

NCN: [2019] EWCA (Crim) 2471
No: 201805184 A2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 24 January 2019

B e f o r e:

LORD JUSTICE SIMON

MRS JUSTICE McGOWAN DBE

HIS HONOUR JUDGE BURBIDGE QC

(Sitting as a Judge of the CACD)

REFERENCE BY THE ATTORNEY GENERAL UNDER S.36 CJA 1988

R E G I N A

v

MICHAEL JOHN BRIGHT

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Ms C Pattison appeared on behalf of the **Solicitor General**
Mr H Ahuja appeared on behalf of the **Offender**

J U D G M E N T

LORD JUSTICE SIMON:

1. The Solicitor General applies under section 36 of the Criminal Justice Act 1988 for leave to refer a sentence passed in the Crown Court at Taunton on 21st November 2018 as being unduly lenient. We grant leave.
2. The offender is Michael Bright, now aged 27. On 10th August, at a plea and trial preparation hearing, he pleaded guilty to an offence of robbery, contrary to section 8(1) of the Theft Act 1988. Sentencing was adjourned for a pre-sentence report, and the case was listed for sentence on 26th September. On that day, the facts were opened in full and the judge, His Honour Judge Ticehurst, ordered a psychiatric report to be prepared.
3. On 21st November 2018 the judge sentenced the offender to a term of two years' imprisonment, suspended for two years, with a rehabilitation activity requirement of 30 days and a two-year supervision requirement. He was also ordered to pay £170 compensation; and a restraining order was imposed prohibiting him from going within 100 yards of the Co-operative Store in Dulverton (the scene of the robbery) until further order. A victim surcharge of £140 was applied; and a forfeiture and destruction order was made in respect of a silver-coloured plastic knife.
4. During the evening of 8th July 2018, Eva Chalker was working at till number 1 in the Co-operative Store in Dulverton. At about 22:45 the offender entered the store. He was wearing a bandanna that covered part of his face. He approached Ms Chalker and said, "Give me all the money. I'm sorry I'm a cunt, I'm not trying to scare you." He was holding a knife to the front of his body. Ms Chalker described the knife as a short silver

kitchen knife. She thought the offender was joking until she saw the knife.

5. Rachel White, a team leader, overheard the demands and approached the till. She immediately recognised the offender and saw the knife. She described the knife as dark in colour with a silver blade, about 7 cms in length, with a curved end; it looked sharp. She activated the panic alarm to alert the police.
6. Ms White told Ms Chalker to hand over the money. The offender asked for more money, demanding other tills be checked. The offender said to Ms White, "You know who I am, don't you? I know I'm a cunt, I'm know I'm going to mess up my life doing this." Ms White questioned why he was robbing the store, to which he replied, "I'm mental and I'm a cunt".
7. He then asked for a packet of Lambert and Butler cigarettes, and Ms White said to him, "You've done enough, and got enough to get yourself into trouble". He offered to give his address, but she declined, remarking that the police would have it. She stated that when the offender spoke he did not shout, he spoke quite calmly, was not slurring his speech and did not seem drunk. Ms White thought that he both looked agitated and seemed quite nervous. She would have tried to talk to him more. However, because he was a holding a knife, she did not want to risk agitating him. He then left the store.
8. She recognised the offender from the area. He had previously stolen items from the store, causing damage in the process. It was as a result of this previous incident that he had been banned from entering the store.

9. The police arrived and spoke to Ms White. CCTV footage was seized.
10. At 23:28 police officers went to the offender's home. The door was open, but he was not there. They saw Facebook messages on an open computer screen. One of the messages read, "I'm fucked anyway. Robbed £150." Police were still there when he returned home. When informed why the police were there, he said he had just returned from his girlfriend's where he had been all night. He was arrested on suspicion of robbery. He then grabbed a knife and locked himself in the bathroom, threatening to kill himself. He eventually came out and was taken into police custody.
11. His home was searched. A quantity of cash, a sealed packet of Lambert and Butler cigarettes and a silver metallic coloured plastic knife were all recovered from a jacket matching the description of that worn by the robber and captured on CCTV at the store. It is not known whether the knife recovered was the knife used during the robbery, although certain assumptions were made in due course.
12. When interviewed he said he could not remember the offence as he had been drinking alcohol (approximately 20 cans of lager) and had taken prescribed medication (anti-psychotic drugs) albeit more than he should have done. He refused to watch the CCTV footage, but said that if the CCTV showed it was him then it probably was. He was charged with robbery and possession of an offensive weapon - the knife - and remanded in custody.
13. It appears that no victim statement was taken. However, the witness statement made by

Ms Chalker on 8th July 2018 makes clear that she felt panicked and scared during the incident, and still felt shaken up when providing her witness statement to the police.

