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IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202201164/A4

NCN: [2022] EWCA Crim 1292

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 9 August 2022

Before:

LORD JUSTICE WARBY
MRS JUSTICE O'FARRELL DBE
MRS JUSTICE CUTTS DBE

REGINA
V
VIENNA ISRAEL

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MR V SCULLY appeared on behalf of the Appellant

J U D G M E N T

LORD JUSTICE WARBY:

1. This is an appeal against sentence by Vienna Israel, aged 40. On 23 March 2022 in the Crown Court at Isleworth she was sentenced to two years and eight months' imprisonment for one count of robbery to which she had earlier pleaded guilty.

2. The offence was a street robbery or mugging of a man aged 71 called Michael Farrer. It took place at about 9 am on Wednesday 27 October 2021 at an ATM outside a post office on Golborne Road, London. The complainant approached the ATM, looking round as he usually did to make sure that he was not being watched. He did not see this, but the appellant was behind him waiting to act. As he withdrew £150 from the ATM she approached him from behind and grabbed at the money. There was a scuffle lasting several seconds during which the complainant was struck in the stomach by the appellant's left elbow. He in due course released his grip on his cash and the appellant made off with it.

3. In a statement made on the day of the robbery the victim described being shaken up, having already been deaf in one ear, unsteady on his feet and on heightened alert. He spoke of anxiety such that on his way home he had been concerned that he was being followed. The incident had left him fearful of using that ATM and he had changed his habits as a result.

4. The incident had been captured on CCTV and the appellant was identifiable because in the scuffle she had dropped her mobile phone, with part of her name showing on the lock screen, and a scarf which returned a DNA match. She was arrested and interviewed on 10 January 2022 when she declined to answer police questions but gave a prepared statement saying that she could not recall the offence because of her daily drug use.

5. She had three previous convictions for possession of class B drugs and 21 other convictions for a further 48 offences between 1998, when she was aged 16, and the date of this offence. The previous offences included 28 theft, fraud and other acquisitive offences and three offences against the person. There was no previous offence of robbery.

6. The appellant's account as given to probation was that at the time of the offence she had been largely street homeless and "very bad on drugs" using about £250-worth a day, funded by thefts and sex work. She was a mother of six, all of her children having been taken into care. There was some evidence of mental health difficulties.

7. The Probation Officer's assessment was that this was a "relatively unsophisticated robbery" but one carried out with a degree of forethought. The victim's vulnerability was considered likely to have been a factor in the appellant's decision to attempt the offence.

The offending was identified as an escalation given that the appellant's history disclosed mainly non-violent offending, save for an offence of grievous bodily harm at the age of 16 over 20 years earlier. Her drug use was considered the critical factor and one which would continue to spur acquisitive offending.

8. The author of the pre-sentence report assumed that the court would impose a custodial sentence. If the court wished to consider suspending that sentence the author did not feel able to put forward a realistic package of requirements. She noted that as things stood the appellant would be released street homeless with a high risk of relapse and re-offending. Her response to previous supervision had been poor with repeated failures to engage with probation leading to a number of breaches. She was in breach of a community order at the time of this offending. The author suggested that time in a structured environment to engage in treatment away from the stresses and temptations of the community might be helpful to the appellant in the long term. She would have time to work with appropriate support agencies to plan for her release from custody.

9. The sentencing judge, His Honour Judge Hammerton, was also provided with a drug rehabilitation requirement report from Turning Point. This concluded that the appellant was "using drugs problematically" but suggested that she appeared motivated to access treatment and was "appropriate" for a treatment pathway of fortnightly one-to-ones and 12 weekly plan reviews with a focus on alcohol dependency if appropriate.

10. The judge assessed the appellant's culpability as falling within Category B of the guideline. He said the force used was somewhere between very significant and minimal, the elbow in the stomach being a key factor. The harm, said the judge, was at the lower end of Category 2 given the change in lifestyle forced upon the victim. The starting point was thus one of four years with a range of between three and six. The judge identified three aggravating features: the appellant's previous convictions, her targeting of someone known to be vulnerable and the commission of the offence whilst subject to a community order. There were three mitigating factors: the conditions in custody at the time, the appellant's mental health issues and the absence of any previous robbery conviction. Taking account also of the appellant's personal mitigation, the sentence after a trial would have been one of 48 months. After full credit for her guilty plea the sentence was one of 32 months. The community order was revoked.

