NCN: [2018] EWCA (Crim) 2958

No: 201804054/A2

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Thursday, 22 November 2018

B e f o r e:

LORD JUSTICE SIMON

MRS JUSTICE CARR DBE

HIS HONOUR JUDGE PICTON

(Sitting as a Judge of the CACD)

REFERENCE BY THE ATTORNEY GENERAL UNDER

S.36 OF THE CRIMINAL JUSTICE ACT 1988

R E G I N A

v

AMADIO OSBORNE

Mr T Cray appeared on behalf of the **Attorney General**

Mr P Casey appeared on behalf of the **Offender**

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J U D G M E N T

LORD JUSTICE SIMON:

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1. The Solicitor General seeks leave to refer a sentence passed on the offender, Amadio Osborne, at Portsmouth Crown Court on 3 September 2018 under section 36 of the Criminal Justice Act 1988 as being unduly lenient. We grant leave.

2. On 10 July 2018, following a trial before His Honour Judge Melville QC and a jury, the offender, aged 32, was convicted of attempting to cause grievous bodily harm with intent.

On 2 September he was sentenced to a term of 12 years' imprisonment. He is now aged 32, having been born in September 1986.

3. The offence took place in the early hours of 14 November 2017 at the offender's flat in Fareham, Hampshire. Prior to this, the offender had searched the internet and discovered details of EP who was the victim of the crime. EP was a sex worker from Romania, aged 24, who had been in the country for approximately six months.

4. The offender contacted EP by email and phone, and there were messages between them

setting out details of the sexual acts that the offender wished her to perform and the price. They eventually agreed on unprotected vaginal sex for a price of £1,000. The offender

did not have this money and the prosecution case was that this was a planned attack.

5. EP went to the offender's flat while her cousin waited outside. When inside the flat the offender said she should go into the bedroom where she would find the money. As she did so he struck her from behind with a claw hammer. She fell on the bed and the offender aimed several more hammer blows at her head. He also punched her and pulled her hair. EP fought back and managed to get to her phone and make a call to her cousin.

She screamed down the phone that the offender was trying to kill her. This appeared to enrage him, and he managed to get her down on the bed where he put his hand over her mouth and tried to strangle her. At some stage he also tried to use a glass to strike her.

She felt further blows to her body with the hammer.

6. She managed to defend herself by clinging onto the offender and biting his finger. She begged him to stop and said she had a young son. This appeared to change his mood. He said that he did not want to fight any more and that she could leave. She was in the flat for about six minutes, her entry and departure being recorded on CCTV images recorded

on a camera outside the offender's flat.

7. When her cousin saw her outside she was bleeding from a head wound, scared and crying. Later that morning she went to hospital where the head wound was treated. Her victim impact statement said that the attack had led to problems with her vision and to continuing psychological difficulties. There were injuries to her hands, back and face, in

addition to the laceration on her head.

8. At 1.32 am the offender called the police claiming that he had been attacked with a hammer by EP. He said he had arranged to meet her and pay

for sex. When officers attended at the flat they noted that he had only a superficial wound to the back of his head. Additionally, there were signs of more extensive blood staining and significant

disturbance, which were inconsistent with his complaint. As a result, he was arrested.

9. In a prepared statement he said that there had been an argument over payment with EP,

that she had attacked him with a hammer and that he had been defending himself. EP

gave evidence at the trial; the offender did not.

10. In November 2005 he had been tried for murder and convicted of manslaughter on the grounds of diminished responsibility. He was sentenced to custody for life with a minimum term of 30 months. The facts of that previous conviction were that overnight on 21/22 May 2004 he stayed at home with a good friend, Ben Williams. They were both 17 at the time. They spent the evening drinking. The next day the offender did not go to work. He was in communication with a number of other friends who thought he sounded increasingly abnormal and indeed suicidal. When his mother got home from work she found him unconscious, apparently through drink and drugs. The body of Ben Williams lay in a corner of his bedroom. Ben Williams had been bludgeoned to death using a pool cue wielded with high velocity. Initial observations indicated that the attack was a surprise attack; and there was no evidence that the victim had protected or defended himself. The forensic examination indicated two sites of assault, very close to each other, at which the victim's head was smashed into a cupboard door and a bedroom door whilst he was in a kneeling or lying position. The victim had died of multiple blunt force impacts to his head and face causing fractures and haemorrhage. The many impacts may have been from kicks and punches as well as the pool cue. The offender admitted the killing and offered a plea to manslaughter on the grounds of diminished responsibility

which was not accepted.

11. The defence at trial also accepted that the offender had been involved in a previous violent incident which involved the use of a weapon. This had not led to a conviction as

it was not reported to the police before his arrest for murder in May 2004. The victim of this earlier incident was SK who was a niece of the offender. At the relevant time, Christmas 2002, the offender was 16 and she was 14. In the early hours of Christmas Day, whilst asleep in his house, SK woke to find the offender attacking her, first with his hands around her throat, by punching her to the head, by striking her with a lamp stand and then punching her again. The assault was interrupted by her grandmother who

arrived on the scene. SK suffered bruises and cuts but did not go to the police since the

offender was a member of her family.

12. There was a pre-sentence report dated 28 August 2018. The author concluded that the offender posed a high risk of serious harm to the public. The nature of the risk was excessive physical violence through the use of weapons. This also extended to violent offending in the light of the offender's expressed sexual interest in BDSM (bondage,

domination, submission and masochism), and the degree of violence used on the victim.

13. A psychological report on the offender had been prepared by a consultant clinical psychologist Dr Arthur Anderson on 3 June 2018 in advance of the trial. It set out the relevant medical history and progress in custody. That assessment as to risk and progress plainly has to be seen in the light of the subsequent conviction of the offender at trial.

There was also a victim impact statement from EP before the sentencing judge dated 12 January 2018, which this court has seen.

14. Mr Cray invited attention to the following aggravating factors. First, the use of a hammer as a weapon. Second, an intention to cause greater harm than was actually caused.

Third, deliberate targeting of a victim who was vulnerable by reason of her occupation. Fourth, the offence committed when the offender had been released on licence from a life

sentence only six months before.

15. The judge found that the offending, albeit an attempt, fell within Category 1 of the Sentencing Council Definitive Guideline for an offence of causing grievous bodily harm with intent, contrary to section 18 of the Offences Against the Person Act 1864. It was an offence of greater harm because the victim was a sex worker summoned to the offender's home and therefore vulnerable due to personal circumstances. It was an offence of higher culpability due to the use of a weapon (a hammer) with which the offender had armed himself in advance. In addition, he was on licence at the time. A Category 1 offence has a starting point of 12 years which was the sentence imposed.

16. The judge identified that the offence of which he had been convicted was a specified offence and he therefore had to consider whether he was a dangerous offender and whether in such circumstances he should receive a life sentence or an extended sentence of imprisonment. He noted the conviction for manslaughter committed in May 2004, the attack on his niece in December 2002 and that the unprovoked and unexplained attack on EP had been committed only six months after his release from prison, after serving the life sentence for manslaughter. The judge made clear that in his view the offender was dangerous. He considered whether in the circumstances the offence merited a life

sentence and concluded that it did not.

17. He then indicated that he had been minded to impose an extended sentence of imprisonment but had been persuaded by Mr Casey, that since the offender was already subject to a life sentence, any sentence imposed would have to be considered very

carefully by the Parole Board before considering him for release.

18. Mr Cray for the Solicitor General submitted first that the decision to impose a lesser sentence for the offence because his release from the life sentence would in any event be determined by the Parole Board was contrary to principle. Second, in consequence, the determinate sentence of 12 years was an unduly lenient sentence. The appropriate sentence was either a term of life imprisonment or an extended sentence. He drew our attention to three aspects of the decision in Attorney General's Reference No 27 of 2013 (Burinskas and others) [2014] 1 WLR 4209. First, at paragraphs 38 and 39 the importance of the observation of Hughes LJ (as he then was) in R v Round [2009] 2 Cr.App.R (S) 292, at paragraph 44:

"... the general principle that early release, licence and their various ramifications should be left out of account upon sentencing is ... a matter of principle of some importance."

19. Second, at paragraphs 42 and 43, the court's reference to the staged approach to sentencing dangerous offenders, the primary focus being on dangerousness and the

protection of the public from offenders who are found to be dangerous.

20. Third, at paragraph 22, there is the court's finding that when considering

section 225(2)(b) of the Criminal Justice Act 2003, whether the seriousness of the offence or an offence and one or more offences associated with it was such as to justify the imposition of a life sentence, the sentencing judge was not limited to a narrow consideration of the seriousness of the offence and any associated offences in deciding whether the threshold had been reached. The sentencing judge must also consider the offender's previous convictions in accordance with section 143(2) of the Criminal Justice Act, the level of danger to the public posed by the offender and whether there is a reliable estimate of the length of time he will remain a danger, as well as the availability

of alternative sentences.

21. Mr Cray submitted that these three aspects of the decision in Burinskas illustrated the extent of the error that the sentencing judge made in imposing a determinate sentence in this case. First, the sentencing judge's decision not to sentence this offender as a dangerous offender under either section 225 (to a life sentence) or section 226A (to an extended sentence) was based on the false premise that it was legitimate to take into account the ability of the Parole Board to determine his release from the existing life sentence. It was clear from section 225 of the Criminal Justice Act that if a court finds that an offender is a dangerous offender, it must consider whether the seriousness of the offence is such as to justify the imposition of a life sentence. If the court so finds, it must impose a life sentence - see section 225(2). If the court concludes that a life sentence is not justified, the court must consider the issues that arise under section 226A in relation to an extended sentence. This involves considering whether either condition A or condition B applied. In the present case both conditions applied. Condition A because he had previously been convicted of manslaughter, which is an offence listed in schedule 15B, and condition B because the specified custodial term would be more than four years.

22. Secondly, Mr Cray submitted that the true seriousness of the index offence was not reflected in the sentence. Making a favourable adjustment in favour of someone whom the judge decided was a dangerous offender by imposing a lesser sentence than the seriousness of the offence merited on the basis that he was already subject to a life sentence was antithetical to section 143(2) which provides, subject to qualifications which do not apply here, that previous convictions must be treated as an aggravating factor. The offender's previous conviction for manslaughter should have aggravated the

seriousness of this offence and not diminished it.

23. Given that this offence was committed only six months after the offender's release on licence, and given the conclusion in the pre-sentence report as to his dangerousness, Mr Cray submitted that the risk posed by this offender to the public was extremely high and would remain so for an indefinite period. There were therefore grounds to suggest that a life

sentence should have been imposed, notwithstanding that the imposition of a

life sentence is an exceptional course.

24. Mr Cray submitted that this argument derived further support from the decision of the

Supreme Court in R v Smith (Nicholas) [2011] 1 WLR 1795 at paragraphs 18 and 19. The general issue in that case was whether an indeterminate sentence under Chapter 5 of the Criminal Justice Act 2003 could or should have been imposed on a defendant who was already serving a sentence of life imprisonment or whether a determinate sentence

should have been imposed.

25. At paragraph 18, Lord Phillips of Worth Matravers giving the judgment of the court set out one of the arguments raised by the appellant: that an indeterminate sentence for public protection with a minimum term of six years served no purpose since the procedural position would be exactly the same as if the defendant had been given a determinate sentence of 12 years' imprisonment, he would have to serve a minimum of six years and therefore would have to satisfy the Parole Board that he did not pose a risk to the public before he was released. The court expressed some sympathy for that submission but rejected it because a determinate sentence "would not contain within its terms the finding that the defendant does in fact satisfy the dangerousness provisions" at the time of the more recent events. Given therefore that the Parole Board had released the appellant on licence, having been persuaded that he did not pose a risk of serious harm to the public at the point of release, the sentencing judge could not be criticised for imposing a sentence that demonstrated that the contrary was the case.

26. Finally, Mr Cray submitted that, even if the court were to find that the threshold for a life sentence under section 225 had not been reached, there was no justification for passing a determinate sentence rather than the extended sentence that the sentencing judge had

initially in mind.

27. Mr Casey for the offender accepted that this was an offence of high culpability, but submitted that "on its own terms the offence did not necessarily satisfy the test of greater harm." It was not a sustained attack and the injuries were relatively minor. If that were right it was a Category 2 case within the Guidelines, with a starting point of six years' custody and a range of five to nine years and not a Category 1 case with a starting point of 12 years. Nevertheless, and realistically, he accepted that in view of the forensic history the sentence of 12 years was not manifestly excessive.

28. He drew the court's attention to the fact that the offender had spent most of his adult life in custody, for 12 years between May 2005 and May 2017 and since November 2017. He informed the court that on his release from the life sentence in May 2017 he was regarded as something of a model prisoner, and someone who was unlikely to pose any future risk to the public that could not be managed under licence condition. That assessment, Mr Casey acknowledged, was plainly wrong. He did not argue that the judge was not entitled to find that the offender was dangerous. However he submitted that a 12 year determinate sentence was both appropriate punishment for the offence and provided for the future protection of the public. It provided future protection because he was already subject to a life sentence and had been recalled to prison after his arrest for the present offence in November 2017. He submitted that the judge was entitled to the view that a life sentence was not appropriate and that an extended sentence where the licence extension period was limited by section 226A(8)(a) to five years would be redundant. This court's powers, he argued, under section 36 of the Criminal Justice Act 1988 were confined to cases of gross error and was not such as to be exercised so as to provide the

prosecution with a general right of appeal against sentence.

29. Mr Casey's essential point was that the public were no more at risk by the passing of a determinate sentence of 12 years than they would be by an extended sentence. Whatever sentence was passed it is difficult to imagine that the Parole Board would not appreciate the gravity of the offence if they were to read the judge's sentencing remarks, as they would. He submitted that the passage in the judgment in Smith (Nicholas) relied on by Mr Cray

did not ultimately assist since its effect was that the decision on whether or not to impose an IPP sentence was a matter for the discretion of the judge. The argument here was whether a life sentence or an extended sentence would achieve any practical benefit. He submitted that they would not. In any event this court should give weight to the judge's decision not to pass an extended sentence. In summary he submitted it was a

lawful disposition and that it was not lenient, let alone unduly lenient.

30. We would start by observing that, albeit the offence constituted an attempt, this was an

offence whose seriousness was to be measured by Category 1 of the sentencing

guidelines. The premeditated use of a hammer with an intent to cause more serious harm than the harm than was in fact inflicted made it an offence of high culpability. It was an offence of greater harm because the victim, a young woman summoned after midnight to the offender's home, was particularly vulnerable, albeit she was able to some extent to defend herself from the unprovoked hammer attack. It is also plain that the judge was entitled to find that the offender was dangerous within the meaning of Part 12 Chapter 5 of the Criminal Justice Act. He had committed an offence of violence both in effect and intent six months after his release from prison on licence from a life sentence for manslaughter, having served a term of 12 years. The manslaughter had itself been preceded by another violent crime, committed again with a weapon, against his niece. The pre-sentence report concluded he was dangerous, as had the judge who had heard the trial. The risk he posed at the date of sentence was high and would remain so for the foreseeable future. There was a plain and serious risk that he would commit further

specified offences and a significant risk that he would cause serious harm thereby.

31. The life sentence passed in 2005 would have been directly relevant if section 224A applied whether or not there had been a finding of dangerousness - see Burinskas at paragraph 8. Under section 224A where a

specified offence is committed during the currency of a life sentence then, subject to the provisions of section 224A(2), a life sentence must be imposed if the offender were not eligible for release during the first five years of the life sentence. In the present case the life sentence had a minimum term of 30 months and the offender was therefore eligible for release during the first five

years.

32. There had nevertheless been a finding of dangerousness which necessarily informed the sentencing exercise. Having reached a conclusion that an offender is dangerous the court is required to go through the stage process described in Burinskas at paragraph 43. So far as relevant here, this included considering whether a life sentence was justified under section 225 and, if so, a life sentence should be passed. If a life sentence is not justified the court should consider an extended sentence under section 226A. Such a sentence will usually but not always be appropriate. Since the extended sentence is discretionary, in the words of the Lord Chief Justice in Burinskas at paragraph 25 "The option of a

determinate sentence should not be forgotten".

33. In our view, serious as this offence was, it was not such as to justify a sentence of life imprisonment. Although he intended, he did not in fact cause really serious harm and he desisted when the victim fought back. However, it fully justified an extended sentence and this is the sentence that should have been imposed. The judge seems to have been beguiled into an analysis of how the Parole Board would approach the offender's release. That was bound to be uncertain even if there were good reasons to suppose it would be marked by extreme caution in the circumstances. Furthermore, it was contrary to the principle that potential release dates should be left out of account in sentencing. It also resulted in a sentence which would appear to be the same as if he had not been found to be dangerous without any real justification. He was not, for example, a young man for whom a lengthy determinate sentence would provide sufficient protection for the public. The determinate term of 12 years did not provide sufficient protection for the public from

this offender.

34. We would add that the relevant test for this court is not whether the sentence resulted from gross error but whether it was an unduly lenient sentence. In our view the sentence

was unduly lenient.

35. Accordingly, we quash the sentence of 12 years' imprisonment and substitute an extended sentence of 17 years: a custodial term of 12 years and an extension period of five years’

licence.