Neutral Citation Number: [2022] EWCA Crim 250

Case No: 2022/00008/A3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM
His Honour Judge James
T20217007

Royal Courts of Justice
Strand, London, WC2A 2LL
3 March 2022

Before :

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE HILLIARD
and
HIS HONOUR JUDGE CONRAD QC

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IN THE MATTER OF A REFERENCE BY HER MAJESTY'S SOLICITOR GENERAL UNDER SECTION 36 OF THE CRIMINAL JUSTICE ACT 1988

ADAM FLEMING **Respondent**

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Jonathan Polnay appeared on behalf of the **Solicitor General**
Nick Wells appeared on behalf of the **Respondent**

Hearing date : 24 February 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30am on 3 March 2022.

Lord Justice William Davis:

Introduction

1. On 7 September 2021 the offender, Adam Fleming, pleaded guilty to a single offence of causing grievous bodily harm with intent. His plea was tendered on the day that the case was listed for trial before His Honour Judge James sitting in the Crown Court at Canterbury. On 7 December 2021 the offender appeared before the same judge for sentence. The judge imposed an extended determinate sentence of 18 years with a custodial term of 14 years and an extended licence period of 4 years. The Solicitor General seeks leave pursuant to s.36 of the Criminal Justice Act 1988 to refer the sentence to this court as unduly lenient.

The facts

2. From about 2016 the offender (born in March 1994) was in a relationship with a lady named Kelly Webber. They lived together in a flat in Ramsgate. Ms Webber (born in 1972) was considerably older than the offender. She was an extremely vulnerable individual. She suffered from borderline personality disorder. She had learning difficulties. She was subject to more than one physical disability. She had suffered abuse as a child. Because of her vulnerability she had been allocated a social worker.

3. The relationship was volatile. Neighbours regularly heard screaming and shouting coming from their flat. Ms Webber often would be seen with bruises and black eyes. Her social worker had tried to safeguard Ms Webber by providing her with places of safety away from the offender. On 7 January 2021 the social worker visited Ms Webber at her flat. The offender was present. Ms Webber had significant facial bruising. When asked how she had sustained her injuries, Ms Webber said that the offender was not responsible, but she gave no positive explanation of their cause. The offender was playing on an electronic tablet device. He apparently had no interest in Ms Webber's welfare. The social worker told Ms Webber that he would arrange an appointment with her GP. On 9 January 2021 Ms Webber sent the social worker a voice message. In the background the offender could be heard saying "I am going to do this all night" following which Ms Webber cried out in pain.

4. On 11 January 2021 the social worker went to the flat in Ramsgate in order to collect Ms Webber and take her to the GP appointment. He received no answer even when he knocked on the door repeatedly. He shouted through the letterbox but there was no response. After about 10 minutes he left. He went back to his car. As he was driving away, he received a telephone call from the offender who said "something is wrong with Kel, she's had a fit, she's making funny noises". The social worker told the offender to call an ambulance and then returned to the flat. There he found Ms Webber lying on a sofa with obvious and very serious injuries. The offender was speaking on the telephone to emergency services but was showing no sense of urgency or any particular concern for Ms Webber. The social worker took over the call and made it clear that there was a real emergency.

5. Ms Webber was taken to hospital. She had the following fresh injuries: brain damage with internal bleeding; multiple facial fractures including the nasal bones and the left cheekbone; substantial facial bruising; corneal dislocation causing blindness in the left eye coupled with other traumatic injury to that eye; extensive bruising to the chest and

abdomen; fractures of four ribs, three on the left and one on the right. There were old fractures of four ribs, two transverse processes of the lower lumbar spine and the right cheek.

6. Ms Webber was treated initially in intensive care. After 10 days she was transferred to the high dependency unit where she underwent extensive physiotherapy and occupational therapy. She was transferred to two different hospitals first in February and then in March 2021 before being transferred to a neurorehabilitation unit in July 2021. She made very slow progress over the course of 2021. As at 26 May 2021 she had significant communication and behavioural deficits which meant that she was wholly dependent on others to meet her needs. Her cognition was severely affected. She needed full nursing care to maintain continence, nutrition and hygiene. By 19 September 2021 she had made some progress. She then was able to feed herself with assistance. Her behavioural problems had improved and she was able to communicate with others to a limited degree. She remained doubly incontinent.