14. Ms White stated in her witness statement dated 9th July that, looking back, she thinks she felt quite calm during this incident as she did not think the offender would hurt them if they did what he said and gave them the money. She said that Ms Chalker looked terrified during the incident, burst into tears when he left, and was distraught and upset.

15. The offender had six previous convictions for eleven offences between 22nd March 2011, when aged 19, and 25th September 2017, when aged 25. He had received a range of sentences from a fine to a suspended sentence order. The following three convictions are material.

16. First, on 29th April 2014, when aged 22, for possession of a bladed article in a public place, contrary to section 139(1) of the Criminal Justice Act 1988, an offence committed on 14th April 201. He was sentenced to a community order with requirements. The order was subsequently varied, with the unpaid work requirement being revoked.

17. Second, on 8th December 2015, when he was 23, for a further offence of possession of a bladed article in a public place, committed on 17th November 2015 while on bail. He was sentenced to a term of twelve weeks' imprisonment suspended for twelve months, with a rehabilitation activity requirement. Mr Ahuja, who appears today on behalf of the offender, informs this Court that he had told the sentencing court that the articles were in the possession of the offender for the purpose of self-harming.

18. Third, on 25th September 2017, when aged 25, for theft, shoplifting and criminal damage, committed on 18th June 2017, he was sentenced to a community order, with a rehabilitation activity requirement and a compensation order. That community order expired on 26th September 2018 - two-and-a-half months after the robbery. The offender was therefore subject to the community order when he committed the offence.

19. By the date of sentence there was a considerable amount of material that identified some of the offender's difficulties, although none of these excused or purported to excuse his crime.

20. First, there was a pre-sentence report, dated 20th September. That report recorded that the offender accepted responsibility for the offence. He was feeling desperate and wanted to get himself sectioned as he felt his mental health had deteriorated considerably over the last eight months. However, the writer of the report noted that there seemed to be a lack of engagement from the offender with agencies previously involved in trying to assist him. He had been self-medicating with diazepam and abusing alcohol. During the interview he had repeatedly expressed remorse. However, as the writer noted, this was the second incident during which staff at the Co-op store had been victimised by the offender and he had expressed remorse in relation to the previous incident. That incident had led to him being banned from the store.

21. The offender had described his mental health difficulties, which had begun six years before. He described feeling "desperate" at the time of the offence, as he was "losing his mind". In the light of the index offence, there was a potential to cause serious harm, but

he was unlikely to do so provided his mental health and alcohol use were addressed and he engaged with the appropriate community agencies. The proposed sentence was essentially the sentence that the judge was to pass - a 24-month community order with requirements.

22. Second, there was a much earlier letter, dated 20th December 2007, from Mary Chaloner, an educational psychologist in the Somerset Children and Young People's Directorate. This described his educational and learning difficulties as a child.

23. Third, there was an undated letter from the offender written by his mother on his behalf, in which he expressed regret for his actions on the night of the crime and said that he found it hard to admit that he needed help with his mental illness and addiction problems. He expressed a willingness to accept support and rehabilitation, and expressed the fear that he would lose his home if he received a custodial sentence of more than six months.

24. Fourth, there was a letter dated 16th August 2018 from a general practitioner, Dr Boddington, at the offender's health practice, Exmoor Medical Centre. This described a diagnosis of emotional unstable personality disorder, paranoid psychosis and depressive disorder. She described multiple instances of self-harm, usually involving alcohol and overdosing on medication. He had been sectioned in January 2018.

25. Finally, there was a psychiatric report, prepared by Dr Michelle Butterworth, a consultant forensic psychiatrist. The report is undated, but must have been drafted after 19th October, when she had interviewed the offender. She had seen the other reports and the

letters to which we have referred. In her report she referred to the offender's past alcohol dependency, his harmful abuse of alcohol and drug use, his poor memory, agoraphobia, social anxiety disorder and emotionally unstable personality disorder. However, she noted there was little evidence of on-going psychosis. The risks he posed would depend on his abstinence from alcohol and cocaine use. In Dr Butterworth's opinion, the offender's arrest and detention "might prove to be the 'rock bottom' often referred to by those that have later gone on to maintain sobriety and stability".

26. In passing sentence the judge noted that his walking into the store to commit a robbery with what appeared to the staff to have been a knife would have been terrifying for them.

The judge continued:

But what is particularly bizarre is the fact that you apologised throughout the incident, you asked the shopkeeper if she wanted your address ... It was almost as if you wanted to be caught.

27. The judge referred to the offender's medical and psychological difficulties and his failure to take his medication. He noted that he had a previous conviction for a bladed article, but that he was otherwise likely convicted, and this was by far his most serious offence.

