2. The offender is 21 years old. He is represented by Mr Lucas. At his plea and trial preparation hearing on 22 January 2021 the offender pleaded guilty to a single count of manslaughter, the particulars being that on 5 December 2020 he unlawfully killed John Smith. On 21 April 2021 the offender was sentenced to an extended determinate sentence of 3 years and 3 months, comprising a custodial term of 2 years and 3 months and an extension period of 12 months.

### ***The Facts***

3. In December 2020 the offender and the victim, John Smith, were serving prisoners at Her Majesty's Young Offender Institution in Brinsford, the offender for offences of wounding with intent and carrying a knife in a public place. The offender became convinced and complained that other inmates on his wing were racially abusing him.
4. On 5 December 2020, when he and other inmates were returning to their cells from association, he came up behind John Smith, who he said he believed to be responsible for some of that abuse, and punched him once in the jaw, a blow from the rear and sideward. John Smith had no opportunity to defend himself. The blow was struck with sufficient force to propel him against what appears to us to be the concrete wall between cell doors and from there to the floor. It fractured his jaw. The blow however was ultimately to lead to John Smith's death. He suffered significant brain injuries which led to his death in hospital the following day.
5. As the prison staff segregated the offender from the victim and took him to his cell he boasted that he had intended to hurt the victim. He said that what had happened to the victim should be a warning to anyone else who was thinking of crossing him (the offender). Later, when the offender was informed that John Smith had died, he dropped his bravado and said he had not meant to kill him. He was arrested on suspicion of manslaughter, made no comment in police interview on 15 December 2020 and was subsequently charged.
6. The offender had three previous convictions: in December 2017 for an offence of robbery, he received a referral order. In March 2020 he was sentenced to 4 months' detention for possessing a knife in a public place and to 3 years 7 months' detention concurrent for an offence of wounding with intent which sentence he was serving at the time of this offence. In that case the victim had referred to the offender as "YG", which is apparently slang for 'kid', the following day the offender threatened the victim with a knife and stabbed him three times to his arm, abdomen and thigh.

### ***The Sentencing Hearing***

7. The pre-sentence report prepared for the sentencing hearing recorded that the offender told the author that he decided to punch John Smith because he wanted to engineer a transfer from the wing for his own safety. He denied any intention to seriously harm him. He said he was shocked to be told that John Smith was dead and expressed remorse for his actions.
8. So far as the offender's history was concerned, his family had moved from Ethiopia to Denmark when he was 2 years old. From there they had travelled to the United Kingdom. He had lived in the United Kingdom ever since. When he was 15 he fell in

with a gang which led him to commit the robbery in 2017. Following his conviction, he had tried to turn away from crime and gone to college but he had committed the offence against the fellow classmate that had resulted in him being sent into youth custody.

9. In the author's assessment the offender presented a high risk of causing serious harm to the public, in particular as his antecedent record showed that he was someone with a propensity for violence.
10. There was also a psychological report which concluded that the offender was not suffering from a major depressive disorder but that he was 'stressed' at the time of the offence.
11. A personal statement from John Smith's mother described the devastation caused to his family by his death; he was a much loved member of the family. John Smith was described as a kind and generous young man who had experienced a number of problems in his youth but who had concrete plans to make a better life for himself following his release from detention.
12. Prosecution counsel submitted that by reference to the Sentencing Council's Definitive Guideline for Manslaughter the offender's culpability was *high* and fell into category B. Defence counsel submitted that the offender's culpability was *medium*.
13. In sentencing the offender the judge said:

"... there had been no ongoing dispute between you and your victim, that your real focus of resentment lay elsewhere, that in the dark hours before the day on which he died your resentment had built and your displeasure at being kept on a wing in which you felt uncomfortable was paramount in your decision to launch an unprovoked attack upon John Smith.

It had twin purposes; firstly, to exact some sort of revenge by causing him harm, you having associated him with those who were harassing you; and, secondly, to force the authorities to move you from the wing by giving them no option to retain you in that cell. It was, therefore, a considered act, the consequences of which you knew, expected and intended to be some harm to your victim.

The CCTV footage tells its own story but the description of your blow as a forceful punch with your weight behind it is accurate on consideration of it. The blow is delivered swiftly and decisively and without there being, as has been submitted to me -- and I accept -- any sort of run up. It was plainly a blow of some force that struck the side of Mr Smith's head.