7. The expectation in the longer term is that Ms Webber will be able to live in sheltered accommodation. However, she will not be able to look after herself and will need close supervision. She will not be able to walk independently.

8. The offender was arrested and interviewed. He provided a prepared statement in which he said that he was not responsible for any injury sustained by Ms Webber. He claimed that he had been in the toilet when he had heard a thud. He went into the living room and found Ms Webber on the floor. He managed to put her onto the sofa. He did not know what caused the injury though he thought that she might have had some kind of fit. She already had a bruise on her face resulting from a fall she had had a few days earlier. Otherwise he made no comment when asked questions by the police.

9. The injuries to Ms Webber's face and body were caused by repeated blunt trauma i.e. blows delivered with considerable force. Medical expert opinion was not able to determine the specific cause of particular injuries save that the facial fractures were consistent with blows from a fist or a foot and the brain injury was indicative of an accelerated fall backwards due to a blow or blows to the front of the face.

Material considered by the judge

10. The offender's record of previous convictions included convictions for assault in 2011 and 2012. Otherwise, his appearances in court between 2013 and 2020 related to minor offences of dishonesty and drunk and disorderly.

11. The offender declined to be interviewed for the purposes of a pre-sentence report. He attended a video conference with a probation officer. But so soon as the probation officer asked him about the offence (to which by now he had pleaded guilty) the offender stood up, shouted abuse and left the video conference room. A report nonetheless was prepared to deal with the issue of dangerousness, the probation officer being able to speak with social workers and others who had dealt with Ms Webber and the offender in the months and years prior to January 2021. The clear conclusion of the report was that the offender presented a very high risk of serious harm to Ms Webber and any other partner he might have in the future.

12. For obvious reasons no VPS was taken from Ms Webber. There was a statement dated 9 September 2021 from Ms Webber's daughter. Amongst other things she said this:

> "….the hospital have told me that their main goal is to get my mum to use a Zimmer frame to walk from one side of the room to the other. It breaks my heart that this is their main goal, as I do not know if I will ever see my mum back to her old self. I believe that my mum will be in a care home for the rest of my life….
> ….My mum's emotions are all over the show, she has improved in that she has stopped scratching herself or pulling her hair as much, but she still seems very sad. I can see in my mum's eyes that she is frustrated and fed up that she can't move and get up, I have seen her cry and gets annoyed when she tries to do this. Since being in hospital my mum hasn't mentioned Adam once, it used to be the case that my mum would never stop talking about Adam, I cannot be sure if this is because my mum doesn't remember him, or if she is so scared of him that she has blocked him out. All I want is to see my mum happy, I want to be able to go out and spend time together, and it destroys me knowing that this might never happen again."

13. There was no psychiatric evidence relating to the offender. It was submitted to the judge by counsel in the course of mitigation that the offender had twice been admitted to a mental hospital during 2020. On each occasion this had been a brief admission. Counsel said that the diagnosis had been emotionally unstable personality disorder. Counsel also referred to the fact that the offender had been brought up in care and that he had some history of learning difficulties.

Sentence

14. The judge began his sentencing remarks by a review of the material relevant to the risk of serious harm posed by the offender to others in the future. He concluded that there was more than sufficient to justify a finding that the offender presented such a risk and that an extended determinate sentence was required.

15. The judge described the injuries suffered by Ms Webber as catastrophic and life-altering. By reference to the revised Sentencing Council guideline effective from July 2021 he assessed the offence as falling into Category 1A. There was high culpability because Ms Webber was obviously vulnerable and the assault was prolonged. Harm was in Category 1 because all of the relevant factors were present. The judge said that the fact that the assault took place in a domestic context and in Ms Webber's own home increased the seriousness of the offence as did the fact that the assault was the culmination of a prolonged course of violent, controlling and coercive conduct in relation to Ms Webber.

16. Taking into account all of those matters the judge considered that the appropriate starting point for the custodial term before the effect of any mitigating factors and the appropriate credit for plea was 16 years. This was at the top of the sentencing range in the guideline for a Category 1A offence. The judge reduced the custodial term to 14 years (a) because the offender had not served a substantial term of custody before and had called for assistance once he had caused the injuries and (b) to give credit of 10% for the late plea. As we have noted already the extended licence period was 4 years.

