IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2022/01477/A1
[2023] EWCA Crim 97

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 25th January 2023

B e f o r e:

LORD JUSTICE EDIS

MR JUSTICE CAVANAGH

HIS HONOUR JUDGE THOMAS KC
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E X

- v -

ABUBAKER DEGHAYES

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Mr T Wainwright appeared on behalf of the Appellant

Mr B Lloyd appeared on behalf of the Crown

J U D G M E N T

Wednesday 25th January 2023

LORD JUSTICE EDIS:

1. The appellant is now 54 years old. On 19th January 2022, following a trial at the Central Criminal Court before His Honour Judge Lickley KC and a jury, he was convicted of one offence of encouraging terrorism, contrary to section 1 of the Terrorism Act 2006.

2. On 21st April 2022, before the same court, he was sentenced to a Special Custodial Sentence of five years, pursuant to section 278 of the Sentencing Act 2020, comprising a custodial term of four years and an extended period of licence of one year. Other orders were made, as is required further to convictions for offences of this kind, but it is unnecessary to set those out.

3. The appellant appeals against the length of the custodial element of the Special Custodial Sentence. It is brought with the leave of the full court. Leave to appeal against sentence was initially refused by the single judge. In giving leave, the court identified one arguable point in particular, namely the judge's application of the sentencing guideline then in force. He assessed this offence as falling within category B for culpability, and the full court held that it was arguable that he should have classified it as a category C offence.

4. The guideline which the judge was required to follow defined the culpability categories as follows:

> "Culpability demonstrated by one or more of the following:
>
> A • Offender in position of trust, authority or influence and abuses their position to encourage others
>
> • Intended to encourage others to engage in any form of terrorist activity

	• Intended to provide assistance to others to engage in terrorist activity
B	• Reckless as to whether others would be encouraged or assisted to engage in terrorist activity and published statement/disseminated publication widely to a large or targeted audience (if via social media this can include both open or closed groups)
C	• Other cases where characteristics for categories A or B are not present"

5. There was and is no issue that on the judge's findings the case was in harm category 2. It followed that if culpability B was adopted, as the judge found it should be, the starting point was three years' custody, and the range two to four years. If culpability C was correct, as is submitted by the appellant, the starting point was two years' custody, and the range one to three years. That is the impact of the point identified by the full court.

6. In giving leave, the full court went on to say this:

> "In identifying the arguable point as narrowly as we have, we do not shut out Mr Wainwright from making the additional submissions on the case which he wishes to make. Those points are all, if they are well founded, relevant to the final sentence, whatever the initial categorisation of the offence might be."

In giving leave, the court also identified the desirability of hearing full argument from both sides in dealing with a difficult and sensitive sentencing exercise of this kind. We gratefully record the excellent written and oral submissions which we have received from both Mr Wainwright, who appears for the appellant, and from Mr Lloyd, who appears for the Crown.

The Facts

7. On 1st November 2020, the appellant had been at evening prayers in Brighton Mosque when a book reading session followed the prayers. Around 50 people had been present in the mosque,

including children, some of whom were young males or boys. During the book reading session the appellant decided to make a speech. He does not appear to have been invited to do so. It appears that his decision to address those present in the mosque, and as to what he should say, was spontaneous, and it may be that he became carried away by the emotion of the moment in becoming more heated as the speech went on. At all events, it was video recorded. There was no doubt about what had been said, and it was played to the jury. On the basis of what they saw and heard, the jury concluded that they were sure that all elements of the offence were made out. That meant that they found that some of what the appellant said was a statement which had the effect of encouraging terrorism and that he was at least reckless as to whether it would in fact have that effect. By "terrorism" the statute means acts of terrorism, that is to say conduct which is capable of causing the most serious harm.

8. The phrases from the speech, which were the principal basis for that finding of the jury, included: "Jihad, jihad, jihad, jihad is compulsory. Jihad by fighting by sword means jihad is a compulsory obligation upon you". While he was saying phrases of that kind, the appellant was jabbing his hand in a stabbing motion in the air.

9. The speech was quite a long speech, although the passage on which the prosecution relied was quite short. However, the content of the speech and the way it was expressed alarmed a leader and a chairman of the mosque, which resulted in members of the mosque community reporting what had happened to the appropriate authorities. This resulted in the arrest of the appellant who was questioned following his arrest. He denied the offence and, as we have indicated, continued to deny it during the trial. Since the trial, he has continued to speak about it, in that he has been interviewed by a probation officer who has prepared a pre-sentence report. We shall turn to the content of that later. It is, however, fair to say that he has been unflinching throughout all the occasions when he has spoken about his conduct in his assertion that he did nothing wrong and that he felt aggrieved that he had been prosecuted for what he did.

10. In his sentencing remarks, the judge summarised the whole speech. It is, in our judgment, important to see the offending passage in its overall context. The judge summarised the speech as follows:

> "The speech.
>
> A transcript is available with areas of dispute and alternative meanings indicated. I summarise the words spoken and the contentious topics addressed. I add, a number of religious teachings that are not relied upon by the prosecution were referred to. A theme that runs through your speech was the pandemic.
>
> First you began by reading from a document. You said in evidence, and I quote, 'I am reading from a book. There is terminology and science about the sayings of the prophet. I am saying there is only one god'. There is no dispute or criticism made of you that you were reading from religious texts and referencing religious stories during your speech.
>
> Second, you later referred to Boris Johnson making a mockery of the niqab before he became prime minister and you referred to him wearing a niqab by wearing a mask.
>
> Third, later you turned to coronavirus and were critical of scientists who had been working to find vaccines.
>
> Fourth, you commented on the new restrictions to worship.
>
> Five, you referred to Belmarsh Prison and implied that a practising Muslim might be taken there if regarded as 'strange'.
>
> Next, you then said that jihad was compulsory and an obligation, saying, and I quote, 'Upon you until the day of resurrection, whatever the British Government thinks, whatever Prevent thinks, whatever Israel thinks, send to the sea. They can go and drink from the sea, Allah cursed their fathers, okay'.
>
> You ended by saying, 'Jihad, jihad, jihad, jihad is compulsory. Jihad by fighting by sword means jihad is a compulsory obligation upon you, not jihad by word of mouth, this is also, but jihad will remain compulsory until the day of resurrection and my livelihood is under the shadow of my spear and who doesn't like that, go fight Allah, go fight Allah'.
>
> The above was accompanied by a stabbing motion that you accepted was, and I quote you, 'The dance of the blade'. You

> said in evidence that the story, and I quote, 'The story carries out the act of jihad', and it came to the speech, it is not the intended speech you read from, and you encourage and to practise from the book, 'Mohammed was fighting an enemy, I was talking about different concepts. While I was talking I was rolling within the speech and things appear. It's all interconnected, it's like a chain. I had not intended to talk about jihad. I saw encouragement from the people there to hear more. There was the plague and I continued to talk, one thing led to another'.
>
> You offered explanations in evidence for the words used, those explanations did not feature in your speech. In your evidence you stressed that any such actions were, in your mind, defensive and not offensive. I note that you, in evidence, condemned terrorist acts and said that committing crime is a sin."

11. Taken overall, therefore, there is no doubt that this was a speech which was specifically designed to influence the behaviour of those who were listening to it. The recklessness which the judge found, as opposed to intention, was as to whether that influence would extend to encouraging them to commit acts of terrorism. The appellant was speaking as vigorously and as powerfully as he could to his audience, trying to persuade them to follow what he said.

12. The judge had heard the trial. He had viewed the video recording, and he had heard what the appellant had to say about it. He made a finding that this was an offence which was committed recklessly, rather than intentionally. The appellant did not care whether the effect of his speech was to cause people to commit acts of terrorism or not.

13. The judge was required by the circumstances to address dangerousness. He decided that the appellant should not be treated as a dangerous offender. For reasons which will become apparent later in this judgment, that was not because there was no risk of repetition by the appellant of this criminal conduct; it was because the judge was not satisfied that that created the necessary risk of serious harm to the public by the commission of specified offences by the appellant.

14. In dealing with the categorisation for guideline purposes, the judge said this about the guideline:

> "Operative from 27th April 2018, page 17. I have considered the submissions made. In my judgement, the offence falls within culpability, category B. There is no evidence that you were in a position of authority or influence within the mosque and abused that position. You were taking part in a book reading session that was open to all. You had done it before. I cannot therefore conclude that you held a position of authority or influence.
>
> The case does, however, fall within category B, in my judgment, as your statement was made recklessly and was directed widely to an audience that might be considered large in the context of those attending that mosque. But in any event, the audience was targeted, in that your speech was directed at and to those attending at the mosque.
>
> I have concluded that the case falls within harm, category 2, because your statement provided non-specific content, encouraging support for terrorist activity endangering life. Encouraging violence by the use of a blade clearly is an activity that could endanger life.
>
> As a consequence, the starting point set out in the guideline is one of three years' custody and a category range is from two to four years' custody before any alteration is made for the increase in the maximum term."

