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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA Crim 1069

No. 202001643 B4

Royal Courts of Justice

Tuesday, 22 June 2021

Before:

LORD JUSTICE STUART-SMITH
MRS JUSTICE CHEEMA-GRUBB
HER HONOUR JUDGE DHIR QC

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MR H. HUGHES appeared on behalf of the Appellant.

J U D G M E N T

MRS JUSTICE CHEEMA-GRUBB:

1 This is a renewed application for an extension of time and permission to appeal against sentence. We are grateful for Mr Hughes who has presented it and attended at his own expense without expectation of remuneration.

2 The proposed single ground of appeal is that the trial judge's determination that the applicant is dangerous, was wrong so the passing of an extended sentence of eight years' custody with an extension of three years for the offence of attempting to cause grievous bodily harm with intent was not merited. There is no challenge to the custodial part of the sentence nor to the period of the extended licence.

3 In essence, permission is sought to argue that the applicant, now a 49-year-old man with a limited antecedent history, suffered unfairly from the judge having been informed of a number of unproven allegations against him set out in the pre-sentence report. Further, absent that information, the judge would have been bound to conclude that an extended sentence was not required or justified.

4 The applicant was indicted with five counts alleging misconduct between 31 July and 3 August 2019. The facts can be summarised thus. He was in a relationship with Y. Y already had a child, Z, and she gave birth to the applicant's daughter, W, in due course. The applicant's conducted towards Y was such that from 2018 social services would not allow the children to remain with their mother unless she desisted from seeing the applicant: however, the contact continued. As she explained in evidence, Y saw the applicant only because she was afraid of his violence if she resisted.

5 Against that background, on 31 July 2019 the applicant arrived at her home, ordered her to pack and go with him, taking her daughters. Over the next few days he hit and terrorised her in a sadistic display of power. On the night of her arrival he raped her with a bamboo cane which had a Jubilee clip fixed at one end.

6 The next day he drank heavily and struck Y to the face while she was sitting on the floor holding the youngest child in her arms. The blow carried such force as to knock the child out of her mother's hold. He then repeatedly hit and kicked her in the head and body. A friend of the applicant who was present described the force he used as such that if the applicant's shoelaces had not been done up tightly, his shoe would have flown off. Y sustained a laceration to her head, which penetrated through to the skull.

7 During this attack, she ran out of the property to seek refuge with a neighbour, but then returned. The applicant threatened to slash and disfigure her with a Stanley knife blade that she knew he had in his wallet. She believed he would carry out the threat, the applicant having left her voice mail messages to a similar effect on 23 July when he had warned that he would cut her throat. This period of violence ended when another friend of the applicant's, who was pregnant, placed herself between them.

8 Later that night, he forced Y into the bathroom to wash away her blood, lest the taxi driver who was to take her home should see it and raise the alarm. In the bathroom he launched yet another attack on her. He desisted only when Y's mother arrived to see her being kicked and beaten. She hit the applicant with a shampoo bottle. In response, he struck her too, punching her several times to the face and body. She responded that she would see him in prison, at which the applicant switched character and tried to pacify his victims.

9 After he had been arrested, two Stanley knife blades were found wrapped in a piece of paper in his wallet. Y's injuries included the laceration to the head, which had to be stitched and

bruising to her face and her jaw, both her arms and all over her legs. Her mother, Y2, sustained bruising; to her face, arms, legs and scratches to her neck. The applicant claimed he had been acting in self-defence.

10 On the first delay day of the trial, 20 January 2020, at Worcester Crown Court the applicant pleaded guilty to unlawful wounding contrary to s.20 of the Offences Against the Person Act 1861. This was in respect of the laceration to Y's head. The trial proceeded before his HHJ Jackson on the remainder of the indictment.

11 The applicant was convicted on 28 January of attempting to cause grievous bodily harm with intent, assault occasioning actual bodily harm and having an article with a blade or point. He was acquitted of driving whilst disqualified. Sentence was adjourned for a pre-sentence report. Subsequently, having invited written submissions as to relevance and admissibility of certain material contained within the report, the judge proceeded to sentence on 28 February 2020.

