IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2020] EWCA Crim 1776

CASE NO 202002765/A1

Royal Courts of Justice

Strand

London

WC2A 2LL

Wednesday 16 December 2020

Before:

LORD JUSTICE FLAUX

MRS JUSTICE CHEEMA-GRUBB DBE

MR JUSTICE MURRAY

REFERENCE BY THE ATTORNEY GENERAL UNDER S.36 CRIMINAL JUSTICE ACT 1988

REGINA

V

KYAH MCKENZIE

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Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

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MR P JARVIS appeared on behalf of the Attorney General.

MR H DICKSON appeared on behalf of the Offender.

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J U D G M E N T

(Approved)

LORD JUSTICE FLAUX:

1. Her Majesty's Solicitor General, appearing by Mr Jarvis of counsel, seeks leave, pursuant to section 36 of the Criminal Justice Act 1988, to refer the sentence of a 2-year community with an unpaid work requirement of 200 hours, passed on this offender on 2 October 2020, as unduly lenient. We grant leave.

2. The offender is now 19 years old, having been born on 4 October 2001. On 27 July 2020, at the conclusion of his trial, he was convicted of an offence of aggravated burglary, contrary to section 10(1) of the Theft Act 1968, of which the particulars were that on 31 July 2018 (when he was 16 years and 9 months old) he and three other unknown males entered a dwelling-house as trespassers and stole a Samsung Tablet, cigarettes and cash, and at the time that they did so they had with them a firearm which was a long-barrelled gun.

3. The relevant facts are as follows. On 31 July 2018, at 1.00 am, Ms Emma Luff was at home in her ground floor flat with her young daughter, who was asleep in her bedroom. As Ms Luff was standing in the kitchen, she saw a hand at the window and called out. The person outside said it was the Police and she should let them in. She opened the door and saw four men outside. One of them, Male 1 (not this offender), had the gun over his forearm. He charged at her and as a result the gun struck her arm. He took her by the hair and dragged her into the hallway. The others entered the flat behind him. One of them (Male 2) told her not to look at them and asked for the money and the Rolex. When she said she did not have any money or a Rolex, he demanded to know where the weed was. Male 1 then dragged her down the hall towards the bathroom. Male 2 said that if she told them where the money was they would leave.

4. Male 1 then took Ms Luff's mobile phone and struck her to the head with it. He then

took the phone, some cigarettes and about £85 in cash that was in her handbag. Male 2 then told the others that it was time to leave. Male 1 went into the kitchen and took a Samsung Tablet. Ms Luff tried to stop him but Male 1 slapped and pushed her. All four men then left the flat and she called the police. The police found blood spots on her forearm that returned a positive match for the offender's DNA.

5. The offender was arrested on 4 November 2018 on suspicion of being one of the four males. He was interviewed by the police and in interview he answered mainly "no comment" to all the questions. He did say he could not remember so far back as July and he did not really go to Braintree where Ms Luff lived.

6. He was charged with aggravated burglary on 5 March 2019 and committed by the Youth Court for trial at the Crown Court. He pleaded not guilty on arraignment on 7 June 2019 and the trial was placed in the Warned List for 30 September 2019. It was not reached on that day so was placed in another Warned List for 20 April 2020. The offender had been on bail throughout and was remanded on bail until that date.

7. Meanwhile, on 26 February 2020, the offender was arrested and charged with an offence of possessing an offensive weapon. At the Magistrates' Court he was remanded into custody. His trial was taken out of the Warned List for 20 April 2020 and re-listed for 22 July 2020. That trial went ahead. The offender's defence was that he had attended Ms Luff's address with three other men in order to purchase some cannabis. He was not aware that the others had masks and a firearm. As soon as he realised they intended to steal from the occupier he left. Whilst in the flat he had sustained a cut to his hand; he brushed past Ms Luff on the way out which is how his blood came to be on her clothes. In convicting him, the jury rejected this defence that he had not been a party to the aggravated burglary.

8. At the time of the offence the offender had no convictions, cautions, warnings or reprimands against him. However, only five days after the aggravated burglary, he committed offences of fraud and having counterfeit currency notes. He was convicted of those offences and received a fine and a conditional discharge on 9 January 2020. On 26 February 2020 he committed an offence of possessing an offensive weapon (a knife) in a public place. It was that offence for which he was remanded in custody by the magistrates. He pleaded guilty to that offence and to breaching his conditional discharge and he was sentenced to 12 weeks' detention in a young offender institution.

