

Thursday 4 April 2019

Before:

LORD JUSTICE SIMON

MR JUSTICE SWEENEY

and

MR JUSTICE FREEDMAN

ATTORNEY GENERAL'S REFERENCE

UNDER SECTION 36 OF

THE CRIMINAL JUSTICE ACT 1988

REGINA

- v -

DEAN WILKINSON

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Mr J Polnay appeared on behalf of the Attorney General

Mr G Gatland appeared on behalf of the Offender

JUDGMENT

LORD JUSTICE SIMON:

1. This is an application by Her Majesty's Solicitor General, under section 36 of the Criminal Justice Act 1988, for leave to refer to this court a sentence which he considers to be unduly lenient. We grant leave.

2. The offender is Dean Wilkinson, aged 28. On 21 January 2019, in the Crown Court at Newcastle upon Tyne, he was sentenced by His Honour Judge Freedman for a single offence of robbery, contrary to section 8(1) of the Theft Act 1968.

3. The offender pleaded guilty to the offence at the first opportunity on 5 December 2018 at the plea and trial preparation hearing. Sentence was adjourned for the preparation of a pre-sentence report. On 21 January 2019, he was sentenced to three years' imprisonment, and an order was made under section 143 of the Powers of Criminal Courts (Sentencing) Act 2000 for the forfeiture of an axe used in the robbery.

4. On 5 November 2018, the Blue Flames Sports Club in North Tyneside hosted a fireworks display. At around 10.30pm, Amy Rutherford, Heather Slowey and other members of staff were counting the takings (totalling £21,611) in the women's changing room when two men entered. They wore dark clothing with hoods and scarves used to disguise their faces. Both men carried axes. One of the men shouted aggressively "Give me the money", as he held the axe above his head. The other man took a basket which contained the cash. The two men then left. They were followed by members of staff and club members.

5. As the offender ran off, he dropped cash and cigarettes. An axe was also recovered. He was later found hiding in a bush in a nearby housing estate. He claimed that he had just been walking through a car park. He denied involvement in a robbery. Members of the public

detained him until police arrived and arrested him. In interview, he declined to answer questions.

6. £13,470 of the takings were recovered, having been discarded in the area. The sum of £7,061 remains missing. The other robber has not been apprehended.

7. The offender has been convicted on 30 previous occasions for a total of 72 offences, which include 13 for violence and 23 for dishonesty. In 2007 he was convicted of three offences of robbery and given a community sentence by the Newcastle Juvenile Court. On 26 January 2010, for offences of burglary, theft and failing to comply with the community requirements of a community order, he was sentenced to a total of three years' imprisonment. On 17 April 2013, for three offences of burglary, he was sentenced to three years' imprisonment. On 20 December 2013, for three offences of assault occasioning actual bodily harm and possessing an offensive weapon (a noxious substance in a bottle), he was sentenced to a total of 25 months' imprisonment. On 23 July 2017, for two offences of burglary of a dwelling, he was sentenced to two years and four months' imprisonment. On 23 January 2017, for an offence of affray, he was sentenced to eight weeks' imprisonment. On 20 June 2017, for offences of theft, battery and assault on the police, he was sentenced to a total of twenty weeks' imprisonment. On 31 May 2018, for two offences of assault with intent to resist arrest, two offences of battery and a single offence of criminal damage (all committed on 9 March 2018), he was sentenced to nine months' imprisonment. There was an issue as to whether the instant offence was committed during the licence period for these offences. That has now been resolved in circumstances we will come to shortly.

8. A pre-sentence report assessed the offender as posing a high risk of serious harm to the public and a high risk of offending. Probation Service records noted that at around the time of

the offence, the offender had visited a job centre, had demanded money and had threatened that if he did not receive it, he would go on to commit another offence. The offender told the author of the report that, as he went to bed on the day of the offence, he was contacted by an associate who asked him if he would like to make some money. Once he got into a vehicle, he was given a hat and gloves. He did not plan the offence and felt that he was unable to remove himself from the situation in which he found himself.

9. Two emails were placed before the judge by way of mitigation. First, the offender's mother stated that the offender was truly sorry for what he had done. She spoke of the offender's difficult childhood and how it may have impacted on his life. Second, a friend of the offender, Michael Holland, spoke of how the offender had been a good friend to him and how he had made real efforts to reform.

10. In addition, letters from prison officers stated that the offender had been a model prisoner while on remand. There is also a favourable pre-appeal report, dated 22 March 2019, from HMP Holme House.

11. The offender first appeared before the magistrates' court on 7 November 2018. His case was then sent to the Crown Court. He indicated that his defence would be that he was not responsible for carrying out the robbery. As we have noted, at the plea and trial preparation hearing on 5 December 2018, the offender pleaded guilty and the matter was adjourned for the preparation of the pre-sentence report.

12. Information about the impact of the offence was available to the sentencing judge. Among the comments from those who made victim personal statements are these. Kiera Heard stated:

I am eight months pregnant and this incident has left me feeling very emotional. I was terrified for my safety and that of my unborn child. I am still shock and scared to be by myself at work, especially at cashing-up time.

Heather Slowey stated:

The incident left me shaking and I felt upset for [other staff members]. I feel sick at the thought of what had happened.

Amy Rutherford stated:

I was scared for myself and my colleagues. The male with the grey hoody held the axe about twelve inches from my head. I believed that the male would have hit me with that axe if I had stopped them or tried to stop them taking the money.

13. At the sentencing hearing, it was common ground between the prosecution and the defence that the matter fell within category 2A of the Sentencing Council definitive guideline on street and less sophisticated robbery.

14. In mitigation, the offender's counsel (then, as now, Mr Glenn Gatland) submitted that the organiser of the robbery was the other man; and that it was only at a late stage that the offender realised that there was a plan to commit a robbery.

15. As we have noted, it was common ground that the offending fell within category 2A. There was high culpability because of the production of a bladed article (an axe) to threaten violence; and there was intermediate harm caused, or intended to be caused, to the victims. They did not suffer serious psychological harm, but nor was the psychological harm minimal. The starting point was, therefore, five years' custody, with a range of four to eight years.

16. For the Solicitor General, Mr Jonathan Polnay submitted that there were a number of aggravating circumstances that increased the seriousness of the robbery: the offender's record of previous offending; the targeting of large sums of cash; the place where the offence was carried

out (a female changing room); it was group offending; the offender made efforts to conceal his identity; and the offence was committed while on licence.

17. The Solicitor General recognises that there are three mitigating factors: the offender's expressed wish to reform himself; his difficult childhood and upbringing; and, most importantly, his plea of guilty.

18. For the offender, Mr Gatland submitted that this may be regarded as a lenient sentence but that it was not an unduly lenient sentence; it did not go outside the appropriate range represented by the range for this category of robbery. The offender had been employed as a builder for a few months, but this position came to an end due to lack of work several weeks before this offence, and he had not been paid his benefits. He had been desperate for money and had attended the job centre to ask for a loan, which he did not receive.

19. We note that this submission is inconsistent with what he told the author of the short-form pre-sentence report: that he had been paid that day and was not short of money.

20. Mr Gatland submitted that the offender had been contacted by an associate who asked if he would like to make some money. When he was given the hat and gloves, he thought he would be working at the stores at the firework display at the Blue Flames Sports Centre. Once the situation "escalated", the offender felt "unable to remove himself from the situation" as a result of "a severe lack of solving skills and consequential thinking". This, we would observe, is a gloss on what he told the author of the short-form pre-sentence report.

21. Mr Gatland initially took issue with two factual aspects in the Reference. First, in relation to whether the offender had an axe with him. The offender told the author of the pre-sentence

report that he had not, and the judge did not require a *Newton* hearing on the issue. Secondly, whether he was on licence at the time, Mr Gatland in his oral submissions today accepted that in fact he was. However, he submits more generally that the judge gave, and was entitled to give, substantial effect to the offender's compelling personal mitigation: the two communications we have seen from his mother and his friend, Michael Holland; the fact that his mother appears to have been awarded a substantial sum of money which may make the offender's life easier now; and, importantly, the good that has been seen in the offender by prison staff. Mr Gatland referred to the prison reports indicating the substantial progress that he has made while on remand, and we note the comments of the judge in his sentencing remarks:

I have also been very pleased to read the glowing testimonials which have been provided by prison officers on C Wing where you are currently. You are described variously as a model prisoner, somebody who causes no problems, and you have been given employment which involves a degree of trust, both as a cleaner and as a barber, and you enjoy enhanced status on C Wing. It is clear that you are doing your best whilst in prison to rehabilitate yourself.

Mr Gatland submits that all this amounts to very substantial mitigation. The offender has completely turned around his life.

22. We have considered these submissions. It is common ground that this offending was rightly categorised as category 2A within the relevant robbery guidelines, with a starting point of five years' custody, and a range of four to eight years. There were, in addition, the aggravating circumstances to which Mr Polnay has referred: first, the offender has a very poor record of previous offences for dishonesty and violence; second, the targeting of large sums of cash while they were being counted - plainly regarded as easy pickings; third, the offending occurred in a female changing room, although we bear in mind that Mr Gatland has told us that on the occasion when the robbery took place there were men (apart from the robbers) going into the room where the cash was being counted; fourth, there was the fact that it was a group offence

and the robbers made efforts to conceal their identities; and fifth, the offence was committed while on licence.

23. Whether or not the offender had with him an axe may not matter so much. However, we note that the prosecution opened the case on the basis that the offender did have an axe, and that the judge sentenced on that basis. He said:

This was a very serious offence, not least because you had a weapon with you. True it is that you did not use that weapon, but you will have caused major alarm and panic to those who were responsible for running the event. They did not know that you were not intending to use the axe. To the contrary, they thought that if the money was not handed over, the axe or the axes would be used.

24. Mr Gatland is, of course, entitled to point to the offender's disadvantaged background and other features, including the degree of care which the offender gives his sister. But as we noted during the course of argument, the credit that this affords necessarily decreases the older he becomes and the more convictions he acquires. Nevertheless, we bear in mind the evidence which points towards him changing his attitude generally and his lifestyle in particular.

25. Taking all these matters into account, we have concluded that the judge was wrong to reduce the starting point from five to four years, before giving credit for the guilty plea. On the contrary, it is our view that he should have increased the starting point from five to not less than six years. With 25 per cent credit for the plea of guilty in the Crown Court, the sentence should have been one of four years and six months' imprisonment. The sentence of three years' imprisonment was unduly lenient.

26. Accordingly, we substitute a term of four years and six months' imprisonment.