The view of the forensic pathologist is that an underlying fracture to his jaw is consistent... with having been caused by the impact of that blow, albeit that it is accepted by all that the damage that was caused to his brain was in consequence of the fall that he suffered as a reaction to your blow."

14. Before returning to the reports which spoke of the offender's remorse, the judge reminded herself of the offender's initial reaction to the blow and its consequences when he had struck the victim. She went on to say:

"... in my view, taking a degree of pleasure in your handiwork. That was compounded by your boasts as you were taken from that wing to an isolation wing; that you had wanted to hurt him, in effect that he had deserved it and that others who might think of crossing you would receive like.

I accept that there came a point when your bravado fell away and that your reaction turned to one of shock that your actions had caused Mr Smith's death and then -- and I now refer to both your pre-sentence report and the psychological report -- what I accept to be genuine remorse for that consequence...

I recognise that you struck a single blow, that you did not use a weapon, that whilst your victim was prone on the floor you might have deployed further blows and you did not... in many different environments chance would have caused the consequences of your act to be much less severe."

15. She considered the offender's previous convictions an aggravating feature and also that the offence took place within a prison setting. She accepted that the offender now felt genuine remorse, and went on to say:

"At the age of 20 you cannot be considered, as has been submitted to me, a child but I do accept that you are still, in the context of your life, a young man who plainly has very much to learn in terms of managing his life, dealing with difficult situations and reacting to the challenges of adulthood with an equivalent degree of maturity."

16. In her view the appropriate sentence, after trial, would have been 3 years' detention. Affording credit of 25% for the offender's plea of guilty brought that sentence down to 2 years and 3 months' custody. However, the judge concluded that the offender was dangerous pursuant to section 229 of the Criminal Justice Act 2003 and imposed an extended determinate sentence adding an extension period of 12 months' licence.
17. We note that as a matter of fact the offender was 21 when he was convicted on 22 January 2021 which meant that he should have been the subject of an extended determinate sentence of *imprisonment* rather than detention. But the basis of the Attorney-General's submission is that the judge wrongly categorised the offence in terms of the offender's culpability and therefore arrived at a sentence that was too low.
18. In Her Majesty's Attorney-General's submissions, in that the judge concluded that the sentence after trial would have been 3 years' imprisonment, this fell at the bottom of the category range for a *medium* culpability unlawful act manslaughter whereas this was a

case of *high* culpability on the basis that the punch must have been delivered with the sort of force that would carry with it an obvious risk that some serious harm would befall the victim.

19. Mr Jarvis, amplifies that submission orally by reference to four features. First, the circumstances surrounding the offence: this was a landing on a wing of a young offender institution. The surroundings consisted of metal doors, concrete floors, concrete walls, imposing balustrades and the alike. Secondly, the delivery of the blow: John Smith could not have seen it coming. He was not able to defend himself or even to brace himself against the blow. Third, the place on the body at which the blow was struck - to the jaw. This was more likely to result in an injury which led to disorientation or unconsciousness. Finally, the obvious force of the blow.
20. In these circumstances, the Sentencing Council's Definitive Guideline gives a starting point of 12 years with a range of 8 to 16.
21. In the alternative and accepting that there must be a nuanced assessment of the factors which leads to the ultimate decision as to culpability, he submits that if the judge was correct to assess culpability as *medium* and therefore to identify the starting point as 6 years' custody, the mitigation in this case did not and could not, offset the aggravating features so as to result in a 50% reduction to 3 years.
22. He takes no issue with the credit given for plea or the finding of *dangerousness*, however, he submits the limited term of the extended sentence was such as to call into question whether or not it was appropriate.
23. Mr Lucas submits that the sentencing exercise should be conducted on the basis that this is a classic one-punch scenario, with no aggravating aspects to it save for the defendant's antecedent history. He submits that the judge had regard to *all* of the relevant factors, she obviously having viewed the CCTV footage with care, and we should respect her determination that this was a case that fell within the range of *medium* culpability. He emphasizes the personal circumstances of the offender and that he is still a very young man. He challenges the aggravating features which HM Attorney General identifies and to the contrary reminds us that this was a single blow which was not followed through and that no weapon was involved, whether it be a heavy ring or knuckleduster or the like. He also refers to the fact that the blow had unintended tragic consequences only by reason of the where the victim was standing at the time the blow was struck. He acknowledges the tragedy of the untimely death of John Smith but submits that given the crucial stage of this young offender's life, we should be slow to interfere with the sentence passed in the court below. In so far as these submissions are advanced by way of mitigation before us today, we assume that he seeks to argue that if we did find the sentence to be unduly lenient, that we should exercise our discretion not to increase it.

