Regina v Monika Friedrich

No: 2010/2844/A2

Court of Appeal Criminal Division

14 June 2010

[2010] EWCA Crim 1469

2010 WL 2569120

Before: Mr Justice Holman Mrs Justice Rafferty DBE

Monday, 14 June 2010

Representation

Mr Harry Bentley appeared on behalf of the Applicant.

Judgment

Mrs Justice Rafferty:

1 On 12th April 2010 upon rearraignment in the Crown Court sitting at Inner London, this 27-year-old applicant pleaded guilty to assault occasioning actual bodily harm and on 20th May was sentenced to 16 months' imprisonment. The Registrar has referred to this court her application for leave to appeal against sentence and we give leave. Her co-accused, Artur Dawidowski pleaded not guilty to assault occasioning actual bodily harm, failed to surrender to his bail for trial and a bench warrant was issued. He has not resurfaced.

2 On 22nd June 2008 the complainant, Mr Krzywdziak, went to a public house in Neasden popular with the Polish community. With a friend he enjoyed himself drinking during the evening but the time came when turbulence led to an attack by the appellant and Dawidowski. It would appear to have arisen from, at its lowest, a perception by the appellant that the complainant had in an unwelcome sexual gesture touched her bottom whilst she was dancing. She and Dawidowski had struck the complainant across his face and across his back. A struggle followed and during it the appellant lost a tooth.

3 The complainant quit the public house. He was followed outside by the appellant and by Dawidowski and outside their attack upon him continued. Quite which of the two did what it is not possible to discern, in part at least by the absence from the forensic stage of Dawidowski. But it is not in issue that the two of them knocked him to the ground and, once down, he was kicked repeatedly. As a consequence he endured swelling, bruising and tenderness to his face and head, a bleeding nose, bruising to his back and to his shoulders and a deep one centimetre by one centimetre cut to the upper and to the lower lips. He was to say that the number of sutures required was 17.

4 Arrested and interviewed the appellant repeated her view that the complainant had touched her bottom, that she remonstrated with him and pushed him away and he had then pushed her back. She had punched him, he had punched her, she had lost her tooth and as a consequence once outside she kicked him.

5 A basis of plea was submitted which echoed the account to which we have already referred. It enlarged upon it to a limited extent, explaining that the appellant had gone outside the public house, very upset about losing her tooth, which she had realised was a front tooth. She was also upset about having been, as she saw it, insulted. She accepts that she assaulted the complainant outside

the public house by using unreasonable force. Although, not for the first time, this court remarks that part of the content of the basis of plea was not properly a basis but formed mitigation, for completeness we mention it: the basis of plea included her expression of extreme remorse for what she had done.

6 Born on 30th May 1983 she was of good character. A pre-sentence report recommended a community disposition. The sentencing judge, reminding herself of the appellant's plea of guilty, pointed out that it had come on the morning of a planned trial by jury. The injuries which the judge rehearsed fell in her opinion just short of those which would have constituted the offence of grievous bodily harm. The appellant had accepted repeated kickings and, thought the judge, the use of a weapon would have been no worse than repeated kicks of a man on the ground with a shod foot. The attack was not premeditated and the injuries did not come within the wording of the work of the Sentencing Guidelines Council. The judge fixed upon an appropriate starting point of 18 months. A woman of good character, she was entitled to 10 per cent credit for her late plea. There was an element of non-legal provocation because of her belief that she had been inappropriately touched and by her having lost a front tooth. The judge took account of the contents of the pre-sentence report, of the appellant's good character, of the serious effect the delay had had upon her and the fact that (conceived after the offence) by sentence she had a young child. She was however dangerous, thought the judge, because of the nature of the injuries she inflicted and the prolonged attack as she took out her fury. Quite how the author of the pre-sentence report reached the view that the appellant presented a low risk of re-offending puzzled the judge. The appellant was clearly wholly unpredictable and had inflicted an horrific injury to the complainant's face.

7 In Grounds of Appeal, composed and orally developed by Mr Harry Bentley, complaint is that the sentence of 16 months was manifestly excessive as giving insufficient weight to mitigation — that is her plea, good character, the spontaneous nature of the attack, the non-legal provocation, the injury she had sustained, her four-month-old child, her remorse — and that there was no evidence that she was dangerous.

8 Developing his submissions, Mr Bentley has today taken us briefly to the work of the Sentencing Guidelines Council. We need not repeat the reference to the charging standards of the Crown Prosecution Service, save to say that as he correctly remarks the injuries sustained appropriately position the offence as one of assault occasioning actual bodily harm. Of more concern to Mr Bentley was that area of the work of the Council headed “Assault occasioning actual bodily harm” in which starting points and sentencing ranges are identified. It is of course true, as we have already rehearsed and as was accepted in the court below, that because no one suggested these events were premeditated, there is no category within which, with precision, these facts can fit.

9 The contention advanced today is that these facts align less imprecisely within the second of the categories put in grid 4 in the work of the Council, beginning from the top. They read: “Premeditated assault resulting in relatively serious injury. Starting point 12 months. Range 36 weeks to two years”, as opposed to finding their least unnatural position within the top category: “Premeditated assault either resulting in injuries just falling short of grievous bodily harm or involving the use of a weapon”, into which plainly the learned judge felt they fitted least unattractively, “Starting point 30 months custody. Range two to four years.”

10 Sensibly, Mr Bentley concedes that this was a very difficult sentencing exercise for the learned judge. Equally sensibly he concedes that kicks with a shod foot to the head or face are by definition more serious than the same kicks to the leg or the torso.

11 The use of the shod foot as a weapon clearly struck the learned sentencing judge as a very serious matter and in our judgment rightly so. That said, this was a young woman of good character who, on the night, perceived herself as having endured an insult and then, arguably more importantly, in a tussle arising from turbulence, having lost a front tooth. We remind ourselves that the delay from offence in June 2008 until disposition in late May 2010 is not suggested as being in any way provoked by the behaviour of the appellant.

12 That said, we turn to the loss of liberty imposed. Lacking any distinct guidance by the Sentencing Guidelines Council, the learned judge followed a path of reasoning which is not in our judgment

impugnable. The issue therefore for this court is the simple one of whether on all the circumstances before the court a loss of liberty of 16 months was manifestly excessive. We are just persuaded by Mr Bentley that it was. Events in that public house must have proceeded at a pace and at the time the appellant quit to follow the complainant outside we accept that she would have been both distressed and in pain and aware that she had lost a tooth. None of that justifies her behaviour. It goes some way to explain it.

13 We think that the interests of justice can be met on this occasion by a reduced loss of liberty. We quash the term of 16 months and for it we substitute a term of 12 months. To that limited extent this appeal succeeds.

14 The court is indebted to Mr Bentley not only for the clarity of his written work but also for the economy and the focus with which he has today elaborated upon those submissions.

Mr Justice Holman:

15 Thank you very much. Mr Bentley I would like to associate myself with what my colleague has just said and I would also particularly like to thank the interpreter for your help and assistance today.