12 The applicant had acquired previous convictions for violence, including assaults, in 1990, 1993 and 1995. In 2003 he was convicted of unlawful sexual intercourse with a girl under the age of 16 and a connected offence of witness intimidation in 2004. In 2009 he pleaded guilty to affray.

13 A statement from Y described the psychological impact of the applicant's conduct. She lives in permanent fear of the consequences of giving evidence against him. She has had to be relocated with her children.

14 The applicant maintained his denials to the author of the pre-sentence report, although he said he regretted the wound Y had suffered, which he said had been inflicted during an outpouring of grief from him related to the sudden loss of one of his children in 2016. The report referred to the detailed history provided by Y of the applicant's cruelty and violence, which she had described as "torture", over the period of their relationship. It is not necessary for us to rehearse this, beyond to note that it extended to regular threats to harm her with the Stanley knife blades:

> "He said he would slice the tip of my nose off so that nobody else would want me, cut my mouth from there to there, my private parts."

15 The applicant appeared to enjoy the effect upon his victims of using and threatening violence.

16 There are three particular aspects of the pre-sentence report to which Mr Hughes directs our attention. First, the detailed description of the applicant's history of violence against other intimate partners, which it is suggested had gone largely unreported or untried, due, according to the author of the pre-sentence report, to the fear victims had expressed to police of reprisals from the applicant. The report relied for this on police records. It was noted that on six occasions the police had been called because of verbal abuse towards the applicant's wife, one of which included threats to kill her, but although Mrs X had requested panic alarms she had been unwilling to make statements or press charges. Some of the threats she reported were similar to those made to Y, including references to slitting her throat and she too reported the applicant having a blade secreted in his wallet.

17 The second is to do with the inclusion of specific extracts from police logs in 2018 and 2019 and a police report concerning Y herself and the applicant in 2018, none of which were the subject of prosecution. The logs described violent and controlling behaviour, including allegations of assault. The report relates that prosecution did not follow because Y retracted

her statement at the insistence of the applicant who had driven her to the solicitor's office for that purpose.

18 Thirdly, Mr Hughes directs our attention to the report writer's assessment of the applicant's pattern of violent behaviour, followed by denial, minimisation and intimidation of witnesses wherever challenged. This is summarised by the author as follows:

> "The evidence points not to impulsivity, but rather to controlled violence intended to instil control through fear."

19 Addressing the question of dangerousness specifically, the author of the report concluded that the applicant poses a high risk of serious harm to a range of people, including female partners, members of the public, children and to staff.

20 Having heard the submissions, the judge found the following aggravating features present. Y had been attacked in front of her children. The applicant's behaviour exposed his own young child to abuse. He had no regard to the fact that other adults were present and tried to intervene, including one who was pregnant herself, and the applicant was intoxicated. By way of mitigation, the judge noted that he had expressed remorse when giving evidence and pleaded guilty to the offence of malicious wounding. It was also recognised that his previous convictions did not include instances of domestic violence.

21 However, the judge observed the lateness of the guilty plea and he questioned the genuineness of the applicant's expressions of remorse, given he still blamed Y for what had happened between them. The judge concluded that the applicant has no real insight and he considered the use of violence against the mother of his child to be an everyday unremarkable occurrence. The degree to which he was intoxicated may have explained why the ferocity of the violence witnessed by witnesses had not caused even greater injuries. The jury was sure the applicant intended to cause grievous bodily harm to Y.

22 As to dangerousness, the judge considered the requirements of s.226A and s.229 of the Criminal Justice Act 2003 before passing the extended sentence of 11 years, to which we have referred, and concurrent determinate sentences of four years for unlawful wounding, three years for ABH and two and a half years for the bladed article. The judge also ordered forfeiture and destruction of the cane and Stanley knife blade. He made a restraining order forbidding the applicant from contact with Y and her mother except through social services. He made an order for the payment of prosecution costs in the sum of £3,500, compensation to Y of £2,500 and to her mother of £750. A statutory surcharge was imposed as required.