### ***Our Analysis***

24. The entire incident was captured on CCTV which we have all individually viewed. We have observed the force of the blow, the aim to the side of the head and the offender's position behind John Smith. It is obvious to us that John Smith was completely taken unawares. It appears to us that the offender gloated at his success. The footage supports the description given in the witness statements. However, we are satisfied that that bravado did change to remorse and contrition once the offender understood the fate of John Smith. This accords with the findings of the judge both in respect of her

description of the blow and also her assessment of the offender's state of mind both at the time and subsequently.

25. It is not trite to say that this was a difficult sentencing exercise as Mr Jarvis, on behalf of Her Majesty's Attorney General, conceded it to be. The charge of manslaughter reflects a lack of intent to cause death or grievous bodily harm and the judge proceeded to sentence on that basis, nevertheless aware of the truly devastating impact of this offender's behaviour in causing the needless death of a young man and the loss to his loving family. We pay genuine tribute to the judge's careful and sensitive sentencing remarks.
26. As we have indicated, the judge concluded that the offender's culpability was *medium* and fell into category C; the starting point was 6 years with a range of 3 to 9. Her assessment of culpability was central to the exercise she had to address. The question for us is whether her assessment of the same, and the other features of the case which informed the final sentence, was within the band of reasonable decisions open to her.
27. Whilst it is arguable that the offence fell within the *higher* culpability bracket, we conclude that the judge's determination that this was one of *medium* culpability cannot be categorised as unreasonable having regard to this offender's youth and personal circumstances which tipped the balance towards him behaving recklessly rather than with an appreciation or an awareness that his blow would give rise to the risk of serious harm or death. However, we have no doubt that he intended some significant harm falling short of that. We are satisfied that his boasts were reasonably interpreted as a deliberate show of swagger for the benefit of others and also no doubt for himself without representing his true intent or satisfaction at the havoc he had wreaked.
28. That said, there were aggravating features in this offence as the judge clearly recognised and identified and we have come to the conclusion that they were not sufficiently weighted in reaching the final sentence. That is: the location and timing of the offence; the targeting of the victim for a perceived wrong of which, we stress, there is absolutely no evidence and in any event would not excuse the conduct of the offender; the offender's previous convictions; and, the nature of the offence which undermines the good order of the penal institution in which he and the deceased were incarcerated and which calls for a deterrent aspect to any sentence imposed.
29. The offender's mitigation is subsumed to some degree in the categorisation of the offence, for the reasons we have given above. That is, the fact of his relevant youth and immaturity and personal circumstances led to this case being categorised as *medium* culpability rather than *high*.
30. In our view the judge erred in reducing the starting point rather than increasing it. The offence should have been classified as falling towards the top end of the range; the appropriate sentence, after trial would have been 8 years' imprisonment. Allowing appropriate discount for plea reduces the sentence to 6 years.
31. We agree with the judge that the offender was *dangerous* for the reasons she clearly explained, namely the circumstances of his previous offending and the circumstances of the instant case, and his behaviour in the prison environment, which:

"... are strongly suggestive that you are incapable of seeing solutions to the problems that will befall you going forward as you remain in custody and you begin the process of reintegration into

the community by any other means than using violence."

32. We note that on each occasion that he had been in such a challenging situation he had caused serious harm; there was a pattern of behaviour which meant that what would otherwise be the determinate sentence is not of sufficient length to ensure adequate protection to the public and that an extended determinate sentence is clearly called for.
33. We understand that the extension to the licence period reflected the term of the imprisonment the judge imposed but it is disproportionate to the custodial element of the sentence we intend to substitute for that of 2 years 3 months.
34. Therefore, the extended determinate sentence of 3 years 3 months will be quashed and replaced by an extended determinate sentence of 10 years, comprising a custodial term of 6 years and an extended licensed period of 4 years. To that extent this Reference succeeds.

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

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk