Neutral Citation Number: [2023] EWCA Crim 232

Case No: 202300447 A2

In The Court Of Appeal (Criminal Division)
On Appeal From The Crown Court At Maidstone
His Honour Judge Saxby, K.C.
T20210151

Royal Courts Of Justice
Strand, London, Wc2a 2ll

Date: 03/03/2023

Before :

Lord Justice Edis
Mr. Justice Bryan
And
Her Honour Judge Dhir, K.C.
Sitting As A Judge Of The Court Of Appeal Criminal Division

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Between :

The King
- And -
Arie Ali **Appellant**

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Mr. Jordan Santos-Sindes assigned by the Registrar

Hearing dates: 3 March 2023

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JUDGMENT

Lord Justice Edis:

1. The registrar has referred to the full court this application for permission to appeal against the sentence of 6 months' imprisonment imposed on 6 February 2023 in the Crown Court at Maidstone for one count of assaulting an emergency worker, to which the appellant pleaded guilty on the same day. We grant leave to appeal.

2. On 20 September 2019 the applicant was a serving prisoner at HMP Maidstone. A prison officer, George Wilson, was unlocking the cell doors, but omitted the appellant's door. Another prison officer opened the applicant's door. The appellant came out of his cell and shouted at Mr Wilson, asking why he had not opened his cell door. It seems that the appellant had a misplaced grudge against Mr Wilson. The appellant then threw the boiling hot contents of his mug into Mr Wilson's face. This caused a burn about the size of a hand on the side of his face. Mr Wilson said that it felt like acid and that his face felt as if it was on fire.

3. Mr Wilson attended hospital on the day. The treating doctor described his injury as an uncomplicated superficial burn: a first-degree burn. He took a week and a half off work in order to let the injuries heal. He treated the burn with cream and it healed in 2 to 3 weeks, without any need to see a doctor.

4. Mr Wilson said that the offence was out of character for the appellant, with whom he got on well. As a result of the assault, the appellant spent 29 days on the segregation unit.

5. The applicant had one previous conviction. He was sentenced to 3 years' imprisonment on 29 January 2019 for an offence of conspiracy to assist unlawful immigration into an EU member state. He was serving that sentence when he committed the present offence. He was released from prison on 29 July 2020 and completed his licence on 28 January 2022.

6. The appellant was charged on 8 February 2021 by postal requisition and appeared at Maidstone Magistrates' Court on 19 of March 2021, where he pleaded not guilty and elected for a Crown Court trial. His case was listed for trial on 20 June 2022, but could not proceed, we are told, because of action taken by the Criminal Bar Association in relation to fee levels. His case was re-listed for trial and he pleaded guilty on the first day of that long-adjourned trial.

7. There was no pre-sentence report, but there was a letter from a probation officer which stated that the appellant had complied fully with all aspects of his licence, had engaged well with all rehabilitative work, had completed sessions on consequential thinking, which enabled him to gain insight into behaviours and their impact, and had been polite, compliant and a pleasure to supervise.

8. The judge's assessment was that the appellant's culpability fell within category A, because the contents of the mug were equivalent to a weapon, and that the harm caused fell within category 1. because it was more than minor physical harm. The starting point for the assault was therefore a high-level community order, with a range from a low level community order to 26 weeks' custody.

9. The judge treated the fact that the offence was committed in prison as a very significant aggravating factor. He was right to do so. There were no other aggravating factors.

10. The mitigating factors identified by the judge were:

    a. This offence was out of character for the appellant, who had no previous convictions for violent offences and who had become an enhanced status prisoner.

    b. The appellant had spent 29 days on the segregation unit deprived of privileges.

    c. The judge accepted that the appellant regretted what he did. He had in fact apologised to Mr. Wilson.

    d. There had been a delay of over 16 months before the appellant was charged. Moreover, the pandemic and the Bar's action meant that the appellant's case took much longer than would otherwise have been the case to come to trial.

    e. The appellant had stayed out of trouble since his release in July 2020.

    f. The appellant had been looking for work, with occasional success, and was habitually a hardworking individual.

11. Balancing all of these factors, the judge decided that the appropriate sentence for the assault, but for the appellant's guilty plea, would have been 3 months' imprisonment.

12. The judge then had to apply an appropriate uplift because the assault was committed on an emergency worker. The judge decided that it was appropriate to increase the sentence to 6½ months' imprisonment.

13. The appellant received a one tenth reduction in his sentence by reason of his guilty plea. This cannot be criticised particularly having regard to the fact that he pleaded guilty only on the second occasion when the case was listed for trial. The judge reduced the sentence on this account to 6 months' imprisonment.

14. There are three grounds of appeal.

    a. The Judge erred in not ordering a pre-sentence report. We do not consider this to be a ground of appeal in itself. If the judge had been prepared to consider alternatives to immediate custody, then a pre-sentence report would have been appropriate. However, the judge took the view that an immediate custodial sentence was required. On that basis, a report was unnecessary, especially as the judge had the benefit of the letter from the probation officer.

    b. The length of the sentence was manifestly excessive. We do not agree. It is, as we have said, a very serious aggravating factor that this offence was committed in prison. In relation to the length of the sentence, that factor outweighs all of the mitigating factors. In addition, the judge had to be faithful to Parliament's intention in enacting the Assaults on Emergency Workers (Offences) Act 2018 and to increase the sentence because the assault was committed against a prison officer. These two factors arise from the context in which the offence was

committed and should not be double counted. The term selected by the judge was, in our judgment, proportionate.

c. The judge erred in imposing a sentence of immediate custody. We consider that there is merit in this ground in the exceptional circumstances of this case. In the vast majority of cases, an offence of this nature, committed in prison against a prison officer, would unquestionably lead to an immediate custodial sentence to be served consecutively to any sentence which had caused the offender to be in prison.

15. It is necessary to identify the exceptional circumstances which lead to that conclusion. These are that the appellant was not charged until 16 months after the offence and over 6 months after he had been released from prison. He was not sentenced until 2½ years after he had been released, he had remained out of trouble throughout that period and he had the benefit of a very positive reference from a probation officer.

16. Applying the sentencing guideline on *Imposition of Community and Custodial Sentences*, an offence such as this would, in the vast majority of cases, lead to the conclusion that appropriate punishment could only be achieved by immediate custody, even if, as is the case here, the offender did not present a risk or danger to the public and did not have any history of poor compliance with court orders.

17. However, in the present case, there is a realistic prospect of rehabilitation. With the exception of the present offence, the appellant's response to the sentence imposed in January 2019 has been very positive. By the time he was sentenced for the present offence, he had completed his licence period for the earlier offence and had received the very positive report from his probation officer to which we have referred. The judge said this:-

> "I accept that there is a realistic prospect of rehabilitation, indeed on the face of it you have rehabilitated yourself."

18. A further exceptional factor arises from the fact that the appellant was sentenced at a time of very high prison population. On 30 November 2022 the Minister of State made a statement in Parliament announcing Operation Safeguard. The Government thereby requested the use of 400 police cells to hold people who were remanded in custody or serving prison sentences in the adult male prisons. He explained that this was because "a surge in offenders is coming through the criminal justice system, placing capacity pressure on adult male prisons in particular." On 5 December 2022 Parliament was informed that it was not possible to estimate the duration of the protocol.

19. On 6 February 2023, the day when the sentence in this case was passed, a further announcement was made when the Ministry of Justice gave the National Police Chiefs' Council 14 days' notice to make cells in the North of England and the West Midlands available, following a rise in the number of inmates since the start of the year.

20. On 24 February 2023 the Deputy Prime Minister wrote to the Lord Chief Justice saying:-

> "You will appreciate that operating very close to prison capacity will have consequences for the conditions in which prisoners are held. More of them will be

> in crowded conditions while in custody, have reduced access to rehabilitative programmes, as well as being further away from home (affecting the ability for family visits). Prisoners held in police cells under Operation Safeguard will not have access to the full range of services normally offered in custody, including rehabilitative programmes."

21. In *R v. Manning* [2020] EWCA Crim 592 this court has recently re-stated established principles which apply in situations such as this:-

> "Furthermore, the court heard the instant reference at the end of April 2020 when the nation remained in lock-down as a result of the COVID-19 emergency. The impact of that emergency on prisons was well-known and the current conditions in prison represented a factor that could properly be taken into account in deciding whether or not to suspend a sentence. In accordance with established principles, any court would take into account the likely impact of a custodial sentence on an offender and, where appropriate, on others as well. Judges and magistrates could, and should, keep in mind that the impact of a custodial sentence was likely to be heavier during the current emergency than would otherwise be the case. Applying ordinary principles, where a court was satisfied that a custodial sentence had to be imposed, the likely impact of that sentence continued to be relevant to the further decisions as to its necessary length and whether or not this could be suspended. Moreover, sentencers should bear in mind the Guilty Plea Guideline, which made it clear that a guilty plea might result in a different type of sentence, or enable a magistrates' court to retain jurisdiction, rather than committing for sentence."

22. The judge in this case did not refer to this consideration, and he is obviously not to be criticised for that, given the chronology set out above. We have concluded that there were strong arguments for suspending the sentence in this exceptional case, for the reasons we have given. Any doubt we may have had on that issue is resolved by this additional factor which we do take into account in dealing with this appeal. This factor will principally apply to shorter sentences because a significant proportion of such sentences is likely to be served during the time when the prison population is very high. It will only apply to sentences passed during this time. We have identified above the starting point for the relevance of this consideration for sentencing, which we take to be the implementation of Operation Safeguard 14 days after 6 February 2023. Sentencing courts will now have an awareness of the impact of the current prison population levels from the material quoted in this judgment and can properly rely on that. It will be a matter for government to communicate to the courts when prison conditions have returned to a more normal state.

23. Accordingly, we quash the sentence of 6 months' imprisonment and substitute a suspended sentence order for 6 months' imprisonment, suspended for 18 months. Given the time which the appellant has spent in prison, we do not impose an unpaid work requirement. Nor do we impose any other requirements, given his satisfactory conduct during his 18 months on licence between July 2020 and January 2022.