Materials Available to the Sentencing Judge

9. There was a pre-sentence report for which the author interviewed the offender when he was on remand in prison. He maintained his innocence and repeated the account of events which he had given at trial which the jury had rejected. The author of the report noted that but said that nevertheless she was satisfied that peer pressure played a part in the offender's decision to commit this offence given his young age and his lack of criminal convictions at the time. She speculated that the offender might have decided to become involved as a way of showing off to his friends. The author stated that as the jury rejected the offender's account it is difficult for her to fully assess the motivation for the offence. There appeared to her to have been a financial motivation and the offender's life-style and choice of associates contributed as well. She observed that the offender failed to accept responsibility for his actions and notwithstanding his denials he remained "fully culpable" for what happened. He expressed shame and some remorse and showed insight into how the offence would have affected Ms Luff.
10. The offender had lived with his mother and younger brother and since 2018 had been

registered as the full-time carer for his mother who has Sickle Cell disease. He left school at 16 but would like to attend college in the future. He is interested in boxing and cycling. He told the author of the report that he had smoked cannabis since he was 16 but had stopped now that he was in custody. The author of the report concluded that the offender presents a "medium" risk of reconviction and a "high" risk of harm to others should he reoffend. She expressed concern about the impact that a sentence of immediate imprisonment would have on the offender and suggested that a community order would be a suitable alternative to immediate custody.

11. By the sentencing hearing the defence had also served a letter from the offender's mother setting out her view of her son's character and the important role he played in her life prior to his remand into custody.

12. There was no victim impact statement from Ms Luff, but in her witness statement she described how the events of the morning had left her terrified and in tears. She suffered with anxiety and the incident had left her feeling scared in her own home.

13. Prior to the sentencing hearing the prosecution served a sentencing note in which they accepted that the offender was neither Male 1 nor Male 2 and the males had not used the gun to directly threaten Ms Luff (in the sense that they had not pointed it at her as if to fire it) but the fact that they had the gun with them was obviously threatening in itself.

14. It was submitted in relation to the Definitive Guideline on Aggravated Burglary that there was both greater harm and higher culpability: greater harm because Ms Luff was at home and violence was used against her; higher culpability because the men had arrived as a group, armed with a weapon and equipped for a burglary wearing masks and with a getaway car outside. On that basis, it was submitted that the starting point for an adult offender was 10 years' imprisonment with a sentencing range of 9 to 13 years. The

offence was aggravated by being committed at night and with a child in the flat albeit asleep in another room.

15. The prosecution drew attention to the mitigation which consisted of the offender's age at the time of the offence (16 years and 9 months old) and his lack of convictions at that time and the subordinate role he played in the offence, his remorse, the lapse of time since the offence, the offender's determination to address the causes of his offending behaviour and the fact that he was the carer for his mother.

The Sentencing Remarks

16. The judge accepted that there was greater harm in this case and recognised the seriousness of this offence, in that he said that certainly for an adult who was carrying the gun or who inflicted the violence (in other words where there was higher culpability) the sentence, after trial, would have been 13 to 15 years' imprisonment. However, he rejected the prosecution submission that there was higher culpability in the case of this offender. He found that an important distinction from the others involved is that the offender had not engaged in violence or uttered threats. Given the offender's limited role in the commission of the offence and the judge's tentative conclusion that the others could have coerced the offender into becoming involved, he proceeded against the offender on the basis that there was lower culpability and the offender had played a subordinate role. This meant that the starting point was 6 years' imprisonment with a range of 4 to 9 years' custody. Bearing in mind the aggravating features, the sentence, if he had been an adult, would have been 7 years' custody.
17. The judge said that because the offender was only 16 at the time of the offence the maximum sentence would have been the 2-year detention and training order subject to

the application of section 91 of the Powers of Criminal Courts (Sentencing) Act 2000. Since aggravated burglary carries a maximum sentence of life imprisonment, section 91 was potentially applicable. The judge explained that he could only exercise the power under the section to impose a more severe sentence if of the opinion that neither a youth rehabilitation order nor a detention and training order is suitable. He said that if he were to look at the facts today and the offender's previous convictions, he would probably conclude that section 91 was applicable and that the test was met. However, he had to wind the clock back and look at the position when the offender was 16, without any previous convictions and on that basis he could not be satisfied that neither a youth rehabilitation order nor a detention and training order was suitable.