11. The judge's conclusions meant that he could not suspend the sentence. But he said that he had "anxiously considered" the guidelines for the imposition of custodial and community sentences and he had concluded that it would not have been appropriate to impose a community order having regard to the appellant's poor record of compliance.

12. The single judge gave the appellant leave to advance three grounds of appeal, which Mr Scully has ably argued before us today on her behalf. It is said that the sentencing judge, first, mis-categorised the culpability and secondly mis-categorised the harm with

the result that the sentence was manifestly excessive. Thirdly, it is said that the sentence after reduction of plea should not have been more than two years' imprisonment and should in all the circumstances have been suspended.

13. We have reflected on these submissions, attractively presented as they were. As for culpability, the prosecution and the Probation Officer both suggested that the case fell into Category C as it involved the "threat or use of minimal force". We can see why. But like the judge we have viewed the CCTV recording and we think he was right to reject that view of the matter. We accept of course that the offence of robbery will always require some force to be used, but here the force was more prolonged than it is in the typical case of low-level street robbery which involves mere snatching with brief or no physical contact. Here there was a tussle and also the elbow in the ribs, which takes the case up to the scale. In our judgment the degree of force deployed to wrestle the cash from the victim was properly assessed as more than "minimal". It falls into Category B which covers the threat of violence by a weapon produced or not and "other cases that fall between Categories A and C."

14. That said, the force used here does fall very much at the lower end of Category B, given the modest degree of force involved and the fact that Category A involves the use of a weapon to inflict violence, or "very significant" force, or the production of a blade or real or imitation firearm to threaten violence.

15. We take a similar view of the case when it comes to harm. The Probation Officer suggested this might be in harm Category 1. The prosecution persuaded the judge that it was in Category 2. The appellant submits that it was a case in Category 3, involving "no/minimal physical or psychological harm". In support of that submission Mr Scully has referred us to the case of R v Calvo and Smith [2017] EWCA Crim 1354 where this court granted a Reference by the Attorney General. The point made is that the evidence in that case was that the victim was "very shaken" but the harm was treated as minimal.

16. Like the sentencing judge we derive no real assistance from that case. On the evidence before him in this case the judge was entitled to reject the notion that this 71-year-old victim suffered no harm at all or only minimal harm. The judge was entitled to conclude that there was some psychological impact which placed the case in harm Category 2 but at the lower end.

17. It follows that in our judgment the judge identified the correct sentencing bracket. He also correctly identified the aggravating and mitigating factors. Having done so, however, he arrived at a notional sentence after a trial which matched the category starting point. In our judgment, he fell into error at this stage. The location of the culpability and harm factors at the bottom end of each scale required an initial downward adjustment of the category starting point to the bottom of the category range. Although the aggravating features were significant, we do not think they outbalanced the mitigation. The

appellant's previous offending was of lesser severity and, viewed in context, relatively old. Accordingly, the four-year notional sentence after a trial was manifestly excessive. We do not consider that in all the circumstances a sentence of more than three years would have been merited after the trial. Applying the full one-third credit for the early guilty plea, which was first indicated in the Magistrates' Court, we arrive at a sentence of two years' imprisonment.

18. We cannot however uphold the third ground of appeal, which Mr Scully did not press in his oral submissions. The judge expressly considered the imposition guidelines and the issue of whether a non-custodial option was realistic. He concluded that it was not for reasons that, if sound, inevitably hold good for the alternative option of a suspended sentence with requirements. The appellant's personal history and circumstances do attract sympathy but do not amount to strong personal mitigation. The key issue was whether there was a realistic prospect of rehabilitation. The clear view of probation was that a non-custodial sentence was impracticable and that the only realistic prospect of rehabilitation lay in treatment within the context of a custodial sentence, which we are told is now something available to the appellant. The difference between the pre-sentence report and the DRR report was stark, the pivotal issue being how realistic it was that the appellant would adhere to the DRR plan. The Probation Officer was so sceptical that she felt unable to identify any alternative to immediate custody. Those views were based on a careful review of the appellant's track record. The DRR report made no in-depth assessment of the question. Indeed it contained no acknowledgment of the appellant's lamentable history of non-compliance which, as the judge noted, included failing to turn up for an appointment at Turning Point itself. It is unclear whether the author of the DRR report was even aware of those matters. The judge's view was plainly open to him and cannot be categorised as wrong in principle.

19. For those reasons, we quash the sentence of two years and eight months' immediate imprisonment and substitute a sentence of two years' immediate imprisonment. To that extent this appeal succeeds.