28. He sentenced the offender by reference to the Sentencing Council Definitive Guidelines for street and less sophisticated robbery. The offending fell into Category A culpability because of the use of a bladed article to threaten violence; it fell into Category 3 harm because of the minimal physical or psychological harm caused to the victims and minimal detrimental effect on the business. The judge identified Category 3A as having a starting point of four years' custody, and a category range of three to six years. He

placed the offending at the lower end of the Category 3A range in view of the unusual circumstances of the crime. He then reduced the term from three years to one of two years to reflect full credit for the plea of guilty, which he suspended having regard to all the material that he had seen in relation to the offender. In doing so, the judge acknowledged that he was imposing a sentence that fell outside the guideline.

29. Ms Pattison, who appears for the Solicitor General, submitted that the judge erred in his sentencing approach and that the errors led to a sentence that was unduly lenient. Although she accepted that the offending fell within Category 3A of the relevant guidelines, she argued that there was no proper basis for reducing the starting point from three to two years and then suspending the sentence.

30. The offender had committed the robbery when he was subject to a community order imposed for theft from the same store; the offence was committed while he was under the influence of alcohol or drugs, or alcohol and prescribed medication; the offender had attempted to conceal his identity by wearing a bandanna; and the robbery was committed at night.

31. These were all specified features identified in the guidelines as tending to aggravate the seriousness of the offence.

32. Furthermore, the offender was not of good character. He had previous convictions - materially for possessing bladed articles.

33. For the offender, Mr Ahuja submitted that there were good reasons why the judge placed this offending at the lower end of the range of Category 3A. It was in fact a plastic knife, although it was perceived as a real knife; and therefore, he submitted, it potentially fell within Category 3B. In any event there were unusual factors: the calmness of the offender during the commission of the crime; his apologetic manner at the time; the offering to those he was robbing of his address; and the fact that, when recognised, he did not try to hide his identity. The judge felt, and was entitled to feel, that the offender wanted to be caught; and this was consistent with what he told the writer of the pre-sentence report and Dr Butterworth.

34. The judge had correctly, Mr Ahuja submitted, identified the personal circumstances bearing on the sentence: the offender's alcohol addiction; the severe effect of drugs on him; the suicidal ideation leading to admission to hospital. He pointed out that while in custody for a period of four-and-a-half months or so he remained clear of drugs and was showing the right motivation for improving his life, cooperating with the drugs team and attending meetings of Alcohol Anonymous. In the view of the writer of the pre-sentence report, all this suggested a realistic prospect of rehabilitation if he were given the chance. Mr Ahuja accepts that this was an exceptional course taken by the judge, but points out that the offender appears to be complying well with the requirements of the sentence. He submits that the offender is now in the best position that he has ever been in his life to take advantage of the support that is available to him.

35. On any view of the matter, this was a lenient sentence and one that, as the judge acknowledged, fell outside the guidelines. The offence was committed by a man who

was not of good character, who had acted in breach of a court order, late at night and while under the influence of alcohol or drugs, or both. One might have expected these matters to have increased the sentence from a starting point of three years. On the other hand, the judge was entitled to view that the unusual nature of the offending served to reduce its seriousness.

36. One of the factors identified by the Solicitor General, the use of the bandanna to conceal his identity, was not an aggravating factor since his whole conduct was characterised by apology and self-criticisms, and was marked by assurances that they knew who he was, as indeed they did. As Ms White had remarked at the time, he had done enough to get himself in trouble.

37. This Court has had the advantage of seeing a pre-appeal report (as it is described) prepared by Amelia Ward on 21st January 2019. This sets out in detail the progress that the offender has made, both in engaging with the community mental health team and Somerset Drug and Alcohol Service, seeing Dr Michelle Butterworth on a continuing basis; and the prospect of referral to the Somerset Drug and Alcohol Service, although not immediately available, is now in line. He has also been accepted as acceptable to start a Relapse Prevention Group in the week commencing 21st January 2019. All this is greatly to his credit and suggests that he has taken advantage of the opportunity he was given by the judge. Towards the end of this report Ms Ward says this:

Mr Bright has engaged in a positive and constructive manner with all support offered since being sentenced. His approach is not obstructive or oppositional and there is a clear acceptance of responsibility in relation to the risks posed by his previous instability. He is working hard to address these risks and make meaningful changes to his life that will enable him to sustain

his current progress. There is nothing more that can be asked or expected of an individual in Mr Bright's position in terms of the compliance or engagement.

38. In our view the sentence before reduction for plea should have been more than three years and the sentence even with full credit for plea should have been more than the two-year sentence that enabled the judge to suspend the sentence. It was, as we have said, on any view a lenient sentence, and possibly unduly so. We are, however, not inclined to vary and increase this sentence. The judge considered very carefully the sentence that he imposed. He had asked for, and received, a considerable amount of information about the offender and he passed a sentence that will enable the offender to be supported in his attempts to turn his life around, both to his benefit and to the benefit of society. The most recent report is encouraging in that respect.

39. One thing, however, must be made clear: this was a merciful sentence that must be complied with and any repetition of the offender's anti-social and criminal conduct is very unlikely to be met with a similar sentence.