23 Where a court is required to consider whether the offender poses a significant risk of serious harm to members of the public by the commission of further specified offences, (Sentencing Codes s.308(1) and s.226 of the Criminal Justice Act), the decision requires careful justification. However, this court will not readily overturn the exercise of judicial discretion in making a finding of dangerousness, apparently solidly grounded, because it has not conducted the trial or seen the offender. 'Serious harm' means death or personal injury, whether physical or psychological; Sentencing Code 306(2). By s.229 of the Criminal Justice Act the court must take into account all such information as is available to it about the nature and circumstances of the offence. It may take into account all such information as is available about the nature and circumstances of any other offences of which the offender has been convicted by a court anywhere in the world. It may take into account any information which is before it about any pattern of behaviour which any of the offences forms a part and it may take into account any information about the offender which is before it: Sentencing Code 308(2).

24 The finding of dangerousness does not of course necessarily lead to the imposition of an extended sentence, because the court has a further discretion as to whether an extend sentence is necessary. A fact-specific decision is required, because in some circumstances, even for a dangerous offender, a determinate sentence may provide adequate public protection, for example alongside other protective measures by way of ancillary orders. As ever, the sentence must be just and proportionate and not such as to crush the defendant.

25 Mr Hughes' submissions can be encapsulated as follows. Section 229(c) limits the information upon which a judge may act when considering dangerousness and the judge's approach was inconsistent with it. Although the court was not precluded from reliance upon information outwith the trial evidence, a judge should not take into account an assessment in a pre-sentence report based, at least in part, on disputed matters which are not admitted or proven at trial. In particular, because the applicant had denied every unproven allegation and maintained his position that Y was the aggressor on a number of occasions, the judge was not entitled to determine where the truth lay based upon his own impression of the protagonists during the trial, yet this is what he must have done in finding that the applicant was dangerous.

26 In his sentencing remarks the judge referred to the previous occasions when calls had been made to the police about the use of violence or threats of violence by the applicant. He decided it was not prejudicial for him to have regard to such complaints, irrespective of the fact that they had not resulted in convictions. This was because:

> "Where they had come from different complainants they helped to put the present offences into context and helped demonstrate whether I am dealing with someone who has committed offences that are out of character or whether I am actually dealing with someone who has an entrenched pattern of using violence against others and especially intimate partners. However, I recognise the weight to be given to those of the complaints have to be adjusted to take account of the fact that they are matters which did not result in a conviction."

27 In addition, this information from the pre-sentence report put into context the absence of convictions for offences of violence between 2009 and 2019: the gap did not amount to any real mitigation. We are not persuaded that the judge's approach thus far was wrong in principle.

28 In turning to apply the dangerousness test specifically, both in respect of significant risk and serious harm, the judge said he had regard to the following features in addition to the applicant's age: the applicant's superficial engagement with the probation service in the past and his continued denial of responsibility for the offences after conviction, which indicated he was not liable to change his behaviour given time to reflect. The judge rejected the loss of the applicant's son as an explanation for his actions towards Y and he said:

> "I recognise a number of previous complaints made to the police have not resulted in convictions against you, but the fact of these complaints having been made cannot be disregarded completely. They are part of the overall picture I have to consider. I am satisfied that your entrenched attitudes towards offending, history of previous occasions of using threats of violence, including those which have not resulted in convictions, the denial of responsibility for your actions and the complete lack of insight into the seriousness of them means there is a significant risk you will go on to commit further specified offences of violence or to intimate partners. It is not a risk that shows any signs of being capable of being mitigated at present."

29 Further, the applicant's attitude towards women was illustrated by one of the previous incidents that, although it had not itself formed an allegation, was admitted as an agreed fact at the trial; namely, the voice mail in which the applicant made threats to cut Y's throat on 23 July 2019. Of this the judge said:

> "The man who regards women in such a way has no respect for them as autonomous human beings and that is part of the reason I have come to the conclusion there is a significant risk of you continuing to commit specified offences of violence in future, especially against any woman who becomes involved in a relationship with you."

30 Having concluded that the test was satisfied, the judge went on to consider whether the level of risk posed by the applicant could be met by a determinate sentence and ancillary orders, but he concluded that the applicant's history of past failure to engage in any meaningful way to address his behaviour demonstrated that he still presented a high risk to the public and, accordingly, an extended sentence was necessary.

31 A number of previous decisions of this court make it clear that considerable care is necessary in assessing the weight to be attached to unproven allegations when a judge is assessing dangerousness: see for example the discussions from para. 23 onwards in the consolidated judgment of *R v Considine* [2007 EWCA Crim 1166 where a number of previous authorities are summarised. First principles mandate that no offender can lawfully be punished for offences which have not been indicted and which he has denied or declined to admit. However, as the President of the Queen's Bench Division explained in para.77, in refusing to lay down hard and fast rules about how the court should approach the resolution of disputed facts when considering dangerous, an assessment of dangerousness is not precisely analogous to punishment. Dangerousness is assessed in order to protect against future risk rather than to penalise for past error. Whilst the key guide is fairness to the defendant, the court is entitled to take into account full analysis of the information in the papers before it.

32 Counsel representing the applicant at the sentencing hearing conceded that the ambit of s.229 is wide. The material to which the court could have regard was not limited to that which is strictly evidence in the trial. It could include, for example, material might have formed part of a bad character application or available as a result of previous engagement with probation services, subject as we have said of the principle of fairness.

33 Self-evidently, of course, the role of the author of the probation report is not the same as that of the judge. Placing before the court the fullest possible picture of a defendant with reference to unproven allegations, particularly where those are necessary to support a pattern of conduct which feeds into the author's conclusion, is acceptable in an appropriate case. In the context of domestic violence over a long period of time where complaints are, as the courts have found, frequently unwilling to sustain reports or support prosecution, it would be unhelpful, to say the least, for the author of the pre-sentence to restrict himself or herself to solely those matters which have been admitted by way of guilty pleas or convictions.

34 However, as we have already observed, the judge must be careful to look at the information before him far more narrowly when making his own assessment and applying s.226A and s.229. Note, in particular, that having referred to the facts of the offending of which he had been convicted and which he continued to deny responsibility for, the judge was careful to refer to unproven allegations in a wholly appropriate way when it came to the dangerousness assessment in the passage we have quoted above.

35 We are grateful to Mr Hughes for his submissions. Had there been any merit in this appeal, we would have granted an extension of time. However, in our judgment, it is not reasonably arguable that the judge's approach and overall conclusion that this applicant is dangerous offender is wrong. We reject the submission that the judge based his conclusion solely or largely on unproven allegations which the applicant had not been able to challenge. There was more than ample evidence which emerged during the trial itself to justify the dangerousness finding which was grounded firmly in material before the jury, much of which we have summarised.

36 Although it was not strictly necessary to do so, the judge was entitled to conclude that the additional non-proven material within the pre-sentence report demonstrated that the instant period of offending was not isolated. In fact, the applicants attitude to Y was indicative of his wider approach to women with whom he might have relationships in the future and that he would bring pressure to bear on them not to report this behaviour. These general findings took into account the contents of the full pre-sentence report in a suitably nuanced way as part of the overall picture.

37 Accordingly, we are not persuaded that he gave undue weight to unproven allegation or the information provided about the applicant's general attitude and characteristics. This sentencing exercise was not remotely subject to a hybrid arrangement of the type criticised in *R v Considine* in which an offender is effectively convicted of serious offences by the judge in order for a finding of dangerousness to be sustained.

38 Those being our conclusions, this renewed application must be dismissed.

CERTIFICATE

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