15. The reference in that passage of the sentencing remarks to "encouraging violence by the use of a blade" is a reference to the gestures that were made by the appellant while delivering his speech, specifically while encouraging jihad. Those gestures, it was agreed at the trial, are gestures designed to simulate someone whirling a sword around above their head, preparatory to using it.

16. The judge then considered the impact on that starting point and sentencing range of the decision of this court in *R v Nugent* [2021] EWCA Crim 1535. He observed, correctly, that this decision suggested that such increases were required particularly at the most serious end of offending. The judge therefore had in mind the fact that since the guideline which he was

required to follow had been published, the maximum sentence for this offence had been significantly increased and that that was a matter which he was required to consider.

17. The judge was aware, of course, of the appellant's previous offending history. He had one conviction for one offence of intimidating a witness on 30th August 2018, for which he had been sentenced to 18 months' imprisonment. This was not in any sense a terrorist-related offence. It arose out of an entirely different context. However, it was not irrelevant to the sentencing exercise which the judge was required to perform.

18. The judge also had a pre-sentence report. This was a significant document from which it is necessary to quote one extract. The author said this:

> " However, [the appellant] has expressed an intention to continue to make speeches similar to the one that resulted in his arrest and subsequent conviction for encouraging terrorism. This is a worrying aspect of the case as it indicates that there is limited prospect of change as he has no insight of the harm he has caused. He has shown no remorse which is unsurprising as he does not think he has done anything wrong. Given his lack of insight or concern about his behaviour, his risk of re-offending is assessed as high."

19. Having identified the appropriate starting point and range in the way we have described, the judge then moved on, as the guideline requires, to assess aggravating and mitigating features. As to aggravation, he said this:

> "In my judgment, the only statutory feature that arises is that some of the audience were young males attending with their fathers. Their precise ages are, and whether they were listening, paying attention, difficult to determine from the CCTV. However, some were clearly of school age. As such, they were vulnerable and/or impressionable. I find this factor aggravates the offence, but to a limited degree. I add that your statement was directed at members of society in general and was not based on any hostility to any religious, racial or other minority group."

20. The judge then dealt with the passage in the pre-sentence report which revealed the intention of the appellant to carry on making speeches of this kind when he was free to do so. The judge dealt with that on the basis that it negated any remorse which might otherwise have mitigated the sentence. He said this:

> "It is fortunate that no specific terrorist act can be laid at your door. That said, your comments were made at a time of great tension and uncertainty within our community. I have made the appropriate upward and downward adjustments for the aggravating and mitigating factors. I have taken into account the consequences of custody during the pandemic. I have also taken into account the increase in the maximum sentence for this offence. In my judgment, the starting point set out in the guideline should be moved upwards to reflect that but, given the facts of this case, to a limited degree."

21. The mitigation which had been advanced before the judge and on which reliance is placed before us on this appeal included evidence that, on previous occasions – and on a number of previous occasions – the appellant had made a contribution towards trying to persuade members of his community not to travel to join in any terrorist struggle. It also included the deaths of members of his family (his sons) in the course of such activity. The result of this was that the appellant had achieved a prominent position in his community. No doubt many of the listeners to his speech were aware of his personal history.

22. The grounds of appeal are as follows:

(a) The judge erred in finding that the offending fell into category B in relation to culpability;

(b) The judge made too great an increase from the starting point to reflect the

change in the maximum sentence; and

(c) The judge failed to give sufficient weight to the mitigating factors.

Discussion and Decision

23. The sentencing guideline is not to be construed as a statute. The phrase "published statement/disseminated publication widely to a large or targeted audience" is not drafted as a statute would be for the very good reason that it is a guideline and not a statutory test. We do not need to address the Response to Consultation document published by the Sentencing Council in the course of its preparation of the guideline. In our judgment, the purpose of this phrase is clear enough on its face. It requires the statement or publication to be published widely in all cases and qualifies that by saying that, in addition, the audience must be either large or targeted. There may be a question about what the word "widely" means when the audience is not "large" but "targeted". The task of the court in dealing with guidelines is not to become embroiled in analyses of that kind, but to identify what the guideline identifies as being required in substance before a case of reckless encouragement can be elevated above the general level of seriousness which that kind of conduct attracts.

24. In our judgment, the guideline on encouragement of acts of terrorism was drafted in such a way that the critical factor elevating seriousness in some reckless cases is the extent to which the chances of the statement or publication influencing the actions of an adherent to the cause were increased by the circumstances in which it was published. Accordingly, if such a statement were to be broadcast or published on the internet, or in some other way promulgated so that it reached a very large audience perhaps running into the millions, this would greatly increase the chance that some of those people would be highly likely to be responsive to a call to action. Alternatively, if the audience was filtered so that it included a high proportion of sympathisers who were known to be, or believed to be, prone to action of this kind, the chances

of harm would then be increased. A targeted group may be very large indeed, as the facts of *Nugent* reveal. This means that offences where the offender is reckless as to the consequences of the statement which is published will be treated as more serious where the circumstances are such as to make it far more likely that terrorist action will be the result, than otherwise might be the case. Factors of this kind emerge again in the list of aggravating features at the next step in the guideline, which shows how important this consideration is in determining sentence. Such matters, therefore, can be further considered at that later step, of course having regard to the need to avoid double counting.

25. On that analysis of the guideline, a single speech to an audience of 50 people at a perfectly respectable mosque, where the audience was not selected for any radicalism but was simply a religious community engaged in worship, does not, in our judgment, engage the type of conduct which the guideline is intended to catch. The abuse of that religious gathering to promote terrorism is an aggravating feature, as is the fact that the audience contained young men and boys. These are properly matters to be taken into account when weighing the aggravating and mitigating factors after identifying the correct starting point and range.

26. In our judgment, the proper classification of this case is that it falls into category C for culpability and 2 for harm. This means that the range was one to three years, and the starting point was two years' custody. We consider that the judge was right to apply an increase to the starting point because of the increase in the maximum penalty, which came into force after the publication of the relevant guideline. He was also required to balance the aggravating and mitigating features in deciding what effect they should have on the starting point.

27. In the event, the judge uplifted the starting point by 12 months to one which is within the category range which he had selected. He did not differentiate between the different factors which caused that result. He was not required to do so. That was an uplift, taking into account

the balance of aggravation and mitigation and the *Nugent* increase.

28. There undoubtedly were significant aggravating features. We have just identified one of them, namely the hijacking of a religious gathering. We have also identified, as did the judge, another, namely that the gathering included young men and boys who may have been impressionable. A further and significant aggravating feature is the assertion by the appellant that he intends to carry on giving such speeches because he thinks there is nothing wrong in doing so. This is a very striking feature of this case to which weight had to be given. It is right to say, as the judge did, that this means that there is no mitigation to be derived from remorse, but such an attitude to offending also operates as an aggravating feature in its own right.

29. The statutory purposes of sentencing are set out in section 57 of the Sentencing Act 2020. They include the reduction of crime, including its reduction by deterrence, the reform and rehabilitation of offenders and the protection of the public. All of these factors suggest a longer sentence is required in the case of an offender who says that he intends to offend again as soon as he is free to do so, especially in the terrorist context.

30. We do not consider that it is arguable that the addition of 12 months to the starting point, to reflect the balance between mitigation and aggravation in this case and the *Nugent* uplift, was manifestly excessive. It is important that the judge's assessment of this aspect of the case did not take the final sentence out of the category range. A move upwards within the range was properly open to him, having regard to all relevant factors.

31. In truth, although the appellant's background is striking and unusual, there was very little mitigation in this case. His conduct in the past in trying to prevent young people from going on jihad, and his family experience of jihad, was all no doubt well known. This back story would tend to increase the potency of his speech in this case, and thus the likelihood of harm.

That consideration, in our judgment, balances out what might otherwise have been mitigation and leaves it as a neutral factor.

32. Given the appellant's deep knowledge of radicalisation and the harm that it causes, the judge acted very fairly in his assessment of the case as involving recklessness, rather than intention. We consider that the outcome of that assessment gives sufficient weight to that aspect of the case.

33. Adopting the same approach, but using the lower range we have identified, we consider that an increase in the custodial element of the sentence from the starting point of two years to the top of the appropriate range, namely three years, is appropriate.

34. Accordingly, this appeal is allowed. We will quash the sentence imposed by the judge and substitute a Special Custodial Sentence for offenders of particular concern of four years, with a custodial element of three years and a mandatory period of additional licence of 12 months.

35. The appellant is fully aware of the effect of a sentence of that kind, because it is precisely the same as the sentence he has been serving since he appeared before the judge, except that the custodial element is now reduced in its length from four years to three years.

36. We leave this case with an acknowledgement of the skill and care with which the judge dealt with it. His sentence remarks are cogent and well-crafted. He addressed the meaning of part of the guideline which has not, so far as we are aware, previously received the attention of this court in explaining its significance, and, in the absence of such guidance, reached a conclusion with which we have respectfully disagreed; but that in no way undermines what we have said about his approach to this case.

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