18. The judge noted that the offender had now served a sentence in custody which had a salutary effect. He had no doubt that if the offender had been sentenced by the Youth Court at the time of the offence he would have received a maximum sentence of a 2 years' detention and training order. However, time had passed and there had been delay, not all of it the offender's fault. So that, exceptionally, the judge imposed a sentence of a 2-year community order with requirements that the offender undertake 200 hours of unpaid work and comply with the rehabilitation activity requirement for 50 days.

Submissions for the Solicitor General

19. Mr Jarvis submits that this sentence is unduly lenient for two reasons. First, he takes issue with the judge's assessment that this was a lower culpability case. There were a number of higher culpability factors. There was a significant degree of planning and organisation. The defendants were equipped to carry out a burglary - they had brought a weapon with them and they had arrived as a gang of four. Set against those higher

culpability factors, there was a single lower culpability factor, namely the offender was or might have been exploited or coerced by the others into taking part. Mr Jarvis has accepted that, as the Guideline made clear, sometimes culpability factors have to weighted so that merely because there are more higher culpability factors than lower culpability factors does not make it a higher culpability case. However, he submitted what the lower culpability factor cannot do is completely eradicate the higher culpability factors so as to make this a lower culpability case. At best they cancelled each other out so the correct starting point was between the two starting points of 6 and 10 years' custody. The offence was then aggravated by the fact that it was committed at night, with a child asleep at the flat.

20. Second, Mr Jarvis referred to principles established by R v Ghafoor [2002] EWCA Crim 1857, and applied by the Court of Appeal since, that when a defendant crosses an important age boundary between the date of commission of the offence and the date of sentencing, the court should be careful not to go beyond the maximum sentence that would have been available if the defendant had been convicted and sentenced at around the time the offence occurred. He referred to the fact that, if the offender had been sentenced at the time of the offence, the maximum sentence would have been the 2-year detention and training order unless section 91 applied.

21. As the maximum available sentence for aggravated burglary is life imprisonment, section 91 would have been engaged in the offender's case if he had been under the age of 18 when convicted, in which case the maximum sentence available to the court would have been life imprisonment rather than a detention and training order for 2 years. Mr Jarvis submitted that that was the extent of the comparison that the sentencing court should undertake. When sentencing an 18-year-old defendant, whilst the starting point as set

out in paragraph 6.2 of the Guideline was to ask what was the likely sentence that would have been imposed if the defendant had been 16 or 17 at the date of conviction, that was only the starting point. The judge should then have considered the Burglary Guideline and the seriousness of the offence because the offender was an adult at the time of sentence. He should then have made an appropriate reduction from the appropriate sentence for an adult to reflect the fact that the offender was 16 years and 9 months when he offended.

22. The Definitive Guideline on Sentencing Children and Young People did not strictly apply because the offender was over 18 when sentenced, but Mr Jarvis accepted that the judge was entitled to consider the Guideline when sentencing any offender who was under 18 at the time that the offence was committed. He referred in his written reference to paragraph 6.46 of the Guideline which provides:

> "When considering the relevant adult guideline, the court may feel it appropriate to apply a sentence broadly within the region of half to two thirds of the adult sentence for those aged 15 – 17 and allow a greater reduction for those aged under 15. This is only a rough guide and must not be applied mechanistically. In most cases when considering the appropriate reduction from the adult sentence the emotional and developmental age and maturity of the child or young person is of at least equal importance as their chronological age."

23. Having arrived at the appropriate sentence for an adult the judge could then have reduced it by (at most) 50% to reflect the fact that the offender was 16 years and 9 months old at the date of the offence. Had he approached the exercise in this way, even making all due allowance for the offender's age and immaturity and the other mitigation available, the sentence of a community order was unduly lenient.

Submissions on behalf of the Offender

24. On behalf of the offender, Mr Dickson submitted that that the judge took a correct starting point for an adult offender of 7 years' custody and correctly weighed the appropriate indicators of culpability in reaching that starting point. The judge was entitled to conclude that the offender had been coerced. Having presided over the trial and seen the offender give evidence, he was well placed to find exploitation was a predominant factor in all the circumstances including the offender's subordinate role in the offending, the fact that his co-defendants were described as "older, aggressive and armed" and the fact that the pre-sentence report referred to exploitation and peer influence coupled with underlying psychological concerns regarding the offender's identity and self-esteem.

25. In his written submissions he also referred to the fact that, in any event, the judge had acknowledged the nature of the enterprise, in increasing the Guideline starting point of 6 years to 7 years. That was a proper exercise weighing the factors to make an overall assessment, as directed by the Burglary Guideline. Mr Dickson referred the Court to paragraphs 6.1, 6.2 and 6.3 of the Definitive Guideline on Sentencing Children and Young People:

> "6.1 There will be occasions when an increase in the age of a child or young person will result in the maximum sentence on the date of the finding of guilt being greater than that available on the date on which the offence was committed (primarily turning 12, 15 or 18 years old).
>
> 6.2 In such situations the court should take as its starting point the sentence likely to have been imposed on the date at which the offence was committed. This includes young people who attain the age of 18 between the commission and the finding of guilt of the offence but when this occurs the purpose of sentencing adult offenders has to be taken into account, which is:
> •the punishment of offenders;
> •the reduction of crime (including its reduction by deterrence);
> •the reform and rehabilitation of offenders;
> •the protection of the public; and

> •the making of reparation by offenders to persons affected by their offences.
>
> 6.3 When any significant age threshold is passed it will rarely be appropriate that a more severe sentence than the maximum that the court could have imposed at the time the offence was committed should be imposed. However, a sentence at or close to that maximum may be appropriate."

26. Mr Dickson submitted that the exercise is not confined to ensuring the maximum sentence available at the date of the offence is not exceeded. The judge rightly assessed, pursuant to paragraph 6.2, the likely sentence if the offender had been sentenced at the date of the offence. Accordingly, he had been right to conclude that the maximum of a 2-year detention and training order would have been applicable unless the court was of the opinion, applying section 91, that this sentence was not suitable.

27. Under paragraph 6.46 of the Guideline, the judge was not confined to a maximum 50% reduction from the appropriate adult sentence. That paragraph makes it clear that the range of 50% to 66% of the adult sentence was a rough guide, not to be applied mechanistically. Mr Dickson drew attention to paragraph 6.47 of the Guideline which states:

> "The individual factors relating to the offence and the [offender] are of the greatest importance and may present good reason to impose a sentence outside of this range."

28. He submitted that the judge had properly considered all the features of the offence and the offender in reaching a conclusion that a 2-year detention and training order would have been the appropriate sentence at the date of the offence. The judge was then required to consider further matters arising since the offence in determining what sentence to impose on 6 October 2020. There had been some delay in the proceedings and despite further conviction the offender had demonstrated good progress in custody

and a positive attitude to rehabilitation. Custody was having a particularly negative impact on his mental health. The judge rightly considered those factors, together with the effect of the pandemic on conditions of those in custody, militated against a further period of immediate imprisonment. He submitted that the sentence passed was not unduly lenient.

29. He submitted in the alternative that, if the Court were to conclude that the sentence was unduly lenient, then that can be remedied either by the imposition of more stringent conditions in respect of the community order or by the imposition of a suspended sentence, submitting that the judge was in any event not far off from where a proper analysis under the Guidelines could have taken it.

Discussion

30. The initial question is what would have been the appropriate sentence for the offender if he had been sentenced as an adult. This was a serious offence, with a number of higher culpability features: it was committed at night, on a lone woman at home with a child; physical violence was used and the group had a firearm albeit that it was not used nor was it pointed as Ms Luff, although its presence was threatening in itself. Of course Mr Dickson is right that, having presided at the trial, the judge was well placed to assess the extent to which the offender had been exploited or coerced by the others in the group, thereby reducing the offender's level of culpability. However, we consider there is considerable force in Mr Jarvis's point that the judge should not effectively have eradicated the other higher culpability factors, which were undoubtedly present and which made this a Category 1 offence, despite the mitigation available to the offender. In our judgment, the correct approach would have been to take account of the mitigation

available to the offender of the subordinate role, the element of coercion and his previous good character, by a sentence, at the bottom of the category range for a category 1 offence, in other words 9 years' imprisonment if he had been an adult.

31. Where the offender was under 18 when the offence was committed but has attained the age of 18 by the time he is sentenced, the Definitive Guideline on Sentencing Children and Young People still requires a sentencing judge to take as his or her starting point the sentence likely to have been imposed on the date on which the offence was committed, as paragraph 6.2 of the Guideline makes clear, whilst having regard to the purpose of sentencing adult offenders.

32. What is then established by Ghafoor and paragraph 6.3 of the Guidelines, which is a separate point, is that it would rarely be appropriate to pass a sentence on a young offender who has passed 18 by the time of the sentence which is more severe than the maximum the court could have imposed at the time that the offence was committed. The judge rightly noted that, because the maximum sentence for aggravated burglary was life imprisonment, section 91 of the 2000 Act was engaged.

33. However, in our judgment, where the judge fell into error was in concluding that, despite the gravity of the offence, a sentence of a detention and training order would have been suitable if imposed at the time the offence was committed. As we have said, notwithstanding the offender's subordinate role, this was still a grave offence within Category 1 of the Guideline with a number of aggravating features which merited a more severe sentence than the detention and training order. Specifically, the offence was sufficiently serious to merit a substantial period of custody of some 4 years' detention in a young offender institution and we consider that such a sentence is likely to have been imposed under section 91 if the offender had been sentenced when the offence was

committed. Since the offender was 19 when sentenced, it is not strictly necessary to consider paragraph 6.46 of the Guideline, but we note that a sentence in that range would involve what amounts to a considerable deduction from the appropriate adult sentence to take account of the offender's age and immaturity.

34. In all the circumstances, we consider that the sentence of a community order was unduly lenient. Taking full account of the mitigation available to the offender, including the fact that he is the carer for his mother, the delay since the commission of the offence and the current impact of the pandemic on those in custody, the appropriate sentence is one of three-and-a-half years' detention in a young offender institution. Accordingly, we quash the sentence of a community order and substitute a sentence of three-and-a-half years' detention in a young offender institution. To that extent this Reference succeeds.

MR JARVIS: Just one question arising my Lord. I think the nearest police station to where he lives that he will have to surrender himself to is Forest Gate but I do not know whether the Court wants to make an order as to when he should do by. By default it is immediately but it can be longer.

LORD JUSTICE FLAUX: Lunchtime tomorrow unless Mr Dickson wants to make any representations.

MR DICKSON: I do not have any instructions about a particular problem with that.

LORD JUSTICE FLAUX: You will always have liberty to apply if there were a problem. We will say 1.00 pm tomorrow which is 17 December. The victim surcharge order is now £30. Given than he was sentenced on 6 October, it will run from the 6 October.

(The Bench conferred with the Associate)

MR JARVIS: It will take into account time served on remand which was a period which should be discounted from that in any event.

LORD JUSTICE FLAUX: That is a complication, is it not, he was not on remand for this offence.

MR JARVIS: As we understand it, he was serving a relatively short sentence for one of the offences that he had committed in the intervening period but we understand that bail was then revoked for this offence. My point is that it is not really a matter for this Court (for my Lords), it will be dealt with administratively; I just wanted to make you aware of it.

LORD JUSTICE FLAUX: If you are happy for it to be dealt administratively it is better that it is.

MR DICKSON: Precisely because the lawyers in the room did not get it right. The remand time calculation has been taken out of our hands so it will be dealt with administratively. He was remanded after having been sentenced and therefore appeared at trial in custody. So far as the start date for sentence, it is subject to your Lordship's direction in essence, whether it starts from 6 October or from today. There is of course a powerful logic that where somebody has not been in custody it ought to start today. In all the circumstances I would simply ask that it starts from 6 October.

LORD JUSTICE FLAUX: We hear what you say Mr Dickson, but in the circumstances, I think it will start from the date when he surrenders to custody.

MR DICKSON: Thank you.

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk