Neutral Citation Number: [2021] EWCA Crim 1704

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202101008/A1 & 202101082/A1

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 4 November 2021

LADY JUSTICE CARR DBE
MR JUSTICE JEREMY BAKER
HIS HONOUR JUDGE KATZ QC
(Sitting as a Judge of the CACD)

REGINA
V
ALFIE ATHERTON
REED ROBERTS

_____

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)

_____

MR A MATHIESON (Solicitor Advocate) appeared on behalf of the Appellant Atherton

MR P CASEY appeared on behalf of the Appellant Roberts

_____

J U D G M E N T

LADY JUSTICE CARR:

Introduction

1. Following conviction on their earlier guilty pleas, the appellants Alfie Atherton ("Atherton") (then aged 28) and Reed Roberts ("Roberts") (then aged 30) were sentenced as follows:

   Atherton: On count 1, robbery, contrary to section 8(1) of the Theft Act 1968: 10 years and six months' imprisonment; on count 2, having an article with a blade or point in a public place, contrary to section 139(1) of the Criminal Justice Act 1988: four years' imprisonment; on count 3, robbery, contrary to section 8(1) of the Theft Act 1968: five years' imprisonment; on counts 4 and 5, attempted burglary (non-dwelling), contrary to section 1 of the Criminal Attempts Act 1981: two years' imprisonment. All sentences were ordered to run concurrently.

   Roberts: On two counts of robbery, contrary to section 8(1) of the Theft Act 1968, count 1: seven years and six months' imprisonment; count 3, five years' imprisonment. Both sentences were ordered to run concurrently.

2. Atherton and Roberts now appeal against those sentences; Atherton also renews his application for leave to pursue a further ground (four) against sentence. Mr Mathieson has appeared for Atherton and Mr Casey has appeared for Roberts. We are grateful to both of them for their helpful written and oral submissions.

The facts

3. The robbery offences were staged from a car park at Flaxman Court in the Kings Cross area of London. The appellants used the car park to arrive in vehicles and pick up a moped from a lock-up; the moped was then used to commit the robbery offences. Following the robberies, the appellants would return to the car park on the moped and leave once again in their vehicles.

Counts 1 and 2

4. Counts 1 and 2 involved a robbery at a Liberty of London store. At around 1.30 am on 29 January 2020 the night-time security guard was monitoring the CCTV. He witnessed Atherton filling a large white builder's sack with perfumes and aftershave. He alerted a colleague and the two men saw that a window had been smashed. The security guard went to the window and saw Roberts on a moped and Atherton dragging the large white sack towards it. He and his colleague challenged the appellants, whereupon Atherton produced a lock knife with a double-edged three-inch blade and threatened both men. The appellants then fled the scene on the moped, but not without Atherton first dropping the knife and some of the items from the sack. However, they managed to get away with over 200 bottles of Creed perfume valued at just over £20,500. The window had been smashed with a concrete block and the cost of repair to Liberty of London was just over £1,000.

Count 3

5. Count 3 involved a cash in transit robbery on 1 February 2020. A Loomis courier arrived with his crew at a Sainsbury's store on Clerkenwell Road, London. They were tasked with restocking the ATM machines. Having successfully attended to one ATM

machine, the courier left the crew van to complete another run. He heard someone scream from behind him, "drop the box, drop the box". One of the appellants grabbed him by both arms; he dropped the cash box with which the appellants then made off on a moped, the rear number plate of which had been concealed with a jacket. The cash box had contained some £22,000. It was found empty lying in a road, having been opened by Atherton with the use of an angle grinder which had been passed to him by Roberts. An open but full box of cigarettes was lying next to it. The cash had been taken. The cost of a replacement box to Loomis was £3,300.

Counts 4 and 5

6. On 3 March 2020 two attempted burglaries took place at two stores on New Bond Street, London: Dior (count4) and Fendi (count 5). Two mopeds and four men were captured on CCTV. CCTV from Dior showed that at around 1.40 am a motor bicycle rammed through external doors and tried, unsuccessfully, to ram through the internal shutters. Entry was not achieved but damage was caused to the store at a cost of some £15,000. The motor bicycle that had been used to ram the store was left outside. The offenders mounted two other motor bicycles. They then approached the Fendi store and used a large concrete block to try and smash the window. Again, they were unable to gain entry. Staff then themselves used a van to ram one of the motor bicycles, breaking off a piece of bodywork. Nothing was stolen during this offence, but some £30,000 worth of damage had been caused.

7. Both appellants appeared in the Magistrates' Court for the first time on 12 June 2020 and were sent in custody to the Crown Court. At the PTPH on 20 August 2021 they were not produced. The judge expressly preserved 25 % credit. On 19 October 2021 the case was listed with the appellants excused and neither produced. The matter was adjourned administratively. On 3 December the appellants were produced but there was no link available for conferencing with advocates. The Crown indicated an intention to amend the indictment and were given time to do so. The appellants entered their guilty pleas to the amended indictment on 4 February 2021.

8. Roberts pleaded guilty on a basis, namely that he had not known about the knife which Atherton produced in the offending under count 1.

9. Atherton had nine convictions for 11 offences spanning between August 2006 and December 2017, including for theft and kindred offences and a public disorder offence. In December 2017 he had been sentenced to three years' imprisonment for an offence of burglary and theft (non-dwelling).

10. Roberts had 12 convictions for 17 offences spanning between November 2005 and December 2019. His relevant convictions included a fraud and kindred offence and eight theft and kindred offences. In November 2010 he had been sentenced to four years' detention in a Young Offender Institution for an offence of conspiracy to burgle (non-dwelling).

<u>The sentence below</u>

11. The judge proceeded to sentence without any pre-sentence reports. We agree that none were necessary. He considered that the offending on count 1, which he took as the lead offence, fell to be treated for the purpose of the Sentencing Council Guideline on Robbery ("the Guideline") as a professionally planned commercial robbery. He sentenced Atherton then by reference to the lower end of Category 1A offending. He took a term of 11 years which he raised to 13 years to take account of the further offending on counts 3, 4 and 5. He elevated the term further to 15 years to take account of Atherton's previous convictions. After taking into account the available mitigation, including prison conditions in the pandemic, and after discount of 25% for Atherton's guilty pleas, he reached a sentence of 10 years and six months' imprisonment.

12. The judge sentenced Roberts on the basis that his was Category 1B offending, again at the lower end of the range. From a term of eight years and six months he raised the term to 11 years to take account of the totality of Roberts' offending and Roberts' previous convictions. After taking into account the available mitigation, including prison conditions in the pandemic and a discount of 25% for Roberts' guilty pleas, he reached a sentence of seven years and six months' imprisonment.

Grounds of appeal

Atherton

13. For Atherton, Mr Mathieson submits that the total sentence of ten-and-a-half years' imprisonment was manifestly excessive. Specifically, count 1 should have been dealt with as a Category 2 offence under the Guideline for street and less sophisticated commercial robberies. Such robberies can involve significant planning, as the Guideline makes clear. The facts of this offending can be distinguished from more professional robberies involving banks and building societies; in particular the facts here were not similar to those in R v Khan [2017] EWCA Crim 440; [2017] 2 Cr.App.R (S) 19, an authority relied upon by the prosecution. There, the offending had involved an attack on a bank branch during working hours, a gang of three, gloves, disguises, the restraint of male and female employees and slash injuries. Khan itself was treated by this court as being on the cusp of the e Guideline for street and less sophisticated commercial robberies and professionally planned commercial robberies.

14. Mr Mathieson emphasises that Atherton and Roberts were easily traceable; Atherton left his DNA on the knife and the concrete block, and on a disc from the angle grinder and on the cash box; there were no burner phones; this was a crude attempt to break in with a concrete block; there was no evidence of surveillance or trial runs, nor was there any evidence of a distribution network - the perfume was recovered at Roberts' address four months later.

15. Mr Mathieson also submits that there was an excessive uplift for Atherton's previous convictions and in all the circumstances, including totality, the Recorder's starting point for sentence was simply too high.

16. On his renewed application, Mr Mathieson submits that the judge should have afforded more than 25% credit for guilty plea.

Roberts

17. For Roberts, Mr Casey does not take issue with the applicability of the professionally planned commercial robbery section of the Guideline. However, he does submit that the total sentence of seven years and six months' imprisonment on Roberts was manifestly excessive. The judge took too high a starting point for harm. He referred to the targeting of "high value goods" when the relevant part of the guideline in fact speaks of "very high value goods" - a distinction said to be not merely semantic. Reference is made to the case of R v Downey [2019] EWCA Crim 1438, where a sum of just under £16,000 taken in a cash in transit robbery was deemed to be Category B harm; and to R v Suwaid [2019] EWCA Crim 1477 where this court questioned whether an empty cash box in a cash in transit robbery was properly to be categorised as the targeting of very high value sums.

Discussion

18. It is common ground that there was nothing objectionable in the judge's decision to treat count 1 as the lead offence. There is, however, controversy as to which part of the Guideline fell properly to be applied: namely that applicable to street and less sophisticated commercial robberies or that relating to professionally planned commercial robberies. The Guideline states:

> "Street/less sophisticated commercial robbery refers to robberies committed in public places, including those committed in taxis or on public transport. It also refers to unsophisticated robberies within commercial premises or targeting commercial goods or money."

And:

> "Professionally planned commercial robbery refers to robberies involving a significant degree of planning, sophistication or organisation."

19. There is a marked difference in sentencing levels between the two sections. Thus, by way of example, for a professionally planned commercial robbery the starting point for Category 1A offending is 16 years. For Category 1A offending in a street and less sophisticated robbery section, the starting point is eight years. Therefore, the decision where to place the offending can be a significant one. However, there can be and often are elements of overlap. Thus, for example, significant planning is an aggravating factor for street/less sophisticated robberies. Here the judge started for Atherton at one year below the bottom of the relevant range for 1A offending in a professionally planned robbery; for Roberts at six months below the bottom of the relevant range for Category 1B offending in a professionally planned robbery.

Atherton

20. We turn first to Atherton. In our judgment the judge was entitled to consider that the facts of the offending on count 1 fell properly to be classified as a professionally planned commercial robbery for the purpose of the Guideline, albeit at the lower end. Whilst this was not particularly sophisticated offending, there was a significant degree of planning

and organisation. We refer to the appellant's arrangements to meet, to collect a moped to enable a swift getaway, the use of a parking facility away from home, a degree of disguise, operating as a team with clearly defined roles and going equipped with a sack and, in Atherton's case, a knife. In addition, looking at totality of the offending, an angle grinder had been used in the cash in transit robbery the subject of count 3.

21. However, we consider that there is force in the submission that the level of harm, something to be determined by weighing up all the factors of the case and by reference to actual and intended harm, was not Category 1 but rather Category 2. In the context of professionally planned commercial robberies, this was not a case where "very high value goods or sums were targeted or obtained". The judge referred on several occasions in his sentencing remarks to only "high" as opposed to "very high" value goods. There was no evidence of serious detrimental effect on the business and no serious physical or psychological harm to anyone. The judge commented that higher value goods had been targeted than obtained and that the intervention of security staff prevented greater theft, but we accept the submission that the evidence did not bear that out. The means of entry was crude, there was only one sack and one person available to drive away.

22. On this basis, the starting point for Category 2A offending was one of nine years with a range of seven to 14 years. We would start at around eight years, to reflect the fact that this was robbery at the lower end of the scale. The judge's starting point of 11 years was far too high. Aggravating factors in the shape of Atherton's previous convictions and the timing of the offence, together with consideration of the totality of his offending, would justify significant upward adjustment to the top end of the range. There was little by way of mitigation, although we note that Atherton had lost his father and brother early in life and accommodation had to be made for prison conditions in the context of the pandemic.

23. Putting all these matters in the balance, a term of 12 years before credit for guilty pleas was appropriate. We see no merit in the submission that credit of greater than 25% for Atherton's guilty plea should have been granted and we refuse leave on this ground. The recent authority of R v Plaku [2021] EWCA Crim 568; [2021] 4 WLR 82 makes it clear that there will be very few occasions when the sentence of a defendant who has not pleaded guilty at the first stage of the proceedings and who cannot bring himself within one of the exceptions could properly be reduced by more than one-quarter. Atherton did not indicate his guilty plea at the first stage of the proceedings and it cannot be argued that he fell within one of the exceptions in the Sentencing Council Guideline on Reduction for Sentence for Guilty Plea. This was not a case where there were particular circumstances significantly reducing his ability to understand what was alleged or which otherwise made it be unreasonable to expect him to indicate a guilty plea sooner than he did.

24. Thus, we would reduce the sentence on count 1 for Atherton to a term of nine years' imprisonment.

Roberts

25. Whilst Roberts was not to be implicated in Atherton's possession of the knife, as the judge noted, Roberts continued with the robbery after Atherton had produced the knife (and also carried on to the offending with Atherton in count 3). The analysis for Roberts is similar to that for Atherton. The judge was entitled to treat the robbery in count 1 as professionally planned commercial robbery towards the lower end, and Mr Casey fairly does criticise his decision to do so. But in our judgment the judge did err in treating harm as Category 1.

26. The starting point for Category 2B offending is five years with a range of four to eight years' custody. The starting point adopted by the judge of eight-and-a-half years was far too high. A starting point of around four-and-a-half years, which we would take, would then fall to be increased to take account of the offending on count 3, Roberts' previous convictions and the timing of the offence. Again, there was little by way of mitigation. Roberts has three children and accommodation would have to be made for the harsh prison conditions in the context of the pandemic.

27. In our judgment, a term of seven-and-a-half years before credit for guilty plea was appropriate and again credit of 25% for Roberts' guilty plea was unobjectionable. The resulting sentence for Roberts is one of five years and six months' imprisonment on count 1.

Conclusion

28. For these reasons and to this extent we allow both appeals. For Atherton the sentence of 10 years and six months' imprisonment on count 1 will be quashed and a sentence of nine years' imprisonment will be substituted in its place. For Roberts the sentence of seven years and six months on count 1 will be quashed and a sentence of five years and six months' imprisonment will be substituted in its place. All other elements of the sentences remain unaltered.

Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400
Email: rcj@epiqglobal.co.uk