Submissions

17. On behalf of the Solicitor General it is submitted that the judge's assessment of the proper custodial term before consideration of mitigation and credit for plea was inadequate in two respects. First, it gave insufficient weight to the truly exceptional level of harm caused to the victim. Three factors are identified in the guideline as showing the highest level of harm. They are: (i) particularly grave or life-threatening injury caused; (ii) injury results in physical or psychological harm resulting in lifelong dependency on third party care or medical treatment; (iii) offence results in a permanent, irreversible injury or psychological condition which has a substantial and long term effect on the victim's ability to carry out their normal day to day activities or on their ability to work. The presence of any one of those factors should lead to a finding of Category 1 harm. In this case all three factors were present. It is argued that this meant that, subject to discount for plea, a sentence outside the category range of 10 to 16 years should have been imposed for this reason alone. Reference is made to the concept of "extreme impact" as referred to in the guideline.

18. Second, there then should have been a further uplift to reflect the aggravating factors: the offence occurred in a domestic context; the injuries were caused after a prolonged course of violent, controlling and coercive conduct; the offender had failed to adjust his behaviour despite what amounted to warnings from Ms Webber's social worker.

19. The Solicitor General does not argue that this is a case in which it was "contrary to the interests of justice" to follow the Sentencing Council guideline: see Section 59 of the Sentencing Act 2020. We have considered the provisions of Section 60 of the 2020 Act. The relevant parts read as follows:

> "(1)This section applies where—
> (a)a court is deciding what sentence to impose on an offender for an offence, and
> (b)offence-specific guidelines have been issued in relation to the offence.
> (2)The principal guidelines duty includes a duty to impose on the offender, in accordance with the offence-specific guidelines, a sentence which is within the offence range……….
> (4)If the offence-specific guidelines describe different seriousness categories—
> (a)the principal guidelines duty also includes a duty to decide which of the categories most resembles the offender's case in order to identify the sentencing starting point in the offence range, but
> (b)nothing in this section imposes on the court a separate duty to impose a sentence which is within the category range.
> (5)Subsection (4) does not apply if the court is of the opinion that, for the purpose of identifying the sentence within the offence range which is the appropriate starting point, none of the categories sufficiently resembles the offender's case."

It may be said that, in a case where no category sufficiently resembles the circumstances with which the court has to deal, the sentence properly will fall outside the range identified in the guideline. The proposition would be that the facts of this case were not reflected even by the highest category within the guideline. We shall return to these issues later.

20. On behalf of the offender Mr Wells (who appeared in the court below) invites us to consider the following: the possibility of some further recovery on the part of Ms Webber so that she may not be fully dependent on third party care; the offender's limited criminal history which could amount to mitigation within the guideline; the fact

that the judge was fully aware of the domestic context when he referred to the history of coercive and controlling conduct; the offender's own vulnerability and difficulties. Taking those matters into account the sentence imposed was not unduly lenient. Mr Wells accepts that the evidence established a history of violence and coercive behaviour on the part of the offender. With that in mind, some judges might have taken a starting point outside the category range but it was not unduly lenient to avoid that course.

Discussion

21. The correct formulation of what amounts to an unduly lenient sentence is still that provided by the then Lord Chief Justice in Attorney-General's Reference No 4 of 1989 [1990] 1 WLR 41.

> "A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate."

It follows that, for us to conclude that this sentence was unduly lenient, we must find that it was not reasonably appropriate for the starting point before credit for plea to be within the sentencing range identified in the guideline.

22. There are two points in the guideline at which a sentence outside the category range explicitly is contemplated. First, there is the rubric which appears in the guideline immediately above the grid setting out the various starting points and category ranges. This reads as follows:

> "For category A1 offences the extreme nature of one or more high culpability factors or the extreme impact caused by a combination of high culpability factors may attract a sentence higher than the category range"

The second limb of the rubric uses the term "extreme impact" which is a phrase relied on by the Solicitor General but he does so in the context of harm. "Impact" in the context of any offence relates to the effect on the victim. That is generally reflected by harm factors. The submission here is that the presence of all three harm factors set out in the guideline justifies a finding of "extreme impact". Yet the guideline refers to "extreme impact caused by a combination of high culpability factors". There will be cases where a combination of such factors will have an extreme impact on the victim. For instance, where a victim is subjected to an attack over a period of hours by a group of people of whom the offender is the leader and very serious injury is caused in the course of the attack by various highly dangerous weapons, those factors will have an extreme impact on the victim. Such cases are likely to be rare. In the great majority of cases a victim is unlikely to experience extreme impact from culpability factors. For instance, it is unlikely to matter to the victim that the attack was planned or that the motive was revenge. Planned or not the victim will see the impact of the offence in terms of the effect on them i.e. the harm they suffer.

23. This rubric was not included in the first iteration of the guideline which applied from 13 June 2011. It appears only in the guideline effective from 1 July 2021. So far as we are aware it has not been considered previously by this Court. It was part of the draft guideline which was issued in the consultation process which was open between April and September 2020. The response to the consultation was published in May 2021.

The published response does not refer at all to the rubric. Applying the natural and ordinary meaning of the words, the "extreme impact" to which the rubric refers must be related to a combination of culpability factors. Contrary to the submission on behalf of the Solicitor General there is no specific wording in the guideline relating to the extreme impact caused by a combination of harm factors. We respectfully wonder whether it should do so given that there is a rubric which identifies the kind of case which may attract a sentence higher than the category range. This case would seem to be a good example of a case where the combination of harm factors was extreme. The Solicitor General's use of the term is apposite. In very many cases where the injury caused is particularly grave, the victim will go on to make a reasonable recovery. It will be unusual for the combination of harm factors to be life changing to the extent that applies in this case. Here, Ms Webber suffered injuries which were life threatening. Medical intervention preserved her life. She will be dependent on others for the rest of her life and her every day activities have been affected severely. It must be a matter for the Sentencing Council as to whether they wish to provide explicit guidance in such a case which allows a judge to move above the category range. For reasons which follow, we do not find it necessary to give a purposive reading to the second limb of the rubric so as to relate it to harm factors rather than culpability factors. We doubt whether it would have been appropriate to do so.

24. The first limb of the rubric permits a sentence outside the guideline if one or more of the high culpability factors is extreme in nature. In this case the victim was "obviously vulnerable due to….. personal characteristics or circumstances". Her vulnerability was significant. It was very clearly within the knowledge of the offender given that he lived with her and he was aware of the involvement of the social worker. Had the argument been that Ms Webber's vulnerability was so extreme that it warranted a sentence higher than the category range, we consider that it would have had some force. It is one thing for an offender to attack someone who is obviously vulnerable. It is another to do so when the offender has the kind of awareness of the extent of the vulnerability which was present in this instance. However, the Solicitor General has not put the application on that basis and the offender has not had the opportunity to address any argument on the issue. Since we can reflect this feature by another route, we shall take it no further.

25. The second point at which a sentence outside the category range is contemplated is after consideration of factors increasing seriousness. The wording of the guideline is familiar since it appears in very many of the offence specific guidelines issued by the Sentencing Council. It is as follows:

> "The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range."

We agree that there were factors increasing seriousness as identified on behalf of the Solicitor General. The fact that the offence occurred in a domestic context brings into play the guideline issued in 2018, namely Overarching principles: domestic abuse. Paragraph 7 of that guideline is as follows:

> "The domestic context of the offending behaviour makes the offending more serious because it represents a violation of the trust and security that normally exists between people in an intimate or family relationship. Additionally, there may be a continuing threat to the victim's safety, and in the worst cases a threat to their life or the lives of others around them."

The violation of trust in this instance was particularly gross.

26. We are satisfied that the combination and nature of the culpability factors and the extreme nature of the harm suffered by Ms Webber required the judge to move to the top of the category range before any consideration of factors increasing seriousness. It would not have been reasonable to do otherwise. That approach would not involve any departure from the guideline. Having reached that point the judge was obliged to give proper weight to the factors increasing seriousness and any mitigating factors. In reality there were no mitigating factors of any substance. The fact that the offender had not previously been sent to custody other than for a very short time had no impact when the instant offence was as serious as this one. The offender may have called for assistance but in reality this was only at the behest of the social worker. Any problems and difficulties which may have afflicted the offender could not be said to have had any relevance to his behaviour towards Ms Webber.

27. The factors increasing seriousness were substantial. Given the nature of the relationship between the offender and Ms Webber, she was effectively defenceless in her own home. The violation of trust was acute. This was not a case of a sudden outburst of temper in an otherwise good relationship. As accepted on the offender's behalf there was a long history of violence and coercive behaviour on his part. He continued to behave in that way despite the intervention of social workers trying to act in the best interests of Ms Webber. In his submissions to us, Mr Wells said that it may be that the offender "thought that he could behave like he did". That clearly was the case. It adds substantially to the overall seriousness of the case.

28. Having considered the factors increasing seriousness we find that the only proper sentence before credit for plea was significantly outside the category range identified in the guideline. On that basis the sentence imposed by the judge in this case was outside the range of sentences which reasonably could be considered appropriate. We reach this conclusion simply by applying the guideline.

29. As we have said the Solicitor General does not argue that it would be contrary to the interests of justice to follow the guideline. It may be that he had regard to what was said in *Long and others* [2021] 1 Cr App R 19 at [83]/[84] albeit in relation to a different guideline, namely the guideline relating to unlawful act manslaughter:

> "…we note a striking feature of the submissions. When applications are made by the Attorney General for leave to refer to this court sentences which are said to be unduly lenient, it is frequently on the basis that the judge fell into error by failing to follow a relevant guideline. In this case, however, the argument advanced by the Attorney is that the sentence of Long, and therefore the sentences on Bowers and Cole, were unduly lenient because the judge erred in failing to depart from the relevant guideline.
> That is, to say the least, an unusual submission. It involves the proposition that in the circumstances of this case, a sentence within the guideline offence range was

> not within the range properly open to the judge, who was instead required to pass a sentence outside that range. We think it regrettable that, in advancing that submission, the structure and ambit of the guideline were not addressed. Nor was any sufficient explanation given why it is contended that the judge was not merely entitled to depart from the guideline but positively required to do so."

Because we are concerned with a different guideline, the same issues of structure and ambit do not necessarily arise. Cases in which injuries of the kind sustained by Ms Webber are sustained will be rare. The brutality of the attack required to inflict them is unusual. There will be cases where it is not in the interests of justice to remain within the relevant sentencing range as defined by a guideline. Were that not the case Section 59 would be redundant. There must be rare cases where (a) the interests of justice require departure from the guideline and (b) a failure to do so will lead to an unduly lenient sentence. Given the approach taken by the Solicitor General and in view of the outcome of a conventional application of the guideline, it is unnecessary for us to determine whether this is one of those cases. Had we been required to decide the issue, our preliminary view is that, irrespective of any other application of the guideline, this is one of those rare cases.

30. Given our conclusion following a conventional application of the guideline, it is not necessary for us to consider the extent to which Section 60 permits the departure from a guideline. In respect of offence specific guidelines Section 60(2) imposes a duty on a court to impose on an offender a sentence within the offence range. In the case of the guideline with which we are concerned, the offence range is 2 to 16 years. Nothing in the later sub-sections of Section 60 undermines that duty. There is nothing in Section 60 which assists our consideration of this case.

Conclusion

31. We give leave to the Solicitor General to make a reference to this court under the provisions of Section 36 of the Criminal Justice Act 1988. We find that the sentence imposed on the offender was unduly lenient for the reasons we have set out. Prior to consideration of the factors increasing seriousness a sentence at the top of the category range was the only appropriate sentence. Taking those factors into account and giving due weight to the appalling consequences which will affect Ms Webber for the rest of her life, we conclude that the appropriate custodial term before credit for plea but allowing for such little mitigation as was available was 19 years 6 months. Credit for plea (as correctly determined by the judge) will be restricted to 10%.

32. We quash the sentence imposed by the judge, namely an extended determinate sentence of 18 years with a custodial term of 14 years and an extended licence period of 4 years. We substitute an extended determinate sentence of 21 years 6 months with a custodial term of 17 years 6 months and an extended licence period of 4 years. The effect of the substituted sentence is that the offender will serve two thirds of the custodial term of 17 years 6 months before he is eligible for release. Whether he will be released at that point will be a matter for the Parole Board to decide, who will only release him if they consider it safe to do so. Whenever he is released, he will remain on licence for any remaining part of the custodial term and for a further 5 years thereafter.