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No. 202101637 A1

IN THE COURT OF APPEAL
CRIMINAL DIVISION

[2021] EWCA Crim 1543

Royal Courts of Justice

Friday, 8 October 2021

Before:

LORD JUSTICE EDIS

MR JUSTICE TURNER

MRS JUSTICE COCKERILL

REGINA

V

STEVEN MILNER

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5 New Street Square, London, EC4A 3BF

Tel: 020 7831 5627 Fax: 020 7831 7737

CACD.ACO@opus2.digital

MR R. CANNING appeared on behalf of the Appellant.

MR P. JARVIS appeared on behalf of the Respondent.

JUDGMENT

MR JUSTICE TURNER:

1

On 4 May 2021 in the Crown Court at York the appellant, then aged 51, pleaded guilty to an offence of robbery, in respect of which he was sentenced to four years and nine months' imprisonment, and a fraud, in respect of which he was sentenced to four months' imprisonment to be served concurrently, amounting to a total of four years and nine months. He appeals against sentence by leave of the single judge.

2

The facts are these. On 4 April 2021 Malcolm Dove, aged 70, was walking across a railway bridge in the Scarborough area when he noticed the appellant behind him. The appellant shouted "You're a paedophile. I want you." Mr Duff told the appellant to go away, but the appellant continued to stalk his victim before punching him in the face in a completely unprovoked attack, causing him to fall backwards onto the road. The appellant then straddled Mr Dove and rifled through his pockets, using enough force to rip one of them. The appellant proceeded to steal a mobile phone, a wallet containing £50 in cash, a bus pass, as well as other items, including cigarettes and tobacco.

3

Mr Dove went to the local police station to report the robbery and officers duly attended the appellant's house where the mobile phone and wallet, now emptied of cash, were recovered. The appellant had used the complainant's bankcard to buy over £40 worth of tobacco and vodka, thus giving rise to the count alleging fraud.

4

The appellant was interviewed and initially denied the offences, claiming he had not been in the vicinity of the scene of the crime and that he believed that the bankcard belonged to a friend and he had permission to use it.

5

In his victim impact statement Mr Dove said, unsurprisingly, that as a result of the attack he had become anxious and nervous about venturing out alone. He had also lost photographs of considerable personal and sentimental value from his mobile phone.

6

The appellant's criminal record is abysmal. It comprises no fewer than 99 offences, giving rise to 39 court appearances accumulated over the last 40 years. Many of these relate to offences of violence and dishonesty.

7

The judge sought to apply the robbery sentencing guideline to the circumstances of the offence and purported to conclude that the wholly unmerited accusation that Mr Dove was a paedophile allowed him to conclude that the offence was motivated by or demonstrated hostility based on the sexual

orientation of the victim, thereby justifying a finding that the appellant's culpability fell within the highest range in the guideline. It was the correctness or otherwise of this approach which lay at the heart of the single judge's decision to grant leave.

8

In the case of *R v B* [2013] EWCA Crim 291 this court rejected the suggestion that the offender's accusation that his victim was a paedophile prior to assaulting him involved hostility based on the sexual orientation of the victim. It endorsed the view set out in para.7 of the MoJ Circular 2010/05 that the definition of "hatred on the grounds of sexual orientation" does not extend to "orientation based on, for example, a preference for particular sex acts or practices. It therefore covers only groups of people who are gay, lesbian, bisexual or heterosexual." Furthermore, in *R v Pinchion* [2013] EWCA Crim 242, which was decided just six days later, a differently constituted court concluded at para.12:

"We do not consider that presumed paedophilia comes within the guideline's aggravating factor of an offence motivated by hostility based on sexual orientation whether actual or presumed."

9

In addition, we have no difficulty recognising the inherent absurdity of treating paedophilia as if it were a protected characteristic. It follows that we accept the judge was mistaken in categorising paedophilia as falling within the concept of "sexual orientation" for the purposes of the application of the guideline in the circumstances of this case. Indeed, the respondent does not seek to argue the contrary on this appeal.

10

Nevertheless, our analysis does not stop there. Where, as in this case, the offender deploys the term "paedophile" as a term of abuse of his intended victim before physically assaulting him, it is liable to cause significant additional apprehension, fear and distress. This factor can properly be taken into account in sentencing. However, in the absence of any factor falling within category A culpability, the offending ought properly to have been placed in category B.

11

Nevertheless, we reject the appellant's further contention that the judge fell into error in categorising this case as falling within category 2 harm. The impact on Mr Dove was not minimal, as the contents of his victim impact statement revealed. He was fortunate to avoid physical injury, but understandable anxiety and nervousness about going out alone thereafter cannot be relegated to a minimal psychological reaction to the undoubted trauma of what he had been through.

12

The starting point for category 2B harm is four years with a range of between three and seven years. The guideline however goes on to provide:

"The table on the next page 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 sentence arrived at so far. In particular, relevant recent convictions are likely to result in an upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range."

13

In this case the appellant's appalling criminal record comprised a long catalogue of violent and acquisitive offending, which included a relatively recent conviction for robbery for which he was sentenced to a term of three years' imprisonment. This factor called for a strongly deterrent sentence. It was further aggravated, regardless of the fact that it did not fall within the parameters of the term "sexual orientation" in the guideline, by the intimidating accusation that Mr Dove was a paedophile. The judge correctly observed that the offence had been aggravated by the appellant's previous convictions, the age and vulnerability of Mr Dove, and the fact that the appellant had restrained him by straddling him. It had been a prolonged robbery involving considerable force.

14

Having placed the offending within category 2A, the judge concluded that it would have been appropriate after a trial to pass a sentence of seven years which fell within that category range. We have concluded that the offending fell within category 2B, but, nevertheless, consider that a sentence of seven years after trial would have been entirely reasonable. When the accusation of paedophilia is put in its proper context, it remains in our view on the facts of this case a seriously aggravating feature for the reasons we have given. The combination of aggravating features justified moving out of the category range. We therefore reach the same destination as did the judge, albeit by a different route.

15

No complaint can be made of the judge's reduction of 25 per cent to reflect the appellant's guilty plea and his further discount of six months to take into account conditions in custody during the pandemic. It follows that we reject the suggestion that the sentence of four years and nine months was manifestly excessive. This appeal